
2021 S C M R 1728

[Supreme Court of Pakistan]

Present: Mushir Alam, Qazi Faez Isa and Sajjad Ali Shah, JJ

ORIENT POWER COMPANY (PRIVATE) LIMITED through Authorized Officer---Petitioner

Versus

SUI NORTHERN GAS PIPELINES LIMITED through Managing Director---Respondent

Civil Appeal No.1547 of 2019, decided on 17th August, 2021.

(On Appeal from the judgment dated 01.08.2019 of the Lahore High Court, Lahore passed in I.C.A. 210640 of 2018)

(a) Contract---

----Inter-connected, inter-dependent, or multiple contracts forming an 'indivisible whole contract'---Scope---Gas Supply Agreement ('GSA') between a power generation facility and distributor of natural gas---Dispute over payment for gas---After determination by an expert ('expert determination') a separate "Payment Agreement" was executed between parties for payment of disputed amount---Question as to whether the GSA and the Payment Agreement were comprised of interconnected or inter-dependent contracts to be treated as "indivisible whole contract" or whether they were separate and independent from each other---Held, that the both the agreements i.e GSA and the Payment Agreement were by and between the same parties --- Obligations undertaken under the Payment Agreement were for the accomplishment of a single goal i.e. the fulfillment of the terms of the GSA---Both the contracts were economically interdependent and had a common origin.

Terms of the Payment Agreement established that the parties intended to remain within the confines of the Gas Supply Agreement ('GSA') as the purpose of the Payment Agreement was to give effect to the expert's determination. The expert determination itself was a result of a dispute arising out of the obligations of the GSA. Furthermore, the intention of the parties to give effect to the

obligations under GSA was evident by the Recitals to the Payment Agreement, which made explicit mention of the GSA and the dispute arising under it. Moreover, Clause 1 of the Payment Agreement stated explicitly that the definitions set forth in the GSA would carry the same meanings under the Payment Agreement, and Clause 4 stated that after resolution of the issues under the Payment Agreement, the provisions of the GSA shall apply and prevail. Therefore, this was illustrative of the intention of the parties to, not only be bound by the GSA, but also to remain within its confines --- Such continuous reference to the GSA meant that the Payment Agreement was ultimately guided by, and dependent on the GSA for its existence; it was, undoubtedly a "part of an indivisible whole" and the transaction thus must be looked at in its entirety --- Appeal was dismissed.

Philippe Leboulanger 'Multi-Contract Arbitration' (1996) 13 (4) J In't Arb 43, 47 ref.

(b) Arbitration---

----Contract--- Inter-connected or inter-dependent contracts--- Arbitration clause in one agreement deemed to be incorporated into another agreement---Scope---Gas Supply Agreement ('GSA') between a power generation facility and distributor of natural gas--- Dispute over payment for gas---After determination by an expert ('expert determination') a separate "Payment Agreement" was executed between parties for payment of disputed amount---Plea of power generation facility that had the arbitration clause in the GSA did not cover the Payment Agreement, and thus the Sole Arbitrator exceeded his jurisdiction by deciding the issues arising out of the Payment Agreement---Held, that the arbitration clause in the GSA covered disputes, disagreements or default of the seller and buyer "in connection with or arising out of" the GSA---Dispute under the Payment Agreement was inarguably a dispute connected to the GSA, and also arose out of the obligations under the GSA--- Controversy arising out of Payment Agreement was a progeny of the GSA and could not be divorced from the parent GSA---Arbitration clause contained in the GSA would therefore be the "centre of gravity" and would be deemed to be anchored in the Payment Agreement which itself was merely an implementation of the GSA--- Disputes "arising out of" the GSA were thus wide enough to cover the Payment Agreement --- Neither was it commercially sensible nor

realistic to hold that both the agreements were to be decided by separate forums--- Had this been the case, the parties, as rational businessmen, would have been prudent in expressly excluding the arbitration clause from the Payment Agreement---Appeal was dismissed.

Fiona Trust and Holding Corporation v. Privalov [2007] UKHL 40; AmTrust Europe Ltd v. Trust Risk Group SpA [2015] EWCA Civ 437; French Supreme Court on 14 May 1996 1st Civ. Chamber, 14 May 1996, 1997 Rev. Arb. 535; French Supreme Court decided on 5 March 1991 Commercial Ch., 1992 Rev. Arb. 66 and note by L. Ayn s and Tjong Very Sumito and others v. Antig Investments Pte. Ltd; the Singapore Supreme Court [2009] 4 S.L.R.(R) 732, [2009] S.G.C.A. 41 ref.

(c) Arbitration---

----Arbitral tribunal---Jurisdiction---Doctrine of Kompetenz-kompetenz (competence-competence)---Scope---No legal impediment in the way of a court or tribunal to decide its own jurisdiction--- Doctrine of Kompetenz-kompetenz essentially allowed the arbitral tribunal to determine its own jurisdiction.

Government of Punjab v. Sanosh Sultan PLD 1995 SC 541; Raunaq Ali v. Chief Settlement Commissioner PLD 1973 SC 236 and SBP& Co. v. Patel Engineering Ltd. 8 SCC 618 = AIR 2006 SC 450 ref.

(d) Arbitration---

----Contract--- Inter-connected or inter-dependent contracts--- Incorporation of an arbitration clause from one contract into another in international commercial arbitration---Survey of case law from the United Kingdom, Singapore, Hong Kong, India and Pakistan.

TW Thomas & Co. Ltd v. Portsea Steamship Co Ltd. [1912] A.C 1 HL; Aughton Limited v MF Kent Services Ltd. [1991] 57 B.L.R 1; Habaş Sinai ve Tibbi Gazlar Isthisal Endustri A.Ş. v. Sometal S.A.L. [2010] EWHC 29 (Comm); Trade Maritime Corp. v. Hellenic Mutual War Risks Association (Bermuda) [2006] 2 C.L.C 710; International Research Corp v. Lufthansa Systems Asia Pacific Pte Ltd. [2012] SGHC 226; R1 International Pte Ltd v. Lonstroff [2015] 1 S.L.R 521; Astel Peiniger Joint Venture v. Argos Engineering [1994] 3 HKC 328; Gay Constructions Pty v. Caledonian Techmore (Building) Ltd. [1995] 2 HKLR 35; Alimenta SA v. National Agriculture Co-op

Marketing Federation of India (1987) 1 SCC 615; Dwarkadas & Co. v. Daluram Gaganmull AIR 1951 Cal 10; Atlas Export Industries v. Kotak Company (1999) 7 SCC 61; M.R. Engineers and Contractors (P) Ltd v. Som Datt Builders Ltd. (2009) 7 SCC 696 and Messrs MacDonald Layton v. Associated Electrical Enterprises PLD 1982 Karachi 786 ref.

(e) United Nations Commission on International Trade Law on International Commercial Arbitration ("UNCITRAL Model Law")---

----Art. 7(2)---Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011), Preamble---Arbitration Act (X of 1940), Preamble---Arbitration agreements---Incorporation of an arbitration clause by reference---Scope---Article 7(2) of the United Nations Commission on International Trade Law on International Commercial Arbitration ("UNCITRAL Model Law"), in furtherance of its pro arbitration aims, explicitly allowed for incorporation of arbitration clauses by reference---Supreme Court observed that in a commercially fast paced world, where the world was essentially a global village, it was regrettable that Pakistan, although a signatory to 'UNCITRAL Model Law', had till date not incorporated its provisions into its domestic law and the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 made no mention of incorporation of arbitration clauses by reference.

(f) Contract---

----Take or pay clause---Scope and significance.

Take or Pay provisions/clauses were a very familiar feature in gas and liquefied natural gas (LNG) sales contracts, power purchase contracts and many other common energy industry contracts, and provided an option for the buyer to take supply of gas, LNG or power, or to pay for it even if it did not take the commodity.

Take or pay clause tested in English Courts I.E.L.R. 2008, 3, 60-62 ref.

Take or Pay clauses were also widely utilized in the petroleum industry in Pakistan. Therefore, it could be seen that Take or Pay clauses were a common occurrence in energy contracts, and their significance in maintaining a regular income stream for the seller and a regular supply stream for the buyer was paramount.

There were two separate obligations in most take or pay contracts. First, there was the obligation on the seller to make the commodity available to the buyer. Secondly, there was the obligation on the buyer to pay for the commodity that had been made available (either as well as, or instead of, taking up the commodity). Furthermore, take or pay payments had been widely understood to be an amount due to the seller or transportation company as a debt for having made the commodity or transportation services available, and not as damages for failure on the other party to take the commodity. The rule of penalties in this case was not held to apply generally, because the seller or the transportation company was providing the service of making the commodity or transportation services available to the other party, in accordance with the Commodity Sale/Supply Agreement or the Commodity Transportation Agreement which created a debt owing to the seller or the transportation company for that service.

B. Holland 'Enforceability of take-or-pay provisions in English law contracts-resolved' 2016 Journal of Energy & Natural Law Resources; Amoco v. Teeside Gas [2001] 1 All ER (Comm) 865; Associated British Ports v. Ferryways and Another [2008] EWHC 1265 (Comm) and M & J Polymers Ltd v. Imerys Minerals Ltd. [2008] EWHC 344 (Comm) ref.

Take or pay payment should be viewed as being due on the performance of the seller's "specified obligation" in making the commodity available. There would not be any parallel breach by the buyer's failure to take the commodity as the buyer would have an option to take the commodity.

Cavendish Square Holdings BV v. Talal El Makdessi [2015] UKSC 67 ref.

