Stereo HCJ DA 38

JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Original Suit No.80492 of 2017

M/s Tradhol International SA Sociedad Unipersonal **V/S** *M/s Shakarganj Limited*

JUDGMENT

Date of hearing	**22.02.2023**
Applicant (s) by	Barrister Iftikhar ud Din Riaz, ASC with Ahmad Abdul Rehman, Smam Mir and Mehrunisa Virk, Advocates.
Respondent(s) by	Deeba Tasneem Anwar, Advocate, Mirza Nasar Ahmad, ASC, Jam Waseem Haider, Haseeb Ahsan Javed, Ch. Nabeel Rafaqat and Jawad Jamil Malik, Advocates.

"The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership."
(Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press)[1]

JAWAD HASSAN, J. This judgment will decide an application for recognition and enforcement of a foreign arbitral award in Pakistan under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (the ***"Act"***) and its Schedule, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the ***"NY Convention"***) and a guide on UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the ***" NY Convention Guide"***).

[1] *Paragraph 7.01 in Redfern and Hunter on International Arbitration: Sixth Edition: Oxford University Press and See Also Justice Jawad Hassan, ROLE OF JUDICIARY AND JURISPRUDENCE IN DOMESTIC AND INTERNATIONAL ARBITRATION 2018 Corporate Law Digest (CLD) Journal page 17. The paper was presented at the International Arbitration Conference jointly organized by Center for International Investment and Commercial Arbitration (CIICA) and UMT School of Law and Policy at Shalimar Hall, Falletti's Hotel, Lahore, on 5thMay, 2018 on topic of "International Arbitration in Pakistan: Past, Present and Future". The Conference was also to commemorate the 6th anniversary of the UNCITRAL Regional Centre for Asia and the 60th anniversary of the New York Convention, 1958.*

This Court while enforcing the foreign arbitral award dated 04.04.2017 (the ***"Final Award"***) passed by the London Court of International Arbitration (the ***"LCIA"***) will discuss in detail the provisions regarding recognition and enforcement of a foreign arbitral award in Pakistan under the "Act" and its Schedule, the *"NY Convention"*[2] which will then supplement and support the jurisprudence developed by the superior court of Pakistan which are binding under Article 189 and 201 of the Constitution of Islamic Republic of Pakistan, 1973 (the *"Constitution"*). From its inception, the *"NY Convention Guide"* has been conceived to comprehend how the *"NY Convention"* is actually interpreted by national courts. The aim of the *"NY Guide"* is to canvass the richness of the national case law on the Convention in an objective manner.

I. Context

2. This is an application (the ***"Application"***) filed under Sections 3, 5 and 6 of the *"Act"* on behalf of M/s Tradhol International SA Sociedad Unipersonal (the ***"Tradhol"***) for recognition and enforcement of the *"Final Award"* passed by the *"LCIA"*. In this Application, M/s Shakarganj Limited (the ***"Shakarganj"***) has filed objections under Section 7 of the *"Act"* read with Article V of the *"NY Convention"*.

II. *The Parties before the Arbitration in LCIA and in this Court*

3. (1) The *"Tradhol"* is involved in the business of ethanol trading and distribution having its registered Head Office at 28224 Puzuelo De Alarcon, Carretera De Humera 43, Madrid, Spain. The *"Application"* is being filed through Muhammad Ali Seena, who is the authorized attorney of the *"Tradhol International"* by means of power of attorney dated 21.06.2017.

(2) The "*Shakarganj*" is a public limited company established under the company laws of Pakistan and carrying on its business at 10th Floor, BOP Tower, 10-B, Block E-III, Main Boulevard, Gulberg-

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[2] *The "NY Convention Guide" was initiated in 2010, when UNCITRAL commissioned the assistance of Professors Gaillard and Bermann as part of its efforts to promote wider adherence to the text of the "NY Convention" as well as its uniform interpretation and effective implementation.*

III, Lahore. It is engaged in manufacturing, marketing and export of ethanol amongst other products.

