

Enforcing Foreign Arbitral Awards in Pakistan

Orient Power Company (Private) Limited v Sui Northern Gas Pipelines Limited

PLD 2019 Lahore 607

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Introduction

International commercial arbitration has emerged as an expeditious and cost-effective mechanism of dispute resolution compared with the traditional means of litigation. The objective of international or foreign arbitration is to provide a neutral forum for settlement of disputes for parties engaged in international business transactions. While appreciating the efficacious mode of commercial dispute resolution through arbitration,¹ Pakistan signed a multilateral treaty, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“Convention”) and enacted the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (“2011 Act”) to give effect to the Convention. Section 10 of the Act repeals the Arbitration (Protocol and Convention) Act 1937 (“1937 Act”) which was previously applicable in Pakistan.²

The Convention envisages a pro-enforcement policy which is also highlighted in Section 8 of the 2011 Act.³ Before the 2011 Act, there was some confusion as to the definition of a foreign arbitral award as well as its enforcement.⁴ It created uncertainty and incoherence in the domestic jurisprudence causing long delays in the enforcement of foreign arbitral

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¹ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn., 2004) 19-21.

² Section 10 of the 2011 Act provides that the Arbitration (Protocol and Convention) Act 1937 is repealed.

³ Section 8 of the 2011 Act provides that in the event of any inconsistency between this Act and the Convention, the Convention shall prevail.

⁴ For example, Section 9 of the 1937 Act provided that when an agreement is governed by the laws of Pakistan then such an award is not a foreign award. It means such award would be enforced as a domestic award under the Arbitration Act 1940.

awards. However, Section 2 (e) of the 2011 Act defines that an award made in a Contracting State⁵ is a foreign award. Section 3 of the 2011 Act provides that the High Court shall have *exclusive jurisdiction* for the recognition and enforcement of foreign awards. The 2011 Act aims to minimise delays that hindered the enforcement of foreign awards. This judgment implements the 2011 Act in its letter and spirit, ushering an era of expeditious enforcement of foreign arbitral awards in Pakistan.⁶

This case note provides brief facts of the case and narrates the objections raised before the court. It discusses arguments of the counsels and opinion of the court. It analyses the judgment of the division bench of the Lahore High Court (“LHC”), which deals with the recognition and enforcement of foreign arbitral awards and makes jurisprudential contribution in three important areas. Firstly, the judgment decides as to the exclusive jurisdiction of the LHC for the recognition and enforcement of foreign arbitral awards while highlighting the pro-enforcement policy of the Convention. This judgment has effectively addressed the confusion caused by the *Taisei Corporation v A.M. Construction Company (Pvt.) Ltd.*⁷ (“*Taisei case*”), in which the LHC held that the Arbitration Act 1940 (“1940 Act”)⁸ Secondly, the judgment enriches jurisprudence⁹ of commercial contracts such as the energy sector agreements. While extensively exploring foreign jurisdictions, the LHC explains the meaning and concept of *take or pay clause* and holds that it stipulates a contractual obligation and not a penalty clause. Thirdly, the judgment determines the meaning and scope of the public policy of Pakistan after a broad analysis of foreign and domestic jurisprudence. In conclusion,

⁵ Section 2 (b) of the 2011 Act defines that “Contracting State” means a State which is a Party to the Convention.

⁶ *Orient Power Company (Limited) v Sui Northern Gas Pipelines Limited* PLD 2019 Lahore 607. (This judgment is appealed against before the Supreme Court of Pakistan).

⁷ *Taisei Corporation v A.M. Construction Company (Pvt.) Ltd* PLD 2012 Lahore 455.

⁸ The Lahore High Court held that, as there are no provisions equivalent to Sections 14, 30, and 33 of the 1940 Act under the 2011 Act, therefore, the 1940 Act is applicable to both domestic as well as foreign arbitral awards.

⁹ The take or pay clause is commonly incorporated in commercial contracts of long duration such as supply of gas for a power plant in the energy sector. This clause provides two options to the buyer; either to pay and take the product or to pay and defer taking the product until a specified date. It allocates the risks to both the parties over a long period and provides some comfort; a seller gets security of his investment and a buyer gets a guaranteed supply of product.

this case note makes a few suggestions for defining the meaning and source of the public policy of Pakistan.

Facts of the Case

In October 2016, Orient Power Co. (Private) Ltd. (“Appellant”) and Sui Northern Gas Pipelines Ltd. (“Respondent”) entered into a Gas Supply Agreement (“GSA”) for supply of gas to the Appellant for its power generation plant. A dispute arose between the parties as to the Appellant’s obligation to take or pay under clause 3.6 of the GSA. In terms of clause 18.3 of the GSA, the dispute was referred to the London Court of International Arbitration, which passed the Awards dated 27.2.2017 and 13.6.2017 (“Awards”).

The Appellant raised objections on the Awards before the civil court under Section 14(2)¹⁰ of the 1940 Act. The Respondent approached the Lahore High Court under Section 6¹¹ of the 2011 Act for the recognition and enforcement of the Awards. The learned single judge of the Lahore High Court recognised the Awards on 4.4.2018 after finding that the High Court has exclusive jurisdiction to enforce foreign arbitral awards under the 2011 Act. An intra-court appeal was filed before the division bench of the Lahore High Court and the same was dismissed.