(g) Interpretation of statutes---

----Words 'shall' and 'may'---Scope---Words "may" and "shall" in legal phraseology were interchangeable, depending on the context in which they were used, and were not to be interpreted with the rigidity which was attributed to them in ordinary parlance.

Muhammad Saleh v. Tim Chief Settlement Commissioner PLD 1972 SC 326 ref.

(h) Contract Act (IX of 1872)---

----S. 74---Compensation for breach of contract where penalty stipulated for---Reasonable compensation---Scope---In working out the amount for reasonable compensation, it would be relevant to consider whether any loss had or had not accrued to the party, which had suffered on account of the breach, and the extent of that loss---Award of compensation by the court under section 74 of the Contract Act, 1872 would depend upon a case by case factual and circumstantial analysis as to what would be reasonable compensation in each case subject to the limit of the amount mentioned in the contract.

Syed Sibte Raza v. Habib Bank Limited PLD 1971 SC 743 and Province of West Pakistan v Messrs Mistri Patel & Co. PLD 1969 SC 80 ref.

(i) Unjust enrichment---

----Scope---For a claim of unjust enrichment to succeed, there must be enrichment at the expense of the plaintiff and this enrichment must be unjust in such a way that there should be no lawful justification for the same.

Fecto Belarus Tractor Ltd v. Government of Pakistan PLD 2005 SC 605 at 636; Arabian Sea Enterprises v. Abid Amin Bhatti PLD 2013 Sindh 290; Sui Northern Gas Pipelines v. DCIR 2014 PTD 1939 and Garland v. Consumers' Gas Co. [2004] 1 S.C.R. 629 ref.

(j) Arbitration---

----Award---Unjust enrichment---'Juristic reason' for enrichment---Scope---Gas Supply Agreement ('GSA') between a power generation facility ('power company') and distributor of natural gas ('SNGPL')---Dispute over payment for gas after power company refused to take up gas from SNGPL---Question as to whether the award rendered by the Arbitrator in favour of SNGPL amounted to unjust enrichment---Held, that although SNGPL was receiving payment for the same amount of gas twice, it needed to be clarified that this was upon failure of the power company to take up the gas, and further, the SNGPL, in any case, was not recovering the same amount, due to the fact that it was redirecting transmission to its domestic consumers, which paid a lower tariff than Independent Power Producers (IPP) like the power company---Furthermore, to allow the power company's claim would mean overlooking the fact that SNGPL was still under an obligation to supply the Make-Up Gas to

the power company at any time within the duration stipulated under the GSA, therefore, there was a 'juristic reason' for the enrichment---Further, the power company had failed to prove its deprivation as it was entitled to Make-Up Gas at a later date, which it failed to avail within the stipulated time frame---Furthermore the Arbitrator while dismissing the claim of unjust enrichment raised by the power company correctly explained that SNGPL expanded monies to construct the infrastructure to deliver gas to the power company; that SNGPL remained liable to its upstream suppliers even if the power company chose not to take the Take or Pay Quantity but opted to pay instead and to Make Up Gas later; that SNGPL had to bear the responsibility of cutting its losses and find an alternative buyer (even at a lower price) for the Gas not taken by the power company and the likely additional costs of its transmission, distribution and unaccounted for gas---Power company (appellant) had failed to make out a claim for unjust enrichment, and the award rendered by the Arbitrator was not disproportionate to the losses suffered by SNGPL---Appeal was dismissed.

(k) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention")---

----Art. V(2)(b)--- Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011), S. 6 & Preamble---International commercial arbitration---Arbitral award--- Recognition and enforcement of arbitral award may be refused if the award would be contrary to "public policy" of that country" --- Public policy exception---Scope---Public policy exception acted as a safeguard of fundamental notions of morality and justice, such that the enforcement of a foreign award may offend these fundamentals---Public policy exception was never meant to be given a wide scope of application---Most courts world over favoured a restrictive approach to public policy in international commercial arbitration---Public policy exception should not become a back door to review the merits of a foreign arbitral award or to create grounds which were not available under Art. V of the New York 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 would be encouraged to challenge foreign awards on the public policy ground knowing that

there was room to have the Court set aside the award---Public policy defense was an exceptional one, which demanded heightened standards of proof that courts would normally require in order to refuse recognition and enforcement of a foreign arbitral award--- Such heightened standard of proof was compatible with the exceptional nature of the public policy defense as well as with the fact that Art. V(2)(b) of the New York Convention provided a mere facility to the courts and not an obligation.

Parsons & Whittemore Overseas Inc. v. RAKTA 508 F.2d 969 (1974); Betamax Ltd (Appellant) v. State Trading Corporation (Respondent) (Mauritius) [2021] UKPC 14; Nan Fung Textiles Limited v. Sadiq Traders Limited PLD 1982 Kar. 619; Haji Abdul Karim and others v. Sh. Ali Muhammad PLD 1959 SC 167; Sardar Muhammad Yasin v. Raja Feroze Khan PLD 1972 AJ&K 46; Higher Regional Court of Frankfurt (Oberlandesgericht Frankfurt) in Oberlandesgericht [OLG] Frankfurt, Germany 26 Sch 13/08, 16 October 2008; Oberlandesgericht [OLG] Celle, Germany 8 Sch 06/05, 6 October 2005 and Renusagar Power Co. Ltd v. General Electric Co. 1994 SCC Supl. (1) 644 ref.

Salman Akram Raja, Advocate Supreme Court for Petitioner.

Kh. Ahmad Hosain, Advocate Supreme Court for Respondent.

Date of hearing: 12th December, 2019.

JUDGMENT

MUSHIR ALAM, J.---The Appellant, through Civil Appeal No. 1547 of 2019 arising out of CPLA No.3027/2019, has challenged the legality of the order passed by the Learned Division Bench of the Lahore High Court[1] in I.C.A. No. 210640/2018 in C.O.S. No.16/2017. Leave to Appeal was granted on 12.09.19 to consider the points raised by both the Parties in this case.

I. FACTS:

1. The Appellant, Orient Power Company (Private) Limited[2] is a private limited company incorporated under the laws of Pakistan, whereas the Respondent, Sui Northern Gas Pipelines Limited[3] is a public limited company incorporated under the Companies Ordinance, 1984. SNGPL is the sole authorized and licensed distributor of Natural Gas in the provinces of Punjab and Khyber Pakhtunkhwa.

2. The Appellant constructed and operated a power generation facility[4] of approximately 212.7 Megawatts (MW). In this regard, the Appellant entered into a Power Purchase Agreement[5] on 08.11.2008 with National Transmission and Dispatcher Company Limited[6] for a term of thirty (30) years. The PPA governs the terms of the sale and purchase of Energy and Capacity to the Power Purchaser.

3. The Appellant also entered into an Implementation Agreement with the President of the Islamic Republic of Pakistan through Private Power and Infrastructure Board which establishes the framework under which the Complex is to be set up.

4. For the purposes of running the Complex, the Appellant required Natural Gas as a primary fuel, and for this purpose, Appellant entered into a Gas Supply Agreement[7] with the Respondent. The Parties signed the GSA on 18.10.06 which contained a "Take or Pay Clause[8]". Furthermore, the GSA's purchase and supply arrangement were such that it was divided into two time periods: the first being the "Firm Delivery Period", where the Respondent was required to deliver and sell to the Appellant all of the Complex's requirements for Gas, up to the daily contract quantity, and the second being the "As-Available Period" which comprised of the three months excluded during the Firm Delivery Period where the Respondent would provide Gas on 'As Available' basis.

5. During the Firm Delivery Period, the terms of the GSA stated that the Appellant had a gas entitlement of 38 MMCFD (million metric standard cubic feet per day).

6. Differences arose between the parties with respect to the Commissioning Period Start Date,[9] during which the Complex would be tested, and the subsequent Commercial Operating Date,[10] being the date when the Complex was to start its commercial operations, and the Appellant's obligation to take or pay gas under clause 3.6 of the GSA during the CPSD and COD.

7. It was seen vide letter dated 01.07.09 that the parties agreed to appoint Mr. Khalid S. Ibrahim as the Expert[11] under clause 18.2(g) of the GSA to resolve the dispute. The Expert heard the matter and issued his Determination[12] on 19.12.09, 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[13] and COD.[14] The Appellant was directed to make payment in fifteen days.

8. On the basis of the Expert Determination, the Parties, on 11.01.10, executed the "Payment Agreement" which required the Appellant to make payment in three installments. Under the Payment Agreement, it was agreed that the Respondent would be entitled to a late payment surcharge at "Delayed Payment Rate," which would be paid until full payment is made.

9. For the period of 28.02.2011 till 10.05.2011, the Respondent did not supply, and also curtailed supply of gas to the Petitioner, contrary to the terms of the GSA. This was done through various letters written by the Respondent, whereby it purported to declare Force Majeure on account of certain alleged terrorist and sabotage activities. The Appellant was unable to operate the Complex on gas during this period and as a result, payment under the head of "Capacity Price" to be made by the Power Purchaser to Appellant under the Power Purchase Agreement with National Transmission and Dispatch Company Limited (the "Power Purchaser") were withheld and disallowed up to an amount of Rs. 201,998,444/-.

10. The Appellant filed a Request for Arbitration (the "Earlier Arbitration") due to the accrual of such losses. The Parties received the final award of this arbitration on 09.03.16, wherein it was held that Respondent's claim of Force Majeure events could not be classified as such and, that Respondent was in breach of the GSA during those periods and that Appellant was entitled to compensation for the loss suffered.