III. *Execution of Contractual Agreement between the Parties.*

(1) On 11.11.2015, a contractual agreement for delivery upto 30,000 metric tons of different ethanol was executed between the *"Tradhol"* and the *"Shakarganj"* on a discount of US$ 20 per metric ton starting from 10.01.2016 (the ***"Agreement"***). It was agreed that the *"Tradhol"* was entitled to recover the amount of US$ 600,000 and US$ 12,500 as payment to make goodwill.

(2) On 13.11.2015, an email was exchanged between the *"Tradhol"* and the *"Shakarganj"* regarding singing of the *"Agreement"*.

(3) The *"Agreement"* was governed by English Law and contained an arbitration clause whereby the parties agreed to refer all disputes under the *"Agreement"* to arbitration; which reads as follows:

> *"Any dispute arising out of this contract, shall be settled provided that they are not settled in an amicable way by TRI AND SHJ by arbitration at the London Court of International Arbitration ("LCIA") in accordance with English law. Each party shall appoint an arbitrator and the two appointed arbitrators shall appoint a third arbitrator, who shall act as Chairman of the Tribunal, in accordance with the Rules of the LCIA".*

IV. *Arbitration Proceedings*

(1) It is to be noted that failure on the part of the *"Shakarganj"* to fulfil express obligations prompted the *"Tradhol"* to approach the *"LCIA"* on 18.01.2016 with a request for appointment of Mr. Roger Rooks as an arbitrator which was accordingly done.

(2) When the *"Shakarganj"* failed to appoint an arbitrator, the *"LCIA"* appointed Ms. Sarra Kay as arbitrator as a consequence

whereof the Tribunal was completed on 08.03.2016 through appointment of Mr. David Martin Clark as its third member.

(3) On 17.03.2016, the *"Tradhol"* submitted its claim before the Tribunal and defence statement of the *"Shakarganj"* was ordered to be sought till 14.04.2016, but the same was not delivered in time.

(4) Therefore, on 10.05.2016, the Tribunal ordered the *"Shakarganj"* to file statement of defence by not later than 24.05.2016 and said date was subsequently extended to 20.06.2016 for compliance of Tribunal's order.

(5) On 26.06.2016, the *"Shakarganj"* requested the Tribunal for extensions of time through email which reads as follows:

> *I, Mian Ali Ashfaq LLM (London), am writing you in capacity of General Counsel of Shakarganj Mills Limited.*
> *It is with reference to your order dated 29 May 2016 which have received via courier on 13 June 2016. The tribunal as per the order has allowed till 20th June to deliver our defense and counter claims submissions.*
> *In view of the short time, since receipt of the order and keeping in view the large magnitude of documents involved, we request you to kindly allow till 10th July 2016 for delivery of our defense and counter claim submissions as well as for the effective compliance of your order.*

(6) On 19.07.2016, the *"Shakarganj"* complied with Tribunal's order dated 14.07.2016 by paying GBP 10,000.00 to the *"LCIA"* but thereafter challenged its jurisdiction by filing a suit in the Civil Court Lahore on 25.07.2016 and did not take part in arbitration.

(7) On 30.09.2016, the *"Shakarganj"* informed the Tribunal that there was no arbitration agreement and refused to recognize the jurisdiction of the Tribunal.

(8) On 30.11.2016, the Tribunal issued ***'Award on Jurisdiction'*** with following observations:

> *45. WE FIND, HOLD AND AWRD that we have jurisdiction to determine our own jurisdiction.*
> *46. WE FIND, HOLD AND AWARD that we have jurisdiction to determine the substantive dispute between the parties. ACCORDINGLY, we hereby reserve jurisdiction to ourselves to determine the substantive dispute between the Parties and make such further award or awards as may be required in order to address the dispute between the Parties in this reference.*
> *47. WE FURTHER AWARD AND DIRECT that Respondents shall bear and pay costs of this our Award on Jurisdiction, together with interest thereon at the rate of 4.5% (four point five percent) per annum, commencing from the date of this Award until payment in full. These costs (other than the parties' legal or other costs incurred by the parties themselves) have been determined by the LCIA Court, pursuant to Article 28.1 of the LCIA Rules, to be as follows:*
> *Tribunal's Fee £ 10,180.00 (ten thousand one hundred and eight British Pounds)*
>
> *48. WE FURTHER AWARD AND DIRECT that Respondents shall bear their own costs of this reference and shall pay the Claimants their recoverable costs of this reference, together with interest thereon at the rate of 4.5% (four point five percent) per annum, commencing from the date of this Award until payment is full.*
> *49. This Award is final as to the matters with which it deals.*