Objections Raised Before the Court

The Appellant challenged the impugned order dated 4.4.2018, passed by the learned single judge of the Lahore High Court and raised the following objections:

Preliminary objection: The High Court does not have exclusive jurisdiction to recognise and enforce the foreign arbitral awards and that the

¹⁰ Section 14 (2) of the 1940 Act provides that the arbitrators shall, at the request of any party or his representative or on direction of the Court upon payment of charges regarding the arbitration and award, shall cause the award to be filed in Court, and the Court shall give notice to the parties of the filing of the award.

¹¹ Section 6 of the 2011 Act provides that, unless the Court under Section 7, refuses to recognize and enforce the foreign arbitral award, the Court shall recognize and enforce the award in the same manner as a judgment of order of a court in Pakistan, and it shall be binding for all purposes on the persons between whom it was made.

civil court also has similar power. In other words, the High Court and the civil court have parallel jurisdiction to recognise and enforce the foreign arbitral awards. The Appellant has the legal right to file objections against the Award before both the courts; before civil court under the 1940 Act and before the High Court under the 2011 Act.

First objection: In view of Article V (1) (c)¹² of the schedule to the Act, the arbitrator had no jurisdiction over the first claim of Rs.104,133,296/- due under the Payment Agreement dated 11.1.2010 as there was no arbitration clause under the said Agreement.

Second objection: As per Article V (2) (b)¹³ of the schedule to the Act, the second claim of Rs.603,202,083/- under clause 3.6 of the GSA is against Section 74¹⁴ of the Contract Act, 1872 (Contract Act) and the public policy of Pakistan. The following section contains the arguments of the both parties on these objections and the respective opinions of the court.

Arguments on Objections and Opinion of the Court

Arguments on the preliminary objection of jurisdiction of the High Court

The learned counsel for the Appellant contended that he was denied a fair opportunity of hearing as the impugned order dated 4.4.2018 was decided ex-parte; that he has a right to file objections against the Awards both under the 2011 Act and the 1940 Act; that this right is recognised in the *Taisei Case*,¹⁵ however, the single judge of the Lahore High Court made the impugned order

¹² Article V (1) (c) of the 1958 Convention provides that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority, proof that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

¹³ Article V (2) (b) of the 1958 Convention provides that recognition and enforcement of an arbitral award may also be refused if the competent authority of particular country, finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

¹⁴ Section 74 of the Contract Act, 1872 provides that on breach of a contract, if a sum is stipulated by way of penalty, the aggrieved party shall be entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so stipulated irrespective of the proof the actual damage or loss.

¹⁵ (n 7).

without considering the matter of concurrent jurisdiction as recognised in *Taisei Case*, in which it was held that Sections 14,¹⁶ 30¹⁷ and 33¹⁸ of the 1940 Act are applicable to the foreign awards as equivalent provisions are not available under the 2011 Act; that the 1940 Act and the 2011 Act must be interpreted harmoniously to provide all rights available under the law to the Appellant.

The counsel for the Respondent argued that in view of Section 2(e),¹⁹ 6,²⁰ 7,²¹ and 8²² of the 2011 Act, the High Court has exclusive jurisdiction to recognise and enforce the foreign arbitral awards and the 1940 Act is not applicable to foreign awards. Section 2(e) defines that an award made in a Contracting State, that is London in this case, is a foreign award, and the High Court is the court of enforcement. Section 6 stipulates that a foreign award be recognised and enforced per the order of the High Court. Section 7 states that an award is to be recognised and enforced as per Article V of the Convention; and Section 8 stipulates that in case of any inconsistency between the Act, the law, or any judgment of the court, Article V of the Convention shall prevail. The counsel argued that in *Taisei Case*, the court found that the award in question was a domestic award and the 1940 Act is applicable to domestic awards; that there is neither any ambiguity in the law nor the Appellant

¹⁶ Section 14 of the Arbitration Act, 1940 provides that an award is to be signed and filed. (1) When the arbitrators have made their award, they shall sign it and shall give notice to the parties in this regard and the amount of charges payable regarding the arbitration and award. (2) The arbitrators shall, at the request of any party or his representative or on direction of the Court upon payment of charges regarding the arbitration and award, cause the award to be filed in Court, and the Court shall give notice to the parties of the filing of the award.

¹⁷ Section 30 of the Arbitration Act, 1940 provides that an award shall be set aside when an arbitrator has misconducted; that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35; and that an award has been improperly procured or is otherwise invalid.

¹⁸ Section 33 of the Arbitration Act, 1940 states that validity or the existence or the effect of an arbitration agreement or award can be contested by any party or his representative by filing an application to the Court and the Court shall decide the question on affidavits or other evidence.

¹⁹ Section 2(e) of the 2011 Act provides that a “foreign arbitral award” means an arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the official Gazette.

²⁰ (n 11).

²¹ Section 7 of the 2011 Act provides that the recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention.