11. Furthermore, under the Payment Agreement dated 11.01.10, the Appellant made all of the requisite payments to the Respondent except that of Rs. 104,133,296/-; which the Respondent claimed as late payment surcharge.

12. Simultaneously, another dispute arose between the Parties, with respect to six invoices issued by the Respondent from May to October 2011 under the GSA, which the Appellant contended was not due, as the Appellant had paid the full amount for the months in which it was not able to take up the Gas.[15]

13. The Parties decided to refer these disputes to Justice Khalil-Ur-Rehman Ramday ("Justice Ramday") as per Section 18.2 of the GSA. However, it must be noted that the dispute pertaining to the

late payment surcharge under the Payment Agreement was not referred to Justice Ramday for determination,[16] who declared in his Determination dated 11.06.14 that the Respondent was not entitled to retain the entire amount of money paid under Clause 3.6(a) of the GSA for which the gas was not taken, but may still be entitled to reasonable compensation under section 74 of the Contract Act, 1872.

14. The Respondent referred the disputes relating to the unpaid invoices along with the dispute relating to late payment surcharge under the Payment Agreement to arbitration pursuant to section 18.3 of the GSA, which provided for arbitration to be conducted in London under the rules of the London Court of International Arbitration (the "LCIA") on 12.06.14. During the proceedings, the Parties submitted Expert Opinions by Mr. Makhdoom Ali Khan and Chief Justice (R) Tassaduq Jillani.

15. The Respondent, in the arbitration, claimed, inter alia:

(i) A declaration that the Appellant illegally, and in breach of the GSA withheld a total amount of Rs. 603,202,083 from the bills raised by the Respondent pertaining to the months of May to October 2011;

(ii) Late payment surcharge on unpaid amounts under the GSA calculated until 31 May 2014 in the amount of Rs. 485,678,790;

(iii) Continuing late payment surcharge on outstanding amounts to be calculated from 31 May 2014 in accordance with the terms of the GSA; and

(iv) Interest on any award from the date of award to the date of payment;

16. The Appellant advanced an objection to the jurisdiction of the Arbitral Tribunal and, defended the claim on the grounds inter alia-:

(i) Declaration that the Respondent cannot raise any issues regarding the Payment Agreement in these proceedings. Any issue with the Payment Agreement can only be settled as per laws of Pakistan and in a court of competent jurisdiction. Payment Agreement is a standalone agreement and the Appellant has not violated Payment Agreement;

(ii) Declaration that the Appellant is entitled to retain the disputed amounts from the bills of the Respondent and therefore can retain the Make Up Gas amount;

(iii) Declaration that Respondent cannot forfeit the Make Up Gas Amount under GSA or Pakistan law;

(iv) Order Respondent that it either provides the Make Up Gas against the Make Up Gas Amount (i.e. Rs 603,202,083/-) or refunds the same;

(v) Declaration that the Make Up Gas is available even after the expiry of the one Contract Year on "as available" basis;

(vi) Declaration that any valid Force Majeure claims by the Respondent extends the period for Make Up Gas on a day to day basis including the obligation to supply gas for extended period;

(vii) Declaration that the claims made by the Respondent through various letters/notices claiming existence of Force Majeure during the period from 28 February 2011 to 10 May 2011 were illegal, invalid, inapplicable and contrary to the facts and the law and Respondent is entitled to withheld capacity.

17. The Sole Arbitrator issued the Partial Award dated 27.02.17 and Final Award on 13.06.17 in the Arbitration wherein:

(i) Arbitrator dismissed the claim of the Appellant that it did not have jurisdiction over the Payment Agreement;

(ii) Respondent's claim for Rs. 104,133,296/- was allowed;

(iii) Respondent's claim under the six invoices for Rs.603,202,083/- was stated to be the amount due under the invoices;

(iv) Sole Arbitrator directed Appellant to pay Respondent simple interest at the rate of 6% per annum on Rs. 603,202,083/- from 31 October 2011 to the date of the Award and simple interest at the rate of 6% per annum on all sums payable pursuant to the Award from the date of the Award to the date of payment; and

(v) Respondent was liable to pay Rs. 98,452,322 in respect of the Earlier Arbitration.

18. Subsequent to the issuance of the Award, the Respondent filed C.O.S. No. 16/2017 before the Learned High Court at Lahore, and on 04.04.18, the suit was allowed and it was held

that the Award shall be recognized and enforced as a judgment and decree of the court under section 6 of the Foreign Awards (Recognition and Enforcement) of Foreign Arbitral Awards 2011 (the "Foreign Arbitration Act").

19. Consequently, the Appellant filed I.C.A. No. 210640/2018, impugning the judgment of the Learned Single Judge. The same was dismissed by the Learned Division Bench of the Learned High Court, at Lahore, inter alia, for the reasons:

(i) High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards which means it has exclusive jurisdiction to recognize and enforce the Award;

(ii) 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;

(iii) Public policy exception should not be used as 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; and

(iv) The Take or pay clauses in the GSA, being a common provision in commercial contracts, especially gas purchase agreements is valid and enforceable and cannot be considered as a penalty provision. The terms of the GSA were negotiated and agreed to between the parties.

The Appellant has subsequently appealed to this Court, wherein, leave to appeal was granted on 12.09.19 to consider the points raised by both the Parties in this case.

II. Arguments of the Parties

20. Counsel for the Appellant argues that pursuant to the laws of Pakistan, there must be a specific arbitration clause in the Payment Agreement in order for the matter to be referred to arbitration. The first claim in the arbitration, with respect to non-payment of Rs. 104,133,296/- was under the Payment Agreement, which did not contain an arbitration clause and by virtue of accepting the claim, the sole arbitrator exceeded its jurisdiction. Learned counsel for the Appellant further argued that since the Payment Agreement did not

contain a valid arbitration agreement, this was against Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") which has been incorporated into the law of Pakistan via its implementing statute, the 'Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (the "Foreign Arbitration Act").Appellant also argued that the Payment Agreement does not make any express or specific reference to the arbitration clause in the GSA.

21. Learned counsel for the Respondent counters the argument of Appellant by relying on Clause 18.3 of the GSA that provided for all matters 'arising out of or in connection with the GSA to be referred to arbitration'. He contends that it cannot plausibly be argued that amounts due under the Payment Agreement are not "arising out of or in connection with" the GSA. The Respondent further submits that this is a question of contractual interpretation (i.e. interpretation of the scope of the arbitration agreement in the GSA), absent a completely perverse finding by the sole arbitrator and the division bench, this Hon'ble Court ought not interfere in these findings and that the findings of the two fora gave effect sensibly to the commercial terms agreed in the GSA and are therefore, subject to arbitration.

22. ***The Appellant maintains that the Impugned Judgment has wrongfully held that section 74 of the Contract Act is not attracted in the "so called" take or pay clauses, set out in section 3.6(a) of the GSA. Appellant argues that its conduct of not taking the Gas during the relevant period amounted to a breach under section 3.6(a). The Appellant further holds that non- performance of the take or pay provisions would amount to breach under the laws of Pakistan, consequently this would be a situation governed by section 74 of the Contract Act, and that the Take or Pay provisions cannot be allowed to operate outside the sphere of the laws of Pakistan.***

23***. Counsel for Appellant also holds that the Award rendered by the sole arbitrator was patently illegal since it was contrary to section 74 of the Contract Act, 1872 (the "Contract Act"), which essentially states that a party should not be allowed to recover more than it has actually suffered***.

Appellant alleges that the Respondent had not suffered an actual loss of more than Rs. 356,104,346.25/- and that by awarding more than the actual loss suffered amounts to unjust enrichment/double recovery since the amount of Gas not taken by the Appellant was sold to third parties, unjustly enriching the Respondent. ***The protection against unjust enrichment, according to the Petitioner, is a fundamental aspect of the public policy of Pakistan and Section 6 of the Foreign Arbitration Act read with Article V(2)(b) of the New York Convention.***

24. Respondent counters that the judgment of Learned High Court has made sound formulation on public policy, and that under the ***New York Convention, public policy should be construed narrowly and should only be used as a ground to refuse enforcement where the award is on the face of it in clear violation of fundamental notions of morality or justice of the enforcing State.*** Respondent further contends that the Appellant's disagreement is not with public policy but rather with the quantum of the award.

25. The above arguments of the learned counsel for the Parties have been considered with due care and attention, and the available record has been perused at length. Owing to the various issues that arise in this case, each will be dealt separately.

III. Issue No 1: Incorporation of arbitration clause from the Main Contract

26. In today's commercial reality, it is not unusual for parties to have a network of inter-connected, inter-dependent, or multi-contracts, which form an "indivisible whole contract". Therefore, when disputes arise, a party who intends to initiate arbitration will potentially wish to do so under several of these inter-connected, inter-dependent or multi-contracts connected inter-se.

27. Bernard Hanotiau, one of the revered authorities on arbitration, in his book titled 'Complex Arbitrations: Multi-party, Multi-contract, Multi-issue - A comparative Study' aptly explains that

"in a situation involving a series of agreements between the same parties, the main problem is determining whether these

contracts constitute an indivisible whole (ensemble contractual unique). The solution will rest on an interpretation of the will of the parties.'."[17]

28. The main consideration for the instant case, therefore, is whether the GSA and the Payment Agreement are comprised of inter connected or inter-dependent contracts to be treated as "indivisible whole contract" or whether they are separate and independent from each other.

29. The Learned bench of the High Court has rightfully concluded that 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.[18] The Expert Determination itself was a result of a dispute arising out of the obligations of the GSA.