(9) On 16.01.2017, the *'Award on Jurisdiction'* was clarified by the Tribunal to the extent of costs, which reads as follows:

> *"Now we, the said Roger Rooks, Sarra Kay and David Martin-Clark, having carefully and conscientiously read and considered the request for clarification/correction submitted to us, having conferred with one another and being agreed, do hereby clarify our Award of 30 November, 2016, as follows:*
>
> *The wording in paragraph 48 of the Award is intended to award the Claimants their recoverable costs in relation to the Award of the Tribunal on Jurisdiction. It is not intended to*

> *award the Claimants their recoverable costs of the whole reference LCIA 163235".*

(10) Thereafter, on 04.04.2017, the Tribunal issued the *"Final Award"* on merits with the following observations:

> *"Now we, the said Roger Rooks, Sarra Kay and David Martin-Clark, having carefully and conscientiously read and considered the submissions and documents submitted to us, having conferred with one another and being agreed,* ***DO HEREBY*** *– for the reasons set out above MAKE, ISSUE AND PUBLISH this our AWARD as follows:*
>
> > *A) WE FIND, HOLD AND AWARD that Tradhol's claim succeeds in the amounts of (i) USD612,500.00 (six hundred and twelve thousand, five hundred United States dollars); (ii) GBP31,580.12 (thirty-one thousand, five hundred and eighty pounds sterling and twelve pence) and (iii) USDS,000.00 (five thousand United States dollars);*
>
> *B) WE AWARD AND DIRECT that Sharkarganj pay to Tradhol the sums set out in A) above, together with interest thereon at the rate of 4.5% (four point five per cent) per annum and pro rata, compounded at three-monthly rests, commencing as follows: 1) on the amount of USD600,000.00, on and from 12 January 2016; ii) on the amount of USD12,500.00, on and from 1 April 2016 and iii) on the amounts of GBP31,580.12 and USD5,000.00, on and from the date of this Award and in all cases continuing until payment in full;*
>
> *C) WE HEREBY ORDER AND DIRECT that:*
>
> *(i) Sharkarganj shall discontinue the legal proceedings they have brought as against Tradhol in the Court of Senior Civil Judge, Lahore, bearing Suit No. /2016 between Sharkarganj as the Plaintiff and (among others) Tradhol, as a Defendant No 1; and*
>
> *(ii) Sharkarganj shall refrain and be prohibited from instituting or continuing any equivalent proceedings against Tradhol in Lahore or elsewhere.*

D) WE HEREBY GIVE OUR CONSENT, for Tradhol to take such steps as they see fit before the English High Court to secure the enforcement of the Tribunal's Award on Jurisdiction and/or this, our Second Final Arbitration Award including (without limitation) the Orders set forth in paragraph C) and/or the arbitration agreement set forth in the Agreement and/or all or any proceedings for contempt of the English High Court.

E) WE FURTHER AWARD AND DIRECT that Sharkarganj shall bear and pay the costs of this our Award in the sum of £23,425.97 (twenty-three thousand, four hundred and twenty-five pounds sterling and ninety-seen pence) together with simple interest thereon at the rate of 4.5% (four point five percent) per annum, commencing from the date of this Award and continuing until payment in full.

F) WE FURTHER AWARD AND DIRECT that Sharkarganj shall bear their own costs of this reference.