²² Section 8 of the 2011 Act provides that in the event of any inconsistency between this Act and the Convention, the Convention shall prevail to the extent of the inconsistency.

challenged any provision of the 2011 Act, thus, harmonious construction is not required.

Opinion on the preliminary objection

The apparent discrepancy regarding the jurisdiction between the High Court and civil court in enforcing a foreign award under 2011 Act and 1940 Act²³ and held that under Section 2 (d)²⁴ read with Section 3²⁵ of the 2011 Act, the High Court has exclusive jurisdiction for the recognition and enforcement of a foreign arbitral award. Section 6 enables the High Court to recognise and enforce foreign arbitral awards as order of a domestic court. Section 7 envisages that enforcement of a foreign award cannot be refused except on the grounds contained in Article V of the Convention that is appended with the schedule of the Act. The Court relied on various judgments to argue that even under the 1937 Act, the High Courts in Pakistan had exclusive jurisdiction to enforce and recognise foreign arbitral awards.²⁶ The Court noted that the *Taisei Case* relied upon *Hitachi Ltd. and another v Rupali Polyester and others*,²⁷ in which the provisions of the 1937 Act were interpreted. After the repeal of the 1937 Act,²⁸ the Court noted, an award made in a contracting state, notwithstanding the governing law of the contract, is a foreign award and the 2011 Act is the applicable law. The Court further stated that allowing parties to approach the High Court and civil courts simultaneously is not only impracticable, but also contrary to the intent and purpose of the 2011 Act.²⁹ It may cause conflicting judgments and uncertainty towards the same award. The Court pointed out that the 2011 Act aims to facilitate the recognition and enforcement of foreign arbitral awards to avoid litigious delay. The Court

²³ (n 6) 617.

²⁴ Section 2 (d) of the 2011 Act provides that the “Court” means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette.

²⁵ Section 3 of the 2011 Act provides that, notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act.

²⁶ *Taisei Corporation v A.M. Corporation Company (Pvt.) Ltd.* 2018 MLD 2058; *G.M. Pfaff A.G. v Sartaj Engineering Co. Ltd., Lahore* PLD 1970 Lahore 184; *Nan Fung Textiles Ltd. v Sadiq Traders Ltd.* PLD 1982 Karachi 619; *Marines Limited v Aegus Shipping Co. Ltd* 1987 CLC 1299.

²⁷ *Hitachi Ltd. v Rupali Polyester* 1998 SCMR 1618.

²⁸ Section 10 of the 2011 Act repealed the 1937 Act.

²⁹ (n 6) 618.

emphasised on Section 8 to establish that the 2011 Act intends to enforce pro-enforcement policy envisaged in the Convention³⁰ and concluded that the High Court has exclusive jurisdiction for the recognition and enforcement of foreign arbitral awards.

Arguments on the first objection against the first claim: Article V (1) (c) of the schedule to the Act.

The first claim pertains to the payment of Rs.104,133,296/- to the Respondent under the Payment Agreement dated 11.1.2010.

The learned counsel for the Appellant argued that the Payment Agreement does not provide any arbitration clause, thus, the Arbitrator had no jurisdiction to decide the claim. He argued that the parties entered into the GSA, which provided a dispute resolution mechanism in clause 18; however, that mechanism is not applicable to the Payment Agreement; that the dispute with respect to the non-payment of Rs.104,133,296/- is beyond the jurisdiction of the Arbitrator. In the absence of a specific arbitration clause in an agreement, a matter cannot be referred to arbitration. Reliance was placed on *Messrs MacDonald Layton and Company Limited v Messrs Association Electrical Enterprises Limited and another*,³¹ *Syed Arshad Ali v Sarwat Ali Abbasi*,³² and *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*.³³

The Respondent's counsel argued that the dispute between the parties falls under clause 3.6 (*take or pay clause*) of the GSA. After making the payment, the Appellant is given the choice either to take the gas or defer taking the gas to a subsequent date. The counsel argued that as decided by the Expert, the Appellant was bound to pay the amounts owed under clause 3.6 of the GSA to the Respondent within fifteen days, failing which the Appellant sought extension of time for making the due payments and that extension was provided under the Payment Agreement. The counsel stressed

³⁰ Ibid, 617.

³¹ *Messrs MacDonald Layton and Company Ltd. v Messrs Association Electrical Enterprises Limited* PLD 1982 Karachi 786.

³² *Syed Arshad Ali v Sarwat Ali Abbasi*, 1988 CLC 1350.

³³ *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 57.

that clause 4 of the Payment Agreement specifically provides that the provisions of the GSA shall prevail and apply to the Payment Agreement. Thus, the arbitration clause of the GSA was applicable and the Arbitrator had jurisdiction to decide the claim; that the dispute was referred to the Expert under clause 18.2 of the GSA and his determination was binding on the parties. Therefore, the counsel argued, the Appellant is obliged to make the payment to the Respondent.