30. Furthermore, the intention of the Parties to give effect to the obligations under GSA is evident by the Recitals to the Payment Agreement, which make explicit mention of the GSA and the dispute arising under it. Moreover, Clause 1 of the Payment Agreement states explicitly that the definitions set forth in the GSA will carry the same meanings under the Payment Agreement, and Clause 4 states that after resolution of the issues under the Payment Agreement, the provisions of the GSA shall apply and prevail. Therefore, this is illustrative of the intention of the parties to, not only be bound by the GSA, but also to remain within its confines. This continuous reference to the GSA means that the Payment Agreement was ultimately guided by, and dependant on the GSA for its existence. It was, undoubtedly in our minds, a "part of an indivisible whole" and the transaction thus must be looked at in its entirety.

31. Philippe Leboulanger, another revered authority on international commercial arbitration, urges us to take into account the commercial realities of the operation:

"It is important to take into account the commercial reality of the operation, because sometimes the parties' reciprocal synallagmatic[19] obligations arise not from a single contract, but from different contracts. It should be checked whether the

obligations undertaken under the different agreements are reciprocal, having a common origin, identical sources and an operational unit.

When the agreements make up one single business transaction, the interplay between the undertaking cannot be ignored, as there exists within the contractual context a kind of freedom of circulation of obligations and interrelated debts. Whenever obligations were undertaken for the accomplishment of a single goal and are economically interdependent, the different disputes should be appreciated on an overall basis.

Agreements may be considered to be interrelated when they were concluded on the same date, for the same duration, for the same purpose. Another indication of the interrelation between contracts is the presence of a general-or a master, a cover, a basic or a head-agreement outlining the obligations undertaken by the parties, obligations which are usually discussed in more detail in the ancillary agreements. General agreements often contain a preamble describing the transaction and the interrelation between the different agreements. In this case, the interdependence between a general agreement and its ancillary agreements is evident, especially when the general agreement expressly refers to each one of the ancillary agreements and each one of the ancillary agreements expressly refers to the general agreement and to the other ancillary agreements. Interrelation also exists in the context of framework and application agreements."[20]

32. It is therefore, certain that the obligations undertaken under the Payment Agreement were for the accomplishment of a single goal i.e. the fulfillment of the terms of the GSA, both the contracts were economically interdependent and had a common origin.

33. The Appellant further argues that the arbitration clause in the GSA did not cover the Payment Agreement, and thus the Sole Arbitrator exceeded his jurisdiction by deciding the issues arising out of the Payment Agreement. The arbitration clause in 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 dispute under the Payment Agreement was inarguably a dispute connected to the GSA, and also arose out of the obligations under the GSA.

34. Furthermore, we are guided by the following case law and authorities on this matter. In the case of Fiona Trust and Holding Corporation v. Privalov,[21] the U.K House of Lords, held that the proper approach is for courts to give effect to the commercial purpose of the arbitration clause and that parties, as rational businessmen, were likely to have their disputes arising out of their relationship by the same forum i.e. the arbitral tribunal in this case wherein it is stated that:

"7 parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

8. A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause..."

35. Since the decision rendered in Fiona Trust (supra) several cases have since been decided, fine tuning the rationale laid down therein, and courts have considered whether the presumption also applies in a multi-contract scenario, where contracts contain different, potentially inconsistent arbitration agreements. In some of the cases, the presumption has been applied to discover the real intention of the parties, insomuch as that the arbitration clause in one agreement also envisages a dispute under another agreement. Recently, an English Court in multi-contract conflicts expanded the "centre of gravity" approach, and held that a carefully and commercially minded construction of the agreement at hand is required, and the Court of Appeal in the case of AmTrust Europe Ltd v Trust Risk Group SpA[22], further examined which of the inter-related or inter-dependent contracts was the "centre of gravity" of the dispute, based on which the dispute resolution provisions of the

"centre of gravity" contract will govern the resolution of the inter-related or inter-dependent contracts.

36. In a case decided by the French Supreme Court on 14 May 1996,[23] an exclusive distribution agreement had been concluded by two companies and contained an arbitration clause providing that any dispute resulting from the agreement or its termination, or relating thereto, would be decided through arbitration. A dispute had arisen, and the parties had concluded an additional agreement providing for the payment of commissions to the distributor for sales performed outside the scope of the distribution agreement. This second agreement did not contain any arbitration or jurisdiction clause. A dispute arose under the second agreement and the distributor started an action before the Commerce Court of Bobigny. The lower court upheld its jurisdiction considering that the second agreement was not an accessory of the first one since the two agreements concerned different types of transactions and the absence of any explicit reference to the arbitration clause in the second agreement excluded any acceptance of the said clause in the context of this second agreement. The French Supreme Court reversed the finding, deciding that the second agreement was based on a breach of the first agreement and was thus its complement, with the consequence that it fell within the scope of the arbitration clause contained in the first contract.

37. In another case by the French Supreme Court decided on 5 March 1991,[24] the dispute arose from a share transfer agreement concluded between A and B and containing a guarantee in favour of the purchaser. It contained an arbitration clause. Two months later, another agreement was concluded by the same parties to the effect that after the establishment of a final accounting, the debt of the Seller amounted to a certain sum. This second agreement did not contain any arbitration clause. A dispute arose and the purchaser started an action before the French courts. The French Supreme Court considered that the second contract was only the implementation of the first, which both formed a whole and that therefore the force obligatoire (the binding force of the contract) of the arbitration clause included in one agreement extended to the other.

38. The same approach prevails in Singapore, in the case of Tjong Very Sumito and others v. Antig Investments Pte. Ltd; the Singapore

Supreme Court,[25] considered a Share Sale and Purchase Agreement (SPA), which contained a clause providing for disputes to be resolved by arbitration. The arbitration clause stated: " any and all disputes, controversies and conflicts arising out of or in connection with this Agreement or its performance (including the validity of this Agreement) shall be settled by arbitration " The same parties subsequently entered into four further Supplemental Agreements. Each Supplemental Agreement was considered supplemental to the SPA. A dispute arose as to whether a payment arrangement under the fourth Supplemental Agreement, (which did not contain an arbitration clause) was subject to the arbitration clause in the SPA. The Court of Appeal held that since the fourth Supplemental Agreement 'owes its existence to the SPA, such Supplemental Agreement cannot stand independently on its own. Like the first three supplemental agreements, its purpose was to supplement and/or modify certain terms of the SPA'. The dispute therefore, arose in connection with the SPA. The Court concluded that the intention of the parties was manifest to be bound by the Arbitration Clause contained in the principal SPA and such clause extended to the fourth Supplemental Agreement, as well.

39. From the above discussion, and keeping in sight judicial consensus across globe, we decide as follows. In the instant case, both the Agreement i.e GSA and the Payment Agreement are by and between the same parties, therefore we are inclined to apply the liberal interpretation as expounded in the case of Fiona Trust case (supra). We have no hesitation in holding that the controversy arising out of Payment Agreement is a progeny of the GSA and cannot be divorced from the parent GSA. The arbitration clause contained in the GSA would therefore be the "centre of gravity" and would be deemed to be anchored in the Payment Agreement which itself was merely an implementation of the GSA. The disputes "arising out of" the GSA were thus wide enough to cover the Payment Agreement. We hold that it would neither be commercially sensible nor realistic to decide that both the Agreements were to be decided by separate forums. Had this been the case, the parties, as rational businessmen, would have been prudent in expressly excluding the arbitration clause from the Payment Agreement. ***We therefore, are inclined to uphold the***

reasoning and conclusion drawn by the Learned Bench of the High Court, and the Arbitral Tribunal.

40. Learned Counsel for the Appellant has relied upon the UK Supreme Court case of Dallah Real Estate and Tourism Holding v. Government of Pakistan[26] in support of his contention that the award, cannot be sustained on the ground inter-alia; of Article V(1) (a) of the New York Convention. We have examined the cited case, which essentially revolved around the issue of non-signatories to the contract which is a common and recurring issue in international commercial arbitration. Certain others aspects were also explored in this case, more significantly the doctrine of Kompetenz-Kompetenz or competence competence. Kompetenz-Kompetenz, or competence-competence, is a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The concept arose in the Federal Constitutional Court of Germany. This principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [ ] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation[27]. The principle was also considered by this Court in the case of Karachi Dock Labour Board v. Messrs Quality Builders Ltd.[28], wherein it was observed that the arbitral tribunal is indeed a judge of both fact and law, the latter of which includes the question of its own jurisdiction[29]. In numerous cases in Pakistan, it has been held that there is no legal impediment in the way of the court or tribunal to decide its own jurisdiction[30]. The principle Kompetenz-Kompetenz was also recognized by Indian Supreme Court see SBP& Co. v. Patel Engineering Ltd.[31] (Seven-member bench), overturning its earlier judgment in Konkan Railway Corp. Ltd. v. Rani Construction (P) Ltd;[32]. This doctrine, therefore, essentially allows the arbitral tribunal to determine its own jurisdiction.

41. Under the facts and circumstances of this case and in accordance with the doctrine of competence competence, the Sole Arbitrator was well within his rights to determine his own jurisdiction, and the learned counsel for Appellant has not been able to demonstrate that the tribunal lacked jurisdiction, or that

assuming jurisdiction as regard the Payment Agreement, exceeded his mandate under Article V(1)(c) of the New York Convention.

42. Furthermore, reliance of learned counsel on Article V(1)(a) of the New York Convention, is misplaced, relied Article allows refusal of recognition and enforcement of an award if:

"(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 parties have subjected it or, failing any indication thereon, under the law of the country where the award was made "

Thus, enforcement of an award under this Article may be refused if the arbitration agreement is invalid or if the parties lacked the capacity to arbitrate, which is not the position in the instant case.