G) ***This Award is final*** *as to the matter with which it deals but we hereby reserve our jurisdiction to determine any further issue or grant any further relief which may be required.*

V. Matter before this Court

4. Now the *"Applicant"* through the *"Application"* has sought enforcement of the *"Final Award"* by passing a judgment and decree to the sum of the following:

a) i) US$ 612,500 (United States Dollars Six Hundred and Twelve Thousand Five Hundred)

ii) GBP 31,580.12 (Pounds Sterling Thirty One Thousand, Five Hundred and Eight and Twelve Pence).

iii) US$ 5,000 (United States Dollar Five Thousand)

b) Interest at the rate of 4.5% per annum and pro rata, compounded at three monthly rests, commencing as follows:

i) On the amount of US$ 600,000, on and from 12 January, 2016

ii) On the amount of US$ 12,500, on and from 1 April, 2016

iii) On the amount of GBP 31,580.12 and US$ 5,000, on and from the date of Award

and in all cases continuing until payment in full.

c) *Decree in the sum of GBP 23,425.97 being the cost of the award with simple interest thereon @4.5% per annum commencing from the date of the award until payment in full.*

d) *Costs of this suit/application.*

VI. Tradhol's submission before this Court for the enforcement of "Final Award".

5. Barrister. Iftikhar ud Din Riaz, ASC, argues that the *"Tradhol"* has filed this *"Application"* by complying with requirements stipulated in Section 5 of the *"Act"* read with Article IV of the *"NY Convention"* and has sought recognition and enforcement of the *"Final Award"* from this Court under Section 6 of the *"Act"* as this section empowers this Court to recognise and enforce the award in the same manner as a judgment or order of a court in Pakistan. He further stated that the *"Final Award"* passed by the *"LCIA"* is final in all aspects as it has been passed on merits after having examined all the documents and record produced before it. Barrister Iftikhar ud Din Riaz, ASC while referring to Section 7 of the *"Act"* read with Article V of the *"NY Convention"* stated that none of the impediments against the enforceability of the *"Final Award"* are attracted in this case.

VII. Shakarganj's Objections before this Court.

6. Ms. Deeba Tasneem Anwar, Advocate for the *"Shakarganj",* objected to the maintainability of the *"Application"* on the grounds that the *"Agreement"* has neither been executed by the competent person nor the *"Shakarganj"* has authorized any person to sign the same. He also stated that the *"Shakarganj"* challenged the *"Agreement"* before the Civil Court in Pakistan and interim relief, in this respect, was also granted to it that too was communicated to the Tribunal and *"Tradhol"* but, in utter disregard, the Tribunal continued with arbitration proceedings during the continuance of relief granted and passed the *"Final Award".* It has further been objected that the *"Shakarganj"* was neither party to the *"Agreement"* nor the *"Final Award"*. Thus the "*Final Award*" is not in accordance with the laws

of Pakistan and therefore is unenforceable under Article V 1(a) as well as Article V 2(b) of the NY Convention read with Section 7 of the *"Act"*.

VIII. Moot Points for Determination

7. It is to be noted that the entire case of the Respondent revolves around two objections. Firstly, the "*Shakarganj*" has claimed that the *"Final Award"* is unenforceable as the *"Shakarganj"* has neither executed the *"Agreement"* nor it has authorized any person to sign the same. Thus the "*Shakarganj*" is availing the benefit of Article V 1(a) of the *"NY Convention"* while emphasizing that the "*Agreement*" was 'not valid' or 'invalid'. Secondly, the *"Shakarganj"* has claimed that the *"Final Award"* is unenforceable as the *"Shakarganj"* had already challenged the *"Agreement"* before the Civil Courts in Pakistan, which had granted an interim relief, and the Tribunal ought to have awaited the final determination of the issues before the Civil Court but continued with arbitration proceedings and passed the *"Final Award"*. Thus, the *"Shakarganj"* is availing the benefits of Article V 2(b) of the *"NY Convention"* while emphasizing that the enforcement of the *"Final Award"* would be contrary to the "public policy" of Pakistan.