Opinion on the first objection

The Court observed that the first claim pertains to the demand for late payment surcharge under the Payment Agreement. The Court emphasised that as per clause 1 and 4 of the Payment Agreement, the definitions given in the GSA are not only applicable to the Payment Agreement but also have a prevailing effect. Thus, “the settlement recorded in the Payment Agreement is part and parcel of the obligations under the GSA.”³⁴ The Court noted, “in pith and substance, the Payment Agreement reflects the Appellant’s acknowledgement that amounts are due to the Respondent under the GSA, however, since payments could not be made at the prescribed time as per the GSA, the parties agreed to make the payments as per the Payment Agreement. The obligation to pay arises under the GSA and not under the Payment Agreement which was entered into essentially to facilitate the Appellant.”³⁵ The Court held that “the Payment Agreement was not an independent contract outside of the GSA. It was an agreement to make payment *pursuant to obligations* under the GSA that too on account of the Appellant’s default of making payments within the fifteen days mandated by the Expert.”³⁶ Clause 18.3 of the GSA covers all disputes between the parties. This dispute was referred to the Expert under clause 1.1 of the GSA and the determination of the Expert was binding on both the parties. However, the Appellant failed to comply with that determination and sought extension in time for making the due payment to the Respondent. The matter was settled in terms of the Payment Agreement to accommodate request of the Appellant. Therefore, the Court held that “the entire purpose of the Payment Agreement was to ensure that the parties fulfil their obligations under the GSA. Therefore, we conclude that

³⁴ (n 6) 626.

³⁵ *Ibid*, 627.

³⁶ *Ibid*.

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.”³⁷

Arguments on the second objection against the second claim: Article V (2) (b) of the schedule to the Act

The second objection of the Appellant against the Award is that the amount of Rs.603, 202,083/- under clause 3.6 (*take or pay clause*) of the GSA is against Section 74 of the Contract Act, 1872 and the public policy of Pakistan.

The Appellant’s counsel argued that the Respondent is not entitled to this amount because under Clause 3.6 (a) of the GSA, the Appellant was under an obligation to take gas from the Respondent for the relevant period. The Appellant being not able to take gas is in breach of this obligation. As per Section 74 of the Contract Act, if a contract is breached, the complaining party can only claim reasonable compensation after proving an estimate of the actual loss suffered. Hence, the Respondent is required to prove actual loss suffered before claiming any amount from the Appellant. For this, the counsel placed reliance on *Province of West Pakistan v Messrs Mistri Patel & Co. and another*,³⁸ *Syed Sibte Raza and another v Habib Bank Ltd.*,³⁹ *Saudi-Pak Industrial and Agricultural Investment Company (Pvt.) Ltd., Islamabad v Messrs Allied Bank of Pakistan and another*,⁴⁰ *The Bank of Punjab. Dewan Farooque Motors Limited*,⁴¹ and *Atlas Cables (Pvt.) Limited v Islamabad Electric Supply Company Limited and another*.⁴²

Essentially, the counsel argued that clause 3.6 is a penalty clause and in case of its breach by the Appellant, the Respondent, at best, can claim damages to the extent of proving actual loss. The counsel pointed out that the

³⁷ Ibid, 628.

³⁸ *Province of West Pakistan v Messrs Mistri Patel & Co. and another* PLD 1969 SC 80.

³⁹ *Syed Sibte Raza and another v Habib Bank Ltd* PLD 1971 SC 743.

⁴⁰ *Saudi-Pak Industrial and Agricultural Investment Company (Pvt.) Ltd., Islamabad v Messrs Allied Bank of Pakistan and another* 2003 CLD 596.

⁴¹ *The Bank of Punjab v Dewan Farooque Motors Limited* 2015 CLD 1756.

⁴² *Atlas Cables (Pvt.) Limited v Islamabad Electric Supply Company Limited and another* 2016 CLC 1833.

Respondent admits that the actual loss amounts to Rs.356, 104,346.25/-, therefore, in any case, the Respondent cannot be awarded more than the admitted loss as it is against the public policy concerns such as fairness and morality.⁴³ It would amount to unjust enrichment of the Respondent, which offends the principles of economic justice as embodied in the Constitution.⁴⁴ The counsel stressed that the Appellant was entitled to take the make-up gas even after the cut-off date (March 2011). The counsel seems to argue that since the price of gas is paid to the Respondent, the Appellant can take the make-up gas anytime, and the forfeiture of the paid amount, without supply of gas (even after the cut-off date) offends Section 74 of the Contract Act and unjustly enriches the Respondent.

The counsel for the Respondent contended that as per clause 3.6 (c) of the GSA, the Appellant could take make up gas till the cut-off date being March 2011, which the Appellant failed to do so. After this date, the Respondent was not obliged to provide make up gas. The Appellant, however, continued consuming gas released from May to October 2011 and failed to make the payment. Instead of making payment for these six months, the Appellant attempted to adjust this payment against the lapsed make up gas entitlement, which cannot be granted per clause 3.6 (c) of the GSA.

As to the public policy of Pakistan, the Appellant argued that clause 3.6 is a penalty clause, and in case of its breach (by the Appellant), the Respondent can claim a reasonable compensation and that too after proving actual loss in terms of Section 74 of the Contract Act. The counsel reiterated that the claim amount of Rs.603,202,083/- is against the law and the public policy of Pakistan. As per Article V (2) (b) of the Convention, the enforcing court can refuse a foreign arbitral award on the ground of public policy. As the word ‘public policy’ is not defined in the Convention or the Act, the learned counsel relied on the literature and judgments from various jurisdictions⁴⁵ to argue, “public policy means matters of national interest

⁴³ (n 6) 641.