43. Under the Commentary of the New York Convention by Herbert Kronke et al titled 'Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention', it has been stated that Article V(1)(a), permits a court to deny recognition and enforcement of an award if no arbitration agreement exists. We must however, be careful in noting that the issue here is not the existence of the arbitration agreement, but rather, whether the existing arbitration clause could have been read into another agreement i.e. the Payment clause. We are therefore unable to subscribe to the view of the learned counsel for the Appellant that the case is covered by Article V(1)(a).

44. More broadly on the issue of incorporation of an arbitration clause from one contract into another in international commercial arbitration, as a guideline for future cases in Pakistan, we find it necessary to dilate upon the trend followed across various jurisdictions:

(i) UNITED KINGDOM:

45. One of the earliest adjudications regarding the incorporation by reference was the landmark case of TW Thomas & Co. Ltd v. Portsea Steamship Co Ltd.[33] While this was the initial view, the jurisprudence has significantly evolved and departed from the principles dilated in this case. The question arose as to whether an arbitration clause in the charter party, which was referred to, in the margin of the bill of lading had been incorporated into the bill of lading or not. The margin of the bill of lading was inked with the

words " all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause." The charter party itself provided "any dispute or claim arising out of any of the conditions of this charter shall be settled by arbitration." The House of Lords held that that the arbitration clause could not be incorporated because firstly, if the parties are to be deprived of the ordinary legal remedies of approaching the court, the same should be done explicitly; secondly, requisite modifications may be required according to the parties; and thirdly, there is need for certainty in law.

46. The Court of Appeal case of Aughton Limited v MF Kent Services Ltd.[34] *gave rise to differing view by the judges. Sir John Megaw, relied on* the case of Thomas v. Portsea (supra) and reinforced the strict rule that maintained that specific words were necessary to incorporate an arbitration clause into a contract and that the reference in a sub-contract to another contract's terms and conditions would not suffice to incorporate the arbitration clause into the sub-contract.

47. The reasoning, of the learned Judge, for imposing the requirements of specific words of incorporation, is based on three important factors; with respect to arbitration agreements. Firstly, that an arbitration agreement may preclude the parties from bringing a dispute before a court of law, which is not only a permissible, but also desirable way of settling disputes. Secondly, it was held that section 7(1)(e) of the Arbitration Act 1979[35] provide that an arbitration agreement, has to be a "written agreement". The object and effect of which is to ensure that one is not deprived of their right to have a dispute decided by a court of law, unless he has "conspicuously and deliberately" agreed that it should be so. Thirdly, he emphasized on the peculiarity of arbitration clauses, as an arbitration clause, according to him, is a "self-contained contract", for example, it is capable of having a different proper law from the main contract.

48. In the same case, Ralph Gibson L.J reached the conclusion that express words of incorporation were not always necessary. In some circumstances, general words would be sufficient to effect incorporation depending on the terms of the arbitration agreement. His preferred approach was to look at the precise words of the

contract alleged to permit incorporation and to the precise terms of the arbitration agreement. If the terms of the arbitration clause are such that they only apply to the contract in which they appear, Ralph Gibson LJ's view was that general words of incorporation would be insufficient, but if they apply to both, then general words of incorporation are sufficient.

49. The case of Habaş Sinai ve Tibbi Gazlar Isthisal Endustri A.Ş. v. Sometal S.A.L.,[36] expounded upon the approach taken by Justice Langleyin Sea Trade Maritime Corp. v. Hellenic Mutual War Risks Association (Bermuda),[37] wherein, cases were divided into 'single contract' cases. Where parties sought to incorporate a set of standard terms or agreements, which contained an arbitration clause. And 'two-contract' cases, where parties incorporate a set of terms belonging to another contract. Habas, decided 'one contract cases' to be those cases, where both the contracts, were entered into by the same parties. The rest of the cases were classified as 'two contract' cases. In Habas case, there had been fourteen (14) previous contracts between the same parties. The issue in this case was whether general wording mentioned below were capable of incorporating an arbitration clause:

"All disputes, or controversies, or differences, which may arise between the buyer and seller under this contract, shall be settled in London, according to London Arbitration Rules, by the United Kingdom Law."

50. The final contract was prepared by an agent of one of the parties, and did not contain the London arbitration clause but provided that "All the rest will be same as our previous contracts". It was held that in principle, English law accepted incorporation of standard terms by the use of general words. The principle did not distinguish between a term which was an arbitration clause and one which addressed other issues.

51. A stricter rule was applied in charter party/bills of lading cases. In relation to two contract cases, where contracts where not entered into by the same parties, a more restrictive approach to incorporation was required. In such a case, it might not be evident that the parties intended to incorporate not only the substantive provisions of the other contract but also provisions, such as an arbitration clause, particularly if a degree of verbal manipulation was needed for the incorporated arbitration clause to work. Those

considerations however, did not apply to a single-contract case, and the stricter rule was not to be extended to single-contract cases since that would involve the exception swallowing up the rule. In a single-contract case, the independent nature of the arbitration clause should not determine whether it was to be incorporated. General words of incorporation were capable of incorporating terms which included an arbitration clause without specifically referring to it and the question was whether in the instant case they did so.

52. Therefore, it was held that the words of incorporation in the last contract were apt to incorporate the London arbitration clause. Application of the arbitration clause did not require any linguistic manipulation. When the parties referred to "all the rest" being the same, there was no good reason to treat them as meaning all of the rest except the arbitration clause.

53. It may, thus be seen, that the English approach to incorporation by reference has evolved from a strict approach into one with exceptions and carve-outs such as the "single contract" rule.

(ii) Singapore:

54. Singapore advocates the "contextual approach" at present in order to promote arbitration and adopt a pro-arbitration regime, wherein the question of incorporation of an arbitration clause depends on the contractual interpretation of the agreement between the parties.

55. The Court of Appeal of Singapore passed the landmark judgment of International Research Corp v. Lufthansa Systems Asia Pacific Pte Ltd;[38] and discontinued the strict rule of interpretation that had been earlier borrowed from English Common Law. The court provided two primary reasons for distinguishing itself from the UK jurisprudence and its previous decisions. First, it held that ousting the jurisdiction of the court is no longer considered "odious", and therefore, there is no point in requiring such a high threshold of proof for establishing the intention to arbitrate; and, secondly, businessmen, cannot be expected to differentiate between arbitration clause and any other clause of the contract.

56. The said view of the Singapore Court of Appeal was further endorsed in R1 International Pte Ltd v. Lonstroff,[39] where the court affirmed the position that an arbitration clause can be incorporated

into a contract even after its formation provided there was a prior understanding between the parties.

(iii) Hong Kong:

57. Hong Kong also follows the contextual approach of incorporation i.e. there is no requirement of a specific reference to the arbitration clause for its incorporation if intention of the parties was to have arbitration as a dispute resolution mechanism.

58. In Astel Peiniger Joint Venture v. Argos Engineering,[40] the Hong Kong High Court did away with the strict approach laid down in Thomas v. Portsea (supra), and explicitly stated that this rule is not applicable in Hong Kong. It further held that ultimately, courts must endeavor to give contractual and commercial effect to the actual words used by the parties. This was also endorsed in the case of Gay Constructions Pty v. Caledonian Techmore (Building) Ltd.[41]

(iv) India:

59. The general rule for incorporation by reference was laid down by the Indian Supreme Court in the case of Alimenta SA v. National Agriculture Co-op Marketing Federation of India.[42] The Indian Supreme Court held that it is now well established that the arbitration clause of an earlier contract can be incorporated into a later contract by reference; provided it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated.[43] In this case, the contract was for the sale and supply of HPS groundnut kernel Jaras. After the usual terms as to quality, quantity, price, etc., the contract provided in clause 11 that 'other terms and conditions are per FOSFA-20 contract terms.' The question therefore, was whether the arbitration clause in FOSFA-20 contract, was incorporated by reference, in the contract for sale and supply of HPS groundnut kernels. The Supreme Court held that the arbitration clause in FOFSA-20 contract was incorporated by reference into the contract for sale and supply of HPS groundnut kernel jaras. This judgment established an important principle of the doctrine of incorporation, i.e. incorporation can be considered valid only when it is "consistent, sensible and intelligible" with the terms of the contract in which it is incorporated. In doing so, the Indian Supreme Court endorsed the approach laid down by a full bench of the Calcutta High Court in Dwarkadas & Co. v Daluram

Gaganmull[44]. A very fine distinction between the phraseology of the provision incorporating the arbitral clause was drawn and accepted.[45]

60. The next significant case that asses the proposition if an arbitration clause can be incorporated by reference into subsequent contracts; is that of Atlas Export Industries v. Kotak Company[46] which followed the approach laid down in the case Alimenta S.A (supra).

61. The Indian Supreme Court in the case of M.R. Engineers and Contractors (P) Ltd v. Som Datt Builders Ltd.[47] provided a list of guidelines with respect to section 7(5)[48] of the Indian Arbitration and Conciliation Act, 1996 that are to be followed when dealing with incorporation by reference:

1) the contract should contain a clear reference to the documents containing arbitration clause;

2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract; and

3) the arbitration clause should be appropriate, that is, capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.[49]

62. The apex court also clarified that only a specific reference from the referred document in the contract between the parties should have the effect of incorporating the arbitration clause. There is a requirement of a "conscious" acceptance of the parties before incorporation can take place. However, where the contract provides that the standard form of terms and conditions of an independent trade or professional institution should be incorporated, a general reference to the referred document would suffice.