8. In view of the submissions of the *"Tradhol"* and the objections filed by the *"Shakarganj"*, the following moot points are necessary for determination of this Court:

> ***1. Whether this High Court has jurisdiction to enforce a foreign arbitral award?***
>
> ***2. Whether the "Applicant" has furnished documents in accordance with requirements of Section 5 of the Act?***
>
> ***3. Whether the "Final Award" is unenforceable under Article V 1(a) of the NY Convention read with Section 7 of the "Act" because the "Agreement" was invalid?***
>
> ***4. Whether the "Final Award" is unenforceable under Article V 2(b) of the NY Convention read with Section 7 of the "Act" because its enforcement would be contrary to public policy of Pakistan?***

5. Whether the doctrine of pro-enforcement bias is applicable in the Courts in Pakistan?

Moot Point No.1 *(Jurisdiction of High Court for enforcement of award)*

9. At the outset, when confronted to counsel for the "Shakarganj" about participation in proceedings before the "LCIA" coupled with compliance of Tribunal's order dated 14.07.2016 and filing of civil suit before Civil Court, Lahore and not before this Court, Ms. Deeba Tasneem Anwar, Advocate admitted that the "Shakarganj" filed civil suit before the Civil Court, Lahore after appearing before the *"LCIA"*. Barrister Iftikhar ur Din Riaz, ASC argued that the civil court has no jurisdiction for the enforcement of the *"Agreement"* for the reason that the High Court has exclusive jurisdiction to deal with such matter during pre-arbitration, pro-arbitration and post arbitration. Before discussing this issue at length, it is to be noted that Section 3 of the Act deals with jurisdiction of the Court and is reproduced hereinbelow:

> ***3. Jurisdiction of the Court.***--- *(1) Notwithstanding anything contained in any other law for the time being in force, the Court shall have exclusive jurisdiction to adjudicate and settle matters related to or arising out from this Act.*
>
> *(2) An application to stay legal proceedings pursuant to the provisions of Article II of the Convention may be filed in the Court, in which the legal proceedings are pending.*
>
> *(3) In the exercise of is jurisdiction, the Court shall---*
>
> > *(a) follow the procedure as nearly as may be provided for the Code of Civil Procedure, 1908 (Act V of 1908); and*
> >
> > *(b) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908).*

The *"Act"* has defined the "Court" in Section 2(d) as follows:

> *(d) "Court" means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette; and*

10. Accordingly, it follows from the above sections that the *"High Courts"* have exclusive jurisdiction to adjudicate and settle the matters relating to or arising out from the *"Act"*. The notified Courts in Pakistan, in order to protect the sanctity of foreign arbitral awards as defined under Section 2(d) of the *"Act"* are the High Court and such other superior Courts as may be notified by the Federal Government. If the parties have any issue with the foreign agreements or the awards, they can only refer the matter to the Court as defined under Section 2(d) of the *"Act"* and not any other Court which is not notified. To protect the confidence of investors, the Courts (the High Court under Section 2(d) of the "Act") can then, if need be, deal the matter of pre-arbitration, pro arbitration and post arbitration. If we examine the jurisdiction of this Court as defined under Section 3 of the *"Act"* which states that the Court shall exercise exclusive jurisdiction to adjudicate and settle matter relating to or arising out from this "Act", the Court has to enforce *(i)* foreign arbitral award and *(ii)* foreign agreements; although foreign agreements are not defined under the *"Act"* but the agreements are defined under Article II of the *"NY Convention"* therefore, any issue with regard to enforcement of foreign arbitral award or foreign agreement, as defined under the *"Act"* and the Article II, is arisen, then this can further be examined under Section 3(2) of the *"Act"* where again in proceeding regarding the stay application may be filed in the Court. The word "Court" is defined in capital which means the High Court and has been referred in various sections of the *"Act"* which again means the High Court but under Section 4, the word "court" is not in capital but it still means it is in capital and would be the High Court notified by the Federal Government. Section 3 of the *"Act"* gives exclusive jurisdiction to this Court in