⁴⁴ *Ibid*, 642.

⁴⁵ Lecture delivered by Chief Justice Robert French of the High Court of Australia on 18 April 2016 titled ‘Arbitration and Public Policy in Hong Kong’; Justice Stephen Breyer of the United States Supreme Court in the book *The Court and the World* (2015); Justice Sundaresh Menon of the Supreme Court of Singapore in his speech ‘International Arbitration: The Coming of a New Age for Asia (and Elsewhere)’ (2012); *Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd.*, (2003) 5 SCC 705 (Saw Pipes

related to national sovereignty.”⁴⁶ In context of the claim under dispute, the counsel argued that the Respondent should not be granted more than what it has actually suffered; that unjust enrichment of the Respondent would offend the constitutional principle of economic justice and contractual rule of reasonable compensation envisaged in Section 74 of the Contract Act.

The learned counsel for the Respondent argued that in terms of Section 23 of the Contract Act, “any element of injury to public interest would fall within the domain of public policy.”⁴⁷ Reliance was placed on *Nan Fung Textiles Ltd. v Sadiq Traders Ltd.*,⁴⁸ to define the scope of public policy. This judgment enumerates the objects which can nullify a contract on the basis of public policy: the objects which are illegal under the common law or any legislation and are injurious to good government either in the field of domestic or foreign affairs; the objects which interfere with the administration of justice; the objects injurious to family life and the objects, which are against the economic interest of the public. While relying upon *Haji Abdul Karim and others v Sh. Ali Muhammad and others*,⁴⁹ *Maulana Abdul Haque Baloch and others v Government of Balochistan through Secretary Industries and Mineral Development and others*,⁵⁰ *Shri Lal Mahal Ltd. v Progetto Granto Spa*,⁵¹ and *Phulchand Exports Ltd. v O.O.O. Patriot*,⁵² the counsel argued that the public policy exception is to be construed narrowly and it is relevant only when there is an element of injury to the public, which is not the case in hand. Hence, in this case, the Award cannot be refused based on public policy exception.

Case); *Oil and Natural Gas Corporation limited v Western Geco International Limited*, (2014) 9 SCC 263, (Geco Case); the UNCITRAL Secretarial Guide on the New York Convention (2016) (UNCITRAL Guide).

⁴⁶ (n 6) 641.

⁴⁷ *Ibid*, 642.

⁴⁸ *Nan Fung Textiles Ltd. v Sadiq Traders Ltd.* PLD 1982 Karachi 619.

⁴⁹ *Haji Abdul Karim and others v Sh. Ali Muhammad and others* PLD 1959 SC 167.

⁵⁰ *Maulana Abdul Haque Baloch and others v Government of Balochistan through Secretary Industries and Mineral Development and others* PLD 2013 SC 641.

⁵¹ *Shri Lal Mahal Ltd. v Progetto Granto Spa*, (2014) 2 SCC 433.

⁵² *Phulchand Exports Ltd. v O.O.O. Patriot*, (2011) 10 SCC 300.

Opinion on the second objection

With respect to the second claim, the Court noted two issues: First, whether the *take or pay clause* is governed by the law of damages under Section 74 of the Contract Act. Second, whether the award of Rs.603,202,083/- is against the public policy of Pakistan.⁵³

The Court observed that “the *take or pay clause* is a common term in gas supply agreements, which gives the buyer the option to take supply of the gas or else pay for it and defer the taking of the gas supply. The rationale behind this clause is to allocate risk between the supplier and buyer over long term contracts. The buyer seeks stability in supply and some flexibility in prices and the seller seeks assurance for a guaranteed income.”⁵⁴ The Court explained that the *take or pay clause* envisages two separate obligations of the seller: the obligation to supply gas during the firm delivery period and to provide make up gas after the cut-off date till a specified date. The obligation of the buyer is to pay for the gas. The Court held that “the obligation of the buyer under Clause 3.6 (a) of the GSA is to pay for the gas and not take the gas.”⁵⁵ The court further clarified that “due to *take or pay clause*, a breach cannot be triggered on account of failure to take gas. The buyer has the right to exercise the option to take gas or invoke the *take or pay clause*. Hence the exercise of either option is valid under the GSA and would not constitute a breach thereof. Therefore we find that the *take or pay* payment is not due because of a breach or default rather it flows from the contracting party’s valid choice to invoke the right to invoke the *take or pay clause*.”⁵⁶

While relying upon *Port of Tilbury (London) Ltd. v Store Enso Transport & Distribution Ltd.*,⁵⁷ *M&J Polymers Ltd v Imerys Minerals Ltd.*,⁵⁸ *Cavendish Square Holding BV v Talat El Makedssi*,⁵⁹ *Philips Hong*

⁵³ (n 6) 629.

⁵⁴ *Ibid*, 647-648.