63. Therefore, it would appear that when it comes to standard form of contracts, the Indian Court is eager to take a more relaxed view of interpretation, however, where standard form of contracts are not concerned, a requirement of intention of the parties to incorporate the arbitration clause into the contract is needed.

(v) Pakistan:

64. Under the current regime in Pakistan, the case of Messrs MacDonald Layton v. Associated Electrical Enterprises[50] held that parties can incorporate an arbitration clause from another

agreement in their own agreement provided it is so mentioned expressly. Further, it was decided that

"a mere reference that the terms and conditions of a certain agreement will apply to the agreement between the parties will not import the arbitration clause into the agreement. A reference to the arbitration clause should be specific so that there may not be any ambiguity and the intention of the parties be made clear."

(vi) Conclusion:

65. An analysis, and surveillance from various jurisdictions, as discussed above, seems to indicate that the adoption of the United Nations Commission on International Trade Law on International Commercial Arbitration (the "UNCITRAL Model Law") has a bearing on application of the approach taken by the courts on incorporation of an arbitration clause by reference. The UNCITRAL Model Law is designed to assist the States in reforming and modernizing their laws on International Commercial Arbitration and to develop a pro-arbitration regime in their national regime. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

66. For the purposes of incorporation of the arbitration clause by reference, a noteworthy aspect of the UNCITRAL Model Law is Article 7, which relates to arbitration agreements. More specifically, Article 7(2) of the Model Law, states that:

"the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

67. Thus, the UNCITRAL Model Law, in furtherance of its proarbitration aims, has explicitly allowed for incorporation by reference. Legislation based on the Model Law has been adopted in 85 States in a total of 118 jurisdictions[51] including United Kingdom, Singapore, Hong Kong, and India have all incorporated provisions of the UNCITRAL Model Law into their national laws, and have therefore, incorporated Article 7 into their Acts.

68. Indeed, Section 6(2) of the English Arbitration Act, 1996, Section 7(5) of the Indian Arbitration Act, 1996, Article 19(6) of the Arbitration Ordinance No. 17 of 2010, the National Arbitration Act for Hong Kong, and section 4(7) of the Singapore Arbitration Act, 2001 all state that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if the contract is in writing and the "reference is such as to make that arbitration clause part of the contract".

69. Pakistan is a contracting State to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Pakistan became a signatory to the Convention on 30 December 1958 and ratified it on 14 July 2005. It was first implemented through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005. The Ordinance, being temporary in nature, was occasionally repromulgated until 2011 when the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 was passed by Parliament. Pakistan is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID Convention), the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (the Geneva Treaties). However, the Geneva Treaties do not apply to arbitration agreements and awards to which the New York Convention applies.

70. In a commercially fast paced world, where the world is essentially a global village, it is regrettable that Pakistan, although a signatory to UNCITRAL, has till date not incorporated the provisions of the Model Law into its domestic law and the Foreign Arbitration Act makes no mention of incorporation by reference.

IV. ISSUE NO. 2: WHETHER A BREACH OF SECTION 74 HAS OCCURRED?

71. We note that barring the Impugned Judgment, Take or Pay clauses and their significance have not been adjudicated upon by this Court. We therefore, deem it pertinent to dispel any misconceptions regarding such clauses.

72. Briefly, Take or Pay provisions are a very familiar feature in gas and liquefied natural gas (LNG) sales contracts, power purchase

contracts and many other common energy industry contracts, and provide an option for the buyer to take supply of gas, LNG or power, or to pay for it even if it does not take the commodity. The reasoning provided by Paula Hodges QC and James Rogers in an article titled 'Take or pay clause tested in English Courts'[52] illustrate the need for such clauses:

"The significant financial commitment required for exploration, production, shipping and distribution facilities leads participating companies to seek a measure of security as regards the level of supply and demand throughout the duration of any supply arrangements so as to guarantee future returns on their investment. Take or pay clauses have therefore developed to the benefit of both purchasers and suppliers. The supplier is guaranteed a regular income stream, while the purchaser commits to pay for a minimum quantity to guarantee a regular but flexible supply. In the event that the purchaser is not able or willing to take the agreed minimum amount, it is nonetheless required to pay for it.

Take or pay clauses usually operate to the benefit of both purchaser and supplier. The purchaser is given the flexibility to vary his order quantity throughout the life of the contract, subject to the minimum quantities and the supplier has some certainty of income in relation to the sale of the product. There is therefore a commercial justification for including such a provision in a supply contract. Moreover, in the energy sector at least, such provisions will typically be negotiated by sophisticated, commercially experienced parties with comparable bargaining power."

73. Take or Pay clauses are also widely utilized in the petroleum industry in Pakistan. Therefore, it can be seen that Take or Pay clauses are a common occurrence in energy contracts, and their significance in maintaining a regular income stream for the seller and a regular supply stream for the buyer is paramount.

74. There are two separate obligations in most take or pay contracts. First, there is the obligation on the seller to make the gas available to the Buyer. Secondly, there is the obligation on the Buyer to pay for the gas that has been made available (either as well as, or instead of, taking up the gas).[53] Furthermore, take or pay payments have been widely understood to be an amount due to the seller or transportation company as a debt for having made the gas

or transportation services available, and not as damages for failure on the other party to take gas. The rule of penalties in this case is not held to apply generally, because the seller or the transportation company is providing the service of making gas or transportation services available to the other party, in accordance with the Gas Sale/Supply Agreement or the Gas Transportation Agreement which creates a debt owing to the seller or the transportation company for that service.[54]

75. In the House of Lords case of Amoco v. Teeside Gas,[55] the issue was not whether the send or pay agreements (similar to take or pay agreements) were damages or a debt, Lord Hoffman refereed to send or pay agreements as an "income stream". This was held to be a clear reference that this "income stream" would create a debt in favour of the gas transporter, should the shipper avail the service. In the same vein, an "income stream" would be created for the Seller of the gas, as a debt in its favour for supplying the gas to the Buyer.

76. Similarly, in the case of Associated British Ports v. Ferryways and another,[56] it was held, in relation to a send or pay clause at paragraph 50 that the obligation to pay was held not to be " a secondary obligation that is triggered by a breach but is itself a primary obligation given in exchange for ABP's promise to provide a new linkspan, and as such cannot be a penalty."

77. Therefore, it followed that payment under take or pay clause will be a debt, and the law on penalties ought not apply. This settled position was challenged in the case of M & J Polymers Ltd v. Imerys Minerals Ltd;[57] wherein the Commercial Court considered the application of the rule of penalties in the context of take or pay provisions in a commercial contract. This case famously held the claim under the take and pay provisions was a debt. However, Burton J also held that as a matter of principle, take or pay clauses may operate as a penalty, but this would not be their ordinary classification, and would apply where "a sum is specified which is found not to be a "genuine pre-estimate of damage" or a sum is stipulated as "in terrorem" of the offending party". In this case, however, Burton J upheld the take or pay clause on the basis:

"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."

78. A middle course was navigated in the UK Supreme Court case of Cavendish Square Holdings BV v. Talal El Makdessi[58] which held that:

"13 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.

14 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."

This approach illustrates that a take or pay payment should be viewed as being due on the performance of the seller's "specified obligation" in making gas available. There will not be any parallel breach by the buyer's failure to take gas as the buyer will have an option to take gas.

79. In the present case, Learned Counsel for Appellant has argued that the fact that the Appellant did not take up the Gas during the specified time, amounted to a breach of the Take or Pay provisions, thereby rendering Section 74 of the Contract Act applicable to the case. It was further argued that its conduct of not taking the Gas during the relevant period amounted to a breach under Clause 3.6(a) of the GSA, which imposed an obligation on the Appellant to

take the Daily Contract Quantity of Gas from the Respondent from and after the Commercial Operations Date during the Firm Delivery Period.

80. Section 74 of the Contract Act reads:

"74. Compensation for breach of contract where penalty stipulated for.-

When a contract has been broken, if a sum is named in the contract as the amount to be paid in stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."

81. Retired Chief Justice Tassaduq Hussain Jillani, one of the Experts in the arbitration proceedings, at page 30 of his Opinion, lays down when the above provision of law would be attracted:

(i) Firstly, when a contract has been broken;

(ii) Secondly, if a sum is named in the contract in the case of breach, or

(iii) Thirdly, if the contract contains any other stipulation by way of penalty;

(iv) Fourthly, the party complaining of the breach would be entitled, whether or not actual damage has been proved to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for.

82. The first condition for an invocation of Section 74, therefore, is breach of Contract. Learned Counsel for the Appellant argues that, by not taking up the Make-Up Gas, there had been a breach of Clause 3.6(a) of the GSA (the "Take or Pay" payment) on part of the Petitioner. Counsel for Appellant states that this is attributed to the wording of the Section, which, by use of the word "shall", imposes an obligation on the Appellant to take up the minimum quantity of gas; and the latter part of the section which states " if not taken pay for a minimum quantity of Gas " was a provision providing for damages as a consequence of the breach of the Appellant's obligation. This Section is reproduced below for ease of reference:

"Section 3.6: Take or Pay/Make-Up Gas

3.6(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."

(Emphasis supplied)

83. The case of Muhammad Saleh v. Tim Chief Settlement Commissioner[59] is clear authority on whether or not the word "shall" is always to be construed so as to create a compulsive obligation; this case laid down that the words "may" and "shall" in legal phraseology are interchangeable, depending on the context in which they are used, and are not to be interpreted with the rigidity which is attributed to them in ordinary parlance.