terms of Section 2(d) of the *"Act"* and the section ibid starts with '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 the *"Act"*. If Section 3 of the *"Act"* be read with Section 4 of the *"Act"* it makes it clear that jurisdiction is only confined to the High Court because Section 4(1) of the *"Act"* do mentions the word "court" and it is intertwined with Section 3 of the *"Act"* under the doctrine of intertwined as developed by this Court in the case of *"TARIQ IQBAL MALIK Versus M/s MLTIPLIERZ GROUP PVT. LTD. and 04 others"* **(2022 CLD 468)** by holding that "*It may even be said that both Sections 256 and 257 of the Act are in pari materia and thus must be construed together. The ultimate outcome of the said provisions being intertwined with one another leads to the conclusion that in order to invoke Section 257 of the Act, it is mandated that any complainant must have some form of link or nexus to the affairs of a Company. Section 256 of the Act categorically clarifies that the link or nexus required to have the affairs of any company investigated is the holding of membership in such company in the manner as is categorically mentioned in Section 256 of the Act".*

11. Further in the case of *"Malik MEHBOOB Versus COMMISSIONER, RAWALPINDI and others"* **(PLD 2023 Lahore 97)**, the Court held that "*that sections 5, 15 and 19 are closely tied with each other and are intertwined and the same cannot be separately applied in the case of the Petitioner. As learned counsel for the Petitioner stated that while passing the impugned order the Respondent has not considered the provision of section 15(2) of the Act, which according to doctrine of intertwined cannot be applied separately and without fulfilling the requirement of section 15(1) ibid. In the recent judgment of this Court passed at Rawalpindi Bench, reported as "Tariq Iqbal Malik v. Messrs Multiplierz Group Pvt. Ltd. and 4 others" (2022 CLD 468) has also developed the doctrine of intertwined.*

12. Accordingly, the High Court has jurisdiction to entertain the instant matter. It is to be noted that the *"Shakarganj"* during the pendency of arbitration proceeding approached the Civil Court, Lahore by filing civil suit and the said suit was dismissed with the observation that it has no jurisdiction to entertain it. As discussed above, the word "C", the Court means the High Court only under the *"Act"* to entertain such petition for enforcement of arbitral awards not the Civil Court.

Moot Point No.2 *(Furnishing of documents)*

13. When confronted to counsel for the *"Shakarganj"* whether it has filed any document as per Section 5 of the *"Act"*, she stated that the *"Shakarganj"* has only filed reply but no document has been filed. Section 5 of the *"Act"* deals with furnishing of documents by the party applying for recognition and enforcement of the award and is reproduced as follows:

> ***5. Furnishing of documents.***--- *(1) The party applying for recognition and enforcement of foreign arbitral award under this Act shall, at the time of application, furnish documents to the Court in accordance with Article IV of the Convention.*

Article IV of the *"NY Convention"* is also reproduced hereinbelow for clarity:

> *Article IV*
>
> *1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:-*
>
> *(a) The duly authenticated original award or a duly certified copy thereof;*
> *(b) The original agreement referred to in article II or a duly certified copy thereof.*
>
> *2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of*

> *these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.*

14. Barrister Iftikhar ud Din Riaz, ASC for the *"Tradhol"* has filed the affidavit of "Henry Norris Adams", Notary whereby certified copies of documents have been referred and same has been done Apostille and also find mention in the *"Final Award"*. The Court has to only examine the documents filed before in order to enforce such award under the doctrine of pro-enforcement bias.

15. As per the *"Tradhol"*, it has complied with requirements of Section 5 of the "Act" read with Article IV of the *" NY Convention"* by producing certified copy of LCIA's Award on Jurisdiction of 30th November, 2016 ***(Pages 52 to 62 of the "Application"),*** certified of Memorandum of Clarification to the LCIA's Award on Jurisdiction dated 16th January, 2017 ***(Pages 63 to 66 of the "Application")*** *and* certified copy of LCIA's Second Final Arbitration Award dated 04th April, 2017 ***(Pages 67 to 91 of the "Application").*** Certification of aforementioned documents is mentioned in Affidavit of the Tradhhol English Solicitor ***(Pages 11 to 16 of the "Application").*** Since the *"Final Award"* has been rendered by the Tribunal on the basis of the *"Agreement"* and considering the defence with regard to its validity therefore, it would be a reasonable basis for the Court to proceed with the *"Application"* under the "Act" read with the *"NY Convention"*.