⁵⁵ *Ibid*, 648.

⁵⁶ *Ibid*, 649.

⁵⁷ *Port of Tilbury (London) Ltd. v Store Enso Transport & Distribution Ltd.* (2009) EWCA Civ16.

⁵⁸ *M&J Polymers Ltd v Imerys Minerals Ltd.* (2008) EWHC 344 (Comm).

⁵⁹ *Cavendish Square Holding BV v Talat El Makedssi* (2015) UKSC 67.

Kong Ltd v Attorney General of Hong Kong,⁶⁰ *Prenalta Corporation v Colorado Interstate Gas Company*,⁶¹ *Universal Resources Corporation v Panhandle Eastern Pipe Line Company*,⁶² *Miraka Limited v Milk New Zealand (Shanghai) Co. Limited*,⁶³ and *Churchill Falls (Labrador) Corporation Limited v Hydro Quebec*,⁶⁴ the Court observed that “the *take or pay clause*, being a common provision in commercial contracts, especially gas purchase agreements, is valid and enforceable and cannot be considered as a penalty provision.”⁶⁵

The Court noted that the Appellant neither challenged the take or pay clause nor the payments made thereunder. Rather, the Appellant is aggrieved for not taking make up gas within the cut-off date and argues that the Respondent cannot forfeit the agreed/paid price under the GSA and can only seek damages in terms of Section 74 of the Contract Act 1872. In view of the negotiated and agreed upon terms of the GSA, the Court observed that the Appellant’s argument cannot sustain. Hence, the Court held that “the *take or pay clause* does not offend Section 74 of the Contract Act.”⁶⁶ In other words, the Court concluded that the *take or pay clause* is not governed by the law of damages envisaged under Section 74 of the Contract Act 1872.

With reference to the public policy exception, the Court examined the Convention and observed that “the intent of the Convention is pro-enforceability of foreign awards.”⁶⁷ The Court relied upon *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l’Industrie du Papier RAKTA and Bank of America*,⁶⁸ *Polytek Engineering Co. Ltd. v Hebei Import & Export Corp.*,⁶⁹ *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v Ras Ali Khaimah National Oil Co.*, *Shell International Petroleum Co. Ltd.*

⁶⁰ *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41.

⁶¹ *Prenalta Corporation v Colorado Interstate Gas Company* 944 F.2d 677 (199).

⁶² *Universal Resources Corporation v Panhandle Eastern Pipe Line Company* 813 F.2d 77 (1997).

⁶³ *Miraka Limited v Milk New Zealand (Shanghai) Co. Ltd.* [2017] NZHC 2163.

⁶⁴ *Churchill Falls (Labrador) Corporation Limited v Hydro Quebec* 2018 SCC 46 (CanLII).

⁶⁵ (n 6) 654.

⁶⁶ *Ibid*, 655.

⁶⁷ *Ibid*, 656.

⁶⁸ *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l’Industrie du Papier RAKTA and Bank of America* 508 F.2d 969, 974 (2d Cir. 1974).

⁶⁹ *Polytek Engineering Co. Ltd. v Hebei Import & Export Corp.* 23 Y.B. COMM. ARB. 666, 666-84 (Hong Kong Ct. App.) (1999).

Court of Appeal,⁷⁰ *Allsop Automatic Inc. v Tecnoski snc, Corte di Appello*,⁷¹ *Ansell S.A. v OOO Med Bus, Serv.*,⁷² and *Sultan Textile Mills (Karachi) Ltd., Karachi v Muhammad Yousuf Shamsi*⁷³ to conclude that “by and large the application of the public policy exception is restrictive and limited to exceptional circumstances that affect the most fundamental values of a State. Accordingly, *public policy* under Article V(2)(b) of the Convention is kept fluid and adaptive and can be invoked in cases of patent illegality or matters which are fundamental for a state.”⁷⁴

The Court observed that “the public policy exception should not be used as a ‘back door’ for ‘reviewing merits of a foreign arbitral award’ and to ‘create grounds’ which are not available under Article V of the Convention, as this would negate the obligation to recognise and enforce foreign arbitral awards.”⁷⁵ On this premise, the Court stated that the “failure of the Appellant to invoke its make up gas right within the stipulated time does not render the *take or pay clause* as offensive to the fundamental or core values of Pakistan.”⁷⁶ Finally, the Court held that “no loss is caused to the public and no fundamental policy is adversely impacted by requiring the parties to make good on their contractual commitments. Resultantly, the public policy exception is not made out even as per the Appellant’s own case.”⁷⁷ In view of these findings, the appeal was dismissed and the order dated 4.4.2018 passed by the learned single judge of the High Court was maintained.

Analysis

This judgment is a significant contribution in the context of the increasing international commercial arbitration in Pakistan. It decides three important

⁷⁰ *Deutsche Schachtbau-und Tiefbohrergesellschaft m.b.H. v Ras Ali Khaimah National Oil Co., Shell International Petroleum Co. Ltd. Court of Appeal* 13 Y.B. COMM.ARB. 522, 534-35 (1988).