84. Furthermore, this case stressed upon the need for a contextual analysis of provisions. Upon our analysis, we find the Appellant's approach of dividing section 3.6(a) of the GSA into two different parts redundant. The provision, if looked at in its entirety, creates an obligation not to take up Gas, but rather, to pay for it even if it is not taken up. The Take or Pay payment is not due as a result of a contract breach or default, but rather, it flows from the Appellant's valid choice/decision not to take the take or pay quantity. The take or pay payment under Section 3.6 is therefore essentially an agreement whereby the Appellant agrees to either take and pay the contract price for, a minimum contract quantity of Gas; or pay the applicable contract price for such Take or Pay Quantity if it is not taken. Thus, the Appellant's obligation may be described as being in the "alternative" as it can be satisfied in either of the two ways. Therefore, even if the Appellant did not take up the Gas, but did pay for it, there would be no breach of contract. No penalty was attracted as a result of the Appellant not taking up the Gas, rather,

conversely, under Section 3.6(c) of the GSA, the Appellant was allowed to 'make up' for the amount he had paid for. Thus, we are unable to agree with the contention of the Appellant that failure to take up the Gas had resulted in breach of contract. Section 3.6(c) of the GSA is reproduced as follows:

"Section 3.6(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 difference 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 the Gas hereunder on any Day exceed the Daily Contract Quantity. At the end of the Gas Allocation, the Buyer shall be entitled to the Make-Up Gas during the immediately following twelve (12) Months on as-available basis."

(Emphasis supplied)

85. Furthermore, even though it is clear that Section 74 of the Contract Act would not be attracted because there is no breach of contract that triggers the application of this Section, even if it were to have applied to the circumstances of the case, the Appellant would not have been able to make out an arguable case. This is because as per section 74, the Respondent would be entitled to "reasonable compensation". In the case of Syed Sibte Raza v. Habib Bank Limited,[60] it was held that in working out the amount for reasonable compensation, it would be relevant to consider whether any loss has or has not accrued to the party, which has suffered on account of the breach, and the extent of that loss. As per the facts of this case, the fact that the Respondent Bank had spent more than the amount of security it withheld from its now departed employees on their training, therefore the amount of security

deposit forfeited by the Bank was not held to be unconscionable or excessive.

86. Relating back to the case at hand, we note that the Take or Pay clause in the GSA was a reasonable pre-estimate for the loss suffered by the Respondent. This is because if the Take or Pay Quantity was not taken up by the Petitioner, the Respondent suffered losses insomuch as the fact that the Gas not taken by the Appellant is provided to the domestic consumers through its Distribution System. As a result, the Respondent suffered significant loss because domestic consumers enjoy a lower tariff as per the Regulations of the Oil and Gas Regulatory Authority (OGRA). It is a matter of record that when the GSA was executed the IPP tariff was Rs. 264.87 per MMBTU, while the tariff for domestic consumers consuming up to 500M3 per month was Rs. 85.03, and for domestic consumers consuming between 50M3 per month, the tariff was Rs. 162.07. Moreover, Appellant's obligation under section 3.6 may be regarded as a reasonable pre-estimate of damages and not a penalty inserted in the contract for the reason that the Appellant is not burdened with the task of paying for the whole quantity of Gas which was to be taken, but rather 50% of the daily contract quantity after the Commercial Operations Date and 15% of the daily contract quantity during the Commissioning Period. Secondly, if the Appellant did not take/buy gas during the stipulated period, it was given a chance to make up the said quantity of gas not taken, during a specific period mentioned in the GSA i.e. during the Firm Delivery Period of immediately following one (1) Contract Year of the term. This appears to be a reasonable term stipulated in the contract, which has been evidently agreed upon by both parties prior to the signing of the GSA. The Appellant cannot now turn around and claim otherwise.

V. ISSUE NO. 3: WHETHER AWARD RENDERED BY THE ARBITRATOR AMOUNTED TO UNJUST ENRICHMENT?

87. The Appellant vehemently asserts that a party should not be allowed to recover more than it has actually lost; as enshrined in section 74 of the Contract Act, 1872 and that allowing more than the actual loss amounts to unjust enrichment/double recovery. Counsel for the Appellant further contends that Respondent admitted that it had not suffered an actual loss of more than Rs.356,104,346.25/-, and the Sole Arbitrator, by awarding more

than the actual loss suffered unjustly enriched the Respondent. The Appellant has stressed upon the fact that for a loss of Rs. 365 million rupees, the Respondent has been awarded Rs. 603 million, which plainly exceeds reasonable compensation for the losses suffered by the Respondent.

88. The Appellant, in furtherance of his claim, relies on the Witness Statement of the Chief Billing Officer of the Respondent, who, according to the Petitioner, has admitted that the Respondent only suffered an actual loss of Rs. 356,104,346.25/- as a result of the Appellant's inability to take the Gas. Upon perusal of the said document, we are unable to find such an admission on part of the Chief Billing Officer regarding the amount. Rather, conversely, the Chief Billing Officer explicitly states, at paragraph 4, that the total principal amount payable is Rs. 603,202,083.[61]

89. The Appellant, by its failure to pay for the six invoices issued by the Respondent from May to October 2011, was undeniably in breach of its obligation under the GSA. This invariably attracted Section 74 of the Contract Act, which was been discussed at length above.

90. We are guided by the case of Province of West Pakistan v Messrs Mistri Patel & Co;[62] wherein it was held that the award of compensation by the court under section 74 of the Contract Act will depend upon a case by case factual and circumstantial analysis as to what would be reasonable compensation in each case subject to the limit of the amount mentioned in the contract. It is noteworthy that as per the facts of this case, the Government was entitled to forfeit five percent of the contract price in case of breach of contract by the other party. However, it so transpired that because the Government of Pakistan had earned a profit on sale of the remaining goods, the Court declined to award compensation of 5% of the total value of goods that had not been lifted by the supplier by the stipulate date.

91. In the present case, we note that the alleged harshness awarded by the Sole Arbitrator has already been reduced to Rs. 400 million Rupees, with the agreement of both parties by the Court and to be deposited in court, while interpreting section 74 of the Contract Act.

92. However, we find it necessary to dilate upon whether the Appellant's claim for unjust enrichment holds the ground. For a

claim of unjust enrichment to succeed, there are certain factors that ought to be taken into account. In the case of Fecto Belarus Tractor Ltd v. Government of Pakistan,[63] the Supreme Court explained this doctrine as one in which a person gains a "windfall in respect of an amount which is not owned by him nor it has sustained any loss in respect thereof".

93. In more recent decisions, the Sindh High Court in the case of Arabian Sea Enterprises v. Abid Amin Bhatti,[64] has held that the necessary ingredients for a claim of unjust enrichment to succeed are as follows:

i. The plaintiff must prove that defendant has become enriched by the receipt of a benefit;

ii. This enrichment is at the expense of plaintiff;

iii. The enrichment and/or its retention is unjust; and

iv. The defendant can legally be compelled to compensate the plaintiff.

94. The Lahore High Court in the case of Sui Northern Gas Pipelines v. DCIR[65] explained unjust enrichment in the following terms:

"Unjust enrichment occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else

The doctrine of unjust enrichment, therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity."

95. The Canadian Supreme Court in the case of Garland v. Consumers' Gas Co.[66] that:

"As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment."

96. Upon analysis of the above cases, it must be seen that for a claim of unjust enrichment to succeed, there must be enrichment at the expense of the plaintiff and this enrichment must be unjust

in such a way that there should be no lawful justification for the same. Relating back to the case at hand, learned counsel for the Appellant argues that the fact that the Respondent was entitled to recover the amounts for the same Gas twice, amounts to unjust enrichment of the Respondent, which is therefore contrary to the Contract Act, and also the principles of public policy. We cannot agree with this argument. While it may be so that the Respondent is receiving payment for the same amount of Gas twice, it needs to be clarified that this is upon failure of the Appellant to take up the Gas, and further, the Respondent, in any case, is not recovering the same amount, due to the fact that it is redirecting transmission to its domestic consumers, which pay a lower tariff than Independent Power Producers (IPP). Furthermore, to allow the Appellant's claim would mean overlooking the fact that the Respondent is still under an obligation to supply the Make-Up Gas to the Appellant at any time within the duration stipulated under section 3.6(c) of the GSA. There is, therefore, presence of 'juristic reason' for the enrichment. Further, the Appellant has failed to prove its deprivation as it is entitled to Make-Up Gas at a later date, which it failed to avail within the stipulated time frame. It is by now settled law that that if a party failed to avail a remedy within the period of limitation then after the expiry of the said period, the other party acquires a valuable right.[67] Therefore, we hold that the Appellant has failed to make out a claim for unjust enrichment of the Respondent.

97. We are also fortified in our view by the reasoning of the Sole Arbitrator who very succinctly explained the factors to be taken into account when dismissing the claim for unjust enrichment:

o Claimant expanded monies to construct the infrastructure to deliver Gas to the Respondent;

o Claimant having to be ready and able to provide under the GSA, be it Daily Contract Quantity or the Take or Pay Quantity to the Respondent during Firm Delivery Period;

o Claimant remaining liable to its upstream suppliers even if the Respondent chose not to take the Take or Pay Quantity but opted to pay instead and to Make Up Gas later;

o Claimant having to bear the responsibility of cutting its losses and finding an alternative Buyer (even at a lower price) for the Gas not

taken by the Respondent and the likely additional costs of transmission, distribution and unaccounted for gas.

98. Conclusively, we hold that the Appellant has failed to make out a claim for unjust enrichment, and we find that the award rendered by the Sole Arbitrator was not disproportionate to the losses suffered by the Respondent.