Moot Point No.3. *(Invalidity of Agreement)*

16. The foremost objection raised by the *"Shakarganj"* is regarding the execution of the *"Agreement"* coupled with incompetency of its executor/representative and signing thereof so as to form objections to be performed by the *"Shakarganj"* on the touchstone of Article V 1(a) of the *"NY Convention"* read with Section 7 of the *"Act"*.

17. Before going further and discussing the facts of the instant matter in detail, it is essential to reproduce Section 7 of the *"Act"* and Article V 1(a) of the *"NY Convention"* quoted by the learned counsel of the *"Shakarganj"*:

Section 7 of the Act:

> *7. Unenforceable foreign arbitral awards.--- The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the [NY] Convention.*

Article V 1(a) of the NY Convention:

> *1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:-*
>
> *(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
> *… … …*

Bare perusal of Section 7 of the *"Act"* read with Article V 1(a) of the *"NY Convention"* reveals that the recognition and enforcement of a foreign arbitral award may be refused in Pakistan if the party (Shakarganj) furnishes proof to the competent authority of Pakistan (this Court) that the parties to the agreement were under some "incapacity", or the said agreement is "not valid" under the law to which the parties have subjected it (or failing any indication thereon, under the law of the country where the award was made).

18. The objection of the *"Shakarganj"* as embodied in Article V(1)(a) with regard to lack of capacity of the parties is not the issue in hand however, only concern of the *"Shakarganj"* is with regard to invalidity of the *"Agreement"* because the *"Shakarganj"* has neither executed the *"Agreement",* nor it has authorized any person to sign the same. Accordingly, under the above Article, onus is on the "*Shakarganj*" to prove the invalidity of the "*Agreement*" and the

"Tradhol" has only to prove prima facie existence of the *"Agreement"*.

19. Therefore, it is essential to note that the *"Agreement"* was executed between the *"Tradhol"* and the *"Shakarganj"* on certain terms and conditions which includes an arbitration clause, governing law and applicable rules. The basis of settlement was elucidated in *"Agreement"* and the same was also mentioned in the *"Final Award"* which reads as follows:

> *(a) Shakarganj agreed to pay Tradhol a total of USD612,500.00:*
>
> *(i) Of this sum, Shakarganj was permitted to pay USD600,000.00 by way of a discount to the prices negotiated for the sale of cargoes of ethanol of USD20.00 per metric tonne ("mt"). This arrangement was subject to compliance with the terms of the Agreement, failing which any unpaid discount became immediately payable on demand.*
>
> *(ii) Payment of balance of USD12,500.00 was deferred until the end of the first quarter of 2016.*
>
> *(b) Shakarganj accordingly agreed to supply Tradhol with 30,000 mt of Product and to give Tradhol the right of first refusal over all ethanol they produced until Tradhol had lifted this quality (and thus the total discount of USD600,000.00 had been paid).*
>
> *(c) Shakarganj expressly agreed to keep Tradhol informed of their daily production and stock position.*
>
> *(d) All previous disputes between the parties were deemed settled.*

20. As the heart of controversy revolves around the execution of the "*Agreement*" and its invalidity by the *"Shakarganj"*, therefore, it is imperative to look at the definition of the term "agreement" used in Article V 1(a) of the *"NY Convention"*. Article II of the *"NY Convention"* itself defines the term "agreement in writing" as follows:

> *Article II*
>
> *1. ... ...*
> *2. The term " agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties*

> *or contained in an exchange of letters or telegrams.*

Clause 2 of Article II gives an inkling of the scope of the term "agreement in writing", which has been defined to include an arbitral clause in a contract or arbitration agreement, "*signed by the parties or contained in an exchange of letters or telegrams"*. Accordingly, such an agreement can be signed by the parties or be contained in an exchange of letters or telegrams.