⁷¹ *Allsop Automatic Inc. v Tecnoski snc, Corte di Appello* 22 Y.B. COMM.ARB. 725, 725-26 (Ct. App. Milan).

⁷² *Ansell S.A. v OOO Med Bus, Serv* Ruling No.VAS-8786/10, 2 (2010) (Highest Arbitzah Ct., Russian Federation).

⁷³ *Sultan Textile Mills (Karachi) Ltd., Karachi v Muhammad Yousuf Shamsi* PLD 1972 Karachi 226.

⁷⁴ (n 6) 659.

⁷⁵ *Ibid.*

⁷⁶ *Ibid*, 660.

⁷⁷ *Ibid*, 661.

questions; the jurisdiction of the High Court for the recognition and enforcement of foreign arbitral awards; the meaning and scope of *take or pay clause* in commercial agreements such as the GSA; and the meaning and parameters of the public policy of Pakistan. While determining the jurisdiction of the High Court, the Court discussed and distinguished the case relating to the recognition and enforcement of foreign arbitral awards titled *Taisei Corporation v A.M. Construction Company (Pvt.) Ltd.*,⁷⁸ and decided two important legal issues: first, that after the repeal of the 1937 Act, the relevant law that caters for foreign arbitral awards is the 2011 Act;⁷⁹ second, that the High Court has exclusive jurisdiction for the recognition and enforcement of foreign arbitral awards.⁸⁰ This determination provides certainty in the law, which is a hallmark of any legal system.

The judgment moves on to elaborate the meaning and scope of *take or pay clause* in commercial contracts. While deciding the second claim, the Arbitrator observed that “Pakistani case law does not address the manner in which the *take or pay clause* should be interpreted and that there is a lacuna in Pakistani Law with regards to interpretation and validity of *take or pay clause*.”⁸¹ This judgment has filled this lacuna. The Court examined the jurisprudence of US, UK, Canada, and New Zealand to explain the meanings of *take or pay clause*⁸², and concluded that “the *take or pay clause* being a common provision in commercial contracts...is valid and enforceable and cannot be considered as a penalty provision.”⁸³

The Court further observed that “the rationale behind this clause is to allocate risk over long term contracts. It acts as a risk sharing mechanism between the supplier and buyer where the buyer seeks stability in supply and some flexibility in prices and the seller seeks assurance for guaranteed income.”⁸⁴ Thus, this judgment not only declares that *take or pay clause* is enforceable and not a penalty provision but also explains the rationale behind this clause. This is, in fact, the first judgment that explains the commercial sense of the *take or pay clause* in Pakistan.

⁷⁸ (n 7).

⁷⁹ (n 6) 618.

⁸⁰ *Ibid*, 619.

⁸¹ *Ibid*, 629.

⁸² *Ibid*, 649-654.

⁸³ *Ibid*, 654.

⁸⁴ *Ibid*, 647-648.

The explanation of the public policy of Pakistan is also a valuable addition in the public policy jurisprudence.⁸⁵ Our courts discussed public policy in *Sultan Textile Mills (Karachi) Ltd., Karachi v Muhammad Yousuf Shamsi*⁸⁶ in the context of the 1937 Act, and in *Nan Fung Textiles Ltd. v Sadiq Traders Ltd.*⁸⁷ with reference to Section 23 of the Contract Act. In *Hub Power Co. v Wapda*,⁸⁸ the SC tagged corruption, fraud, and bribery as elements of public policy. However, these judgments failed to examine comparative jurisprudence and identify distinctive features of the public policy of Pakistan.

In this regard, the Court first examined the Convention and the 2011 Act to identify the pro-enforcement policy of foreign arbitral awards. Then, the Court explored the law and practice of public policy in foreign jurisdiction and observed, “the pro-enforcement policy is in itself a policy of the Contracting States.”⁸⁹ The Court further noted that “violation of public policy⁹⁰ must be compelling in order for us to justify setting aside a foreign arbitral award.”⁹¹ The Court observed that “by and large the application of the public policy exception is restrictive and limited to exceptional circumstances that affect the most fundamental values of a State.”⁹² In this case, the Court held that as “no injury is caused in the performance of the GSA to the public, no loss is caused to the public and no fundamental policy is adversely impacted by requiring the parties to make good on their contractual commitments. Resultantly the public policy exception is not made out.”⁹³

⁸⁵ Audley Sheppard, “Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?” <http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm> accessed 02 November 2019; (n 6) 657-659.

⁸⁶ *Sultan Textile Mills (Karachi) Ltd., Karachi v Muhammad Yousuf Shamsi* PLD 1972 Karachi 226.

⁸⁷ *Nan Fung Textiles Ltd. v Sadiq Traders Ltd.* PLD 1982 Karachi 619.

⁸⁸ Ahmad Ali Ghouri, *Law and Practice of Foreign Arbitration and Enforcement of Foreign Arbitral Awards in Pakistan* (Springer 2013) 21-23; *Hub Power Co. v Wapda* PLD 2000 SC 841.

⁸⁹ (n 6) 659.

⁹⁰ J. D. Wires, ‘*The Public Policy Sword and the New York Convention: A Quest for Uniformity*’ (2009) SSRN. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323081> accessed 02 November, 2019.