VI. ISSUE NO 4: PUBLIC POLICY

99. Article V of the New York Convention lays down instances where courts may refuse recognition and enforcement of an arbitral award brought before them, more specifically, Article V(2)(b) states that recognition and enforcement may be refused if the award would be contrary to "public policy" of "that country". Thus, since recognition and enforcement of the award is being sought in Pakistan, it is the public policy of Pakistan that one must adhere to while perusing the award, which, in turn requires a discussion on what amounts to a violation of public policy under the laws of Pakistan.

100. It is noteworthy that neither the New York Convention nor the corresponding Foreign Arbitral Awards Act has defined public policy. This was purposefully done by the drafters of the Convention so as to allow each country to derive its own notions of public policy, as it would be unrealistic and utopian to expect all States to adhere to one harmonized ideal of public policy.

101. The dilemma of defining public policy has adequately been by Albert Van Den Berg in his book titled 'The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation' wherein he states that the reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various States. Indeed, this is true, and to that effect both Parties have relied on a great many cases from different jurisdictions to illustrate the views taken by courts and commentators on the interpretation of public policy.

102. Owing to paucity of judicial commentary and literature alike in Pakistan, we find it necessary to expound upon the meaning of public policy, more specifically within the realm of international commercial arbitration.

103. Perusals of the Travaux pr paratoires (preparatory works) of the New York Convention clearly indicate that the public policy

exception was never meant to be given a wide scope of application. Article 1(2)(e) of the Geneva Convention, the predecessor to the New York Convention contained the provision of public policy in such a way that not only a violation of public policy of the country of enforcement hindered recognition and enforcement; an award could also be contrary to public policy if it was contrary to the "principles" of the law of the country in which it was seeking enforcement. The reference to principles of law was omitted by the International Court of Commerce (ICC) Draft of 1953, and Article IV(1)(a) of this draft was limited to only a violation of public policy. In the final discussions leading up to the adoption of the New York Convention, Working Party III was instated to present its report on 3 June, 1958. The wording "incompatible with the public policy of the country in which is award is sought to be relied upon" was recommended, the reasoning behind the same was that the public policy criterion should not be given a broad scope of application. The Convention adopted the draft of Working Party III, which now reads as Article V(2)(b) under the New York Convention.

104. Article V(2)(b)'s defense of public policy is one ground that is frequently invoked by a party resisting enforcement of the award, but rarely is it granted. We find that it would be remiss if we did not echo the Learned High Court in quoting the words of an English Court upon this issue, which are by now almost inextricably linked to this topic and oft cited: "public policy is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail."

105. Another frequently cited judicial comment on public policy is from Judge Joseph Smith in Parsons and Whittemore Overseas Inc. v. RAKTA,[68] who observed that the public policy defense ought only to succeed where enforcement of the award would violate the forum State's most basic notions of morality and justice.

106. The recent Privy Council decision of Betamax Ltd (Appellant) v State Trading Corporation (Respondent) (Mauritius)[69] is of some guidance, in which, on appeal, the Privy Council overturned the decision of the Supreme Court of Mauritius which had set aside an award for being contrary to the public policy of Mauritius, because the underlying contract between the parties was in breach of the public procurement law of Mauritius. The Board held that the court

was not entitled to use the guise of public policy to reopen issues relating to the meaning and effect of a contract or whether it complies with a regulatory or legislative scheme. For that reasons the decision of the Supreme Court of Mauritius setting aside the Award fell to be reversed.

107. In Pakistani jurisdiction, public policy has been interpreted in the context of the Act preceding the Foreign Arbitral Awards Act, 2011 i.e. the Arbitration (Protocol and Convention) Act 1937 in Nan Fung Textiles Limited v. Sadiq Traders Limited[70] as being objects which are illegal by common law or legislation, which are injurious to good government which are adverse to justice, family life or public interest and objects economically against the public interest.

108. This court has also touched upon public policy in the case of Haji Abdul Karim and others v. Sh. Ali Muhammad as:[71]

"Similarly, the appellants not having proved that a license 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."

109. The Supreme Court of Azad and Jammu Kashmir in the case of Sardar Muhammad Yasin v. Raja Feroze Khan[72] has defined public policy as:

" any act the allowing of which would be against the general interests of the community. This policy has involved itself with the growth of organised society. Certain standards in the domain of morality, used in its widest sense, have assumed sanctity on account of the acceptance by the general community. Therefore, any agreement which would destroy these standards or adversely effect [sic] the development of society or its organization have to be viewed from this angle and it is here that the principle of public policy is born."

110. Therefore, it is easy to adduce the hesitance of courts and drafters alike in invoking public policy frivolously and without the most exceptional of circumstances. Most courts world over have favoured a restrictive approach to public policy in international commercial arbitration. It is imperative that, Pakistan is one of the countries that have yet to develop jurisprudence on international

commercial arbitration, and we must be cautious, and ought to adopt standards of practice in line with the international community. There is also a need to develop best standing practices for our own courts, which are seeing a rise in cases pertaining to international commercial arbitration; therefore, there is an utmost need to deliver precedent that is consistent and does not open floodgates to frivolous litigation. Indeed, the very purpose of parties going to arbitration is the (relatively) speedy settlement of disputes, which ought not to be impeded by a party resorting to litigation once an award is rendered.

111. The jurisdiction of courts under international commercial arbitration is merely supervisory; we deem it necessary to step in under circumstances, where, if not remedied, the arbitration award or agreement could lead to an unfair outcome for one of the parties. This is in no way means that domestic awards would be treated less favourably than foreign awards, but rather, the aim is to create a level playing field between the two and treat them at par.

112. A restrictive interpretation on challenge to enforcement of an award would therefore, ensure finality of award at its last stage, giving greater certainty to parties after having gone through rigorous arbitrations. The New York Convention itself advocates for a "pro-enforcement bias" and we are mindful of the same.

113. This does not in any way mean that the pro-enforcement bias impedes State interests however, and where a claim for violation of public policy is made, due care and attention ought to be awarded to that claim. However, one must be mindful that the public policy defense is an exceptional one at that, which demands heightened standards of proof that courts would normally require in order to refuse recognition and enforcement of a foreign arbitral award. Thus the Canadian courts have requested that the party opposing recognition and enforcement should present compelling evidence, and that recognition and enforcement should only be refused in instances of a "patently unreasonable award".[73]

114. This heightened standard of proof is compatible with the exceptional nature of the public policy defense as well as with the fact that Article V(2)(b) ibid; provides a mere facility to the courts and not an obligation.

115. Under the present scenario, we are convinced that this was not a case of unjust enrichment; rather, this was a case where the Appellant was aggrieved by the quantum of compensation awarded by the Sole Arbitrator. There had therefore, been no violation of public policy.

116. The German case of the Higher Regional Court of Frankfurt (Oberlandesgericht Frankfurt) in Oberlandesgericht [OLG] Frankfurt, Germany,[74] dismissed the argument of the Defendant that enforcement of the award would violate German public policy. It was held that even if the Defendant could prove that damages had been awarded arbitrarily by the Arbitral Tribunal, this would not amount to a violation of public policy.

117. Furthermore, in Oberlandesgericht [OLG] Celle, Germany,[75] the Higher Regional Court of Celle also dismissed a claim of public policy presented by the Defendant. The Court held that the penalty, though representing 40% of the main obligation under the contract and being therefore "disproportionally high", did not per se violate the international public policy of Germany. The same principle applied to the decision on costs. In order to violate public policy, the Court held that additional circumstances such as abuse of economic power would have been necessary.

118. Finally, the Supreme Court of India in the case of Renusagar Power Co. Ltd v. General Electric Co.[76] held that enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. More specifically, on the objections of one of the parties based on unjust enrichment, the Court held, in paragraph 100, that the case in question was not one of unjust enrichment, and that the objections raised were with regard to the quantum of the award by the Arbitral Tribunal. To hold that this amounted to unjust enrichment would hold to mean that in every case where an arbitrator awarded an amount higher than what should have been awarded would open the award to be challenged on the ground of unjust enrichment. Such a course was not permissible under the New York Convention.

119. In light of the above cited case law, and in the same vein as Renusagar (supra), we hold that awarding a greater quantum of compensation than that was due by an Arbitral Tribunal does not

amount to violation of public policy, as the same would open floodgates and would require the courts to undertake an examination of each and every award, which is against the very spirit of the New York Convention. Resultantly, we hold that the award rendered by the Sole Arbitrator was not in violation of the public policy of Pakistan.

120. We agree with the finding of the Learned High Court at paragraph 57 of the Impugned Judgment, wherein it is stated:

" [the] 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 The public policy exception acts as a safeguard of fundamental notions of morality and justice, such that the enforcement of a foreign award may offend these fundamentals [T]he 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."

121. Conclusively, for the foregoing reasons, we hold:

i. the Appellant's contention that the award of the Sole Arbitrator to the extent of the Payment Agreement ought to be set aside is dismissed;

ii. there has been no breach of Section 74 of the Contract Act on part of the Appellant by failure to take up the Make Up Gas,

iii. the award rendered by the Sole Arbitrator does not violate the public policy of Pakistan.

122. The Appellant's contentions are therefore misconceived, and this Appeal is dismissed accordingly. No order as to costs.

123. Lastly, I would like to extend and acknowledge my deepest gratitude for the diligent and extensive research carried out by Law Clerks Mahnoor Waqar and Ahmad Hassan on global jurisdictions and new points in issue on Arbitration Jurisprudence under Pakistan Law.

MWA/O-2/SC Appeal dismissed.