⁹¹ (n 6) 656.

⁹² *Ibid*, 659.

⁹³ *Ibid*, 661.

The Court brilliantly identified new elements of the public policy of Pakistan such as ‘core values of the State’ and ‘fundamental notions of morality and justice.’⁹⁴ The Court observed that the impugned arbitral award does not offend these core values or the fundamentals, and held that “public policy exception cannot be used as 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.”⁹⁵ The Court emphasised that the “failure of the Appellant to invoke its make up gas right within stipulated time does not render the *take or pay clause* as offensive to the fundamental or core values of Pakistan.”⁹⁶

Further, as the law 2011 had not been able to achieve its purpose and the Convention was not honoured in letter and spirit, this judgment emphasised on that purpose i.e. the enforcement of foreign arbitral awards without any delay. It is expected that this judgment inspires other courts in Pakistan to enforce foreign arbitral awards within a reasonable time.⁹⁷

The judgment requires that the contractual arrangement be honoured and does not allow one party to change the business deal simply to avoid liability. It would enhance the sanctity of commercial contracts creating a conducive business environment for both local and foreign investors.

Nevertheless, the judgment could have elaborated a few points. The relevant provisions of the 2011 Act could have been reproduced in the judgment for convenience of reference and appreciation of the law. The applicability and scope of the 1940 Act and the 2011 Act should have been discussed thoroughly to establish more clearly why the 2011 Act is applicable and/or why the 1940 Act is not applicable to foreign arbitral awards.

While deciding the jurisdiction of the High Court, the Court provided brief facts and findings of the *Taisei Case*,⁹⁸ however, it ignored to rebut some findings specifically.⁹⁹ For example, the finding that as under the 2011 Act,

⁹⁴ (n 90).

⁹⁵ Ibid.

⁹⁶ (n 6) 660.

⁹⁷ Abdul Maniruzzaman, '*International Arbitration and Mandatory Public Law Rules in the Context of State Contracts: An Overview*', <<http://www.kluwerarbitration.com>> accessed 02 November 2019.

⁹⁸ (n 6) 615.

⁹⁹ Ibid, 616.

the Legislature has not repealed Sections 14, 30, and 33 of the 1940 Act, therefore, the remedies under these provisions remain available to a party affected by an award before the civil court was not thoroughly debated by the Court. The Court could have refuted this finding and the arguments built on this finding more effectively relying upon the principles of interpretation relating to the effect of repeal or non-repeal of pertinent provisions of a statute. Further, the Court omitted to discuss and distinguish facts of the *Hitachi Case*,¹⁰⁰ which was, in fact, relied upon in the *Taisei Case*.¹⁰¹

With reference to the meaning of public policy in Pakistan, the Court could have elaborated important issues, such as what could have rendered against the core or fundamental values of the State; what are those ‘core values’ and ‘fundamental notions of morality and justice’; and, where from these values and notions emerge? For example, the Court could have specified that anything against the national security and economic interest of the State, public good, morality and justice as enunciated in the Quran and Hadith, the aspirations given in the preamble and the principles of policy of the 1973 Constitution would be construed as against the public policy of Pakistan. Finally, the Court could have stressed on the framing of rules under Section 9 of the 2011 Act, for the effective enforcement of foreign arbitral awards in Pakistan.¹⁰²

Conclusion

The judgment makes immense contribution in three areas: first, it determines the exclusive jurisdiction of the High Court for the recognition and enforcement of foreign arbitral awards; second, having examined the jurisprudence of various jurisdictions, it clarifies the nature and scope of *take or pay clause*; third, it ascertains the meaning and scope of the public policy of Pakistan.¹⁰³ This is the first judgment in Pakistan which elaborates the scope of *take or pay clause* and holds that it is not a penalty clause. It also highlights the pro-enforcement policy of the Convention and obligations of the contracting states to enforce foreign arbitral awards in a speedy manner.

¹⁰⁰ *Hitachi Limited and another v Rupali Polyester and others* 1998 SCMR 1618.

¹⁰¹ (n 6) 618.

¹⁰² Section 9 of the 2011 Act provides that the Federal Government may make rules to carry out the purposes of this Act.

¹⁰³ Andrew M. Campbell, ‘*Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*’, 144 A.L.R. Fed. 481 (1998).

With juristic lens, the Court identifies the essential ingredients of the public policy of Pakistan.¹⁰⁴ This judgment is a rich source of knowledge for law students, academics, arbitrators and law practitioners. The substance of the judgment is excellent; however, its execution seems a bit flimsy at a few points. For instance, the Court could have unpacked the myth of the public policy of Pakistan with more precision. The scope and applicability of the 1940 Act and the 2011 Act could have been discussed with academic rigor. The findings of the *Taisei Case* could have been overturned more specifically and thoroughly. Finally, the formulation of rules to execute the pro-enforcement policy of the Convention and the 2011 Act could have been highlighted in the judgment.

¹⁰⁴ Andrew Rogers and Mathew Kaley, 'The Impact of Public Policy in International Commercial Arbitration' (1999) 65 (4) *Arbitration* 326.