21. Accordingly, it is crucial to reproduce chains of communications exchanged between the parties mentioned in the *"Final Award"*.

(a) *By an email timed as 21.13hrs on 20 November 2015 Tradhol wrote to Shakarganj as follows:*

> *"We would like to load as much ethanol as possible and as early as possible, so per Agreement clause 1 we wait to hear from you on yr ethanol availability no later than next Monday November 23rd."*

(b) *On 23 November at 13:27hrs Shakarganj stated by email that they planned to start their distilleries "in the second half of December". As regards the prospect of delivering some product in December 2015, Shakarganj said:*

> *"that it will not be possible for technical reasons as we will be restarting our distillery after a prolonged shutdown. By committing to any quantities before successful restart of plant operations, I will be risking delay in shipment timings"*

Shakarganj also asked Tradhol to "let me know an indicative price offer for end January shipment so I may start my molasses procurement".

(c) *Tradhol gave indicative prices at 18.19hrs on the same day and reiterated their call for Shakarganj to provide details of the quantities being made available in accordance with their obligations under clause 1(f) of the Agreement, to which Shakarganj replied at 19:48hrs as follows;*

> *"This is in order to comply with "Price and quantity (with its qualities spilt) for the first lot shall be proposed not later than November 23 2015" Please appreciate that other distilleries have sufficient stocks of molasses to carry them through November and December while we have to wait for fresh molases and restart our operations after a prolonged shutdown. As such*

> *our situation is not fully comparable to that of other distilleries...*
>
> *I can offer maximum 2,000MT REN at 80MT per day starting 15 December as first lot and if there is any change in production capacity I will inform you well in advance. Once our distilleries are fully operational, we will be able to offer larger quantiles."*

Shakarganj made no comment on the availability of ENA.

(d) *Tradhol immediately queried the position with regard to the ENA and Inform Shakarganj) by email on 24 November at 09.21hrs that per clause a) we notify you we want to ship at much EX at possible and as soon as possible, so pls use your molasses availability to produce said grade and not Ren".*

Tradhol further reiterated in that email that, "until 30,000 MT delivered", they were interested in "all ethanol you can produce with your available molasses, so you are not entitled to sell to others"... that is, including any REN which Shakarganj was able to produce over and above the ENA which Tradhol prioritized. In the same email, Tradhol said:
"...I am curious why you capped ren availability to 2,000 MT".

(e) *At 13.04hrs that day Shakarganj stated:*

Please note our ENA capacity is 2,500MT per month but it will only come online in January as we are performing maintenance/modification to avoid same quality issues that were identified in the previous reason.

Please be assured I have NO OTHER ENA commitments to anyone in the market to any ENA that I ship will be for you only, I have noted your request to produce as much ENA as possible and I will allocate my molasses accordingly. However, please do note I have some REN commitments to other buyers that were male prior to our agreement. Still, before making any new REN sales also, I will give you first right of refusal and share with you the best price offered to me as well. I will only make ethanol sales for a given month to other buyers only after you have declined to lift the volume.

Regarding your curiosity about 2,000MT. it was my understanding we were make first shipment on 10 January so I estimated 2,000 MT from 13 December to 10 January If it is later, then obviously the quantity will be higher".

(f) *At 15.06hrs on 24 November 2015 Shakarganj wrote again, as follows:*

> *"For first parcel I indicated firm date of 10 January upon your insistence for 2,000AFT.*

> *For ENA I Informed you that we have maintenance work on the plant which is expected to be completed in December. For 12 months of 2016 if you want my entire capacity of 80MT ENA per day you can have it. I have no other ENA commitments. Obviously we need appropriate pricing for this.*
>
> *I have REN commitments from last year that will not affect your cargoes. I can offer approx 2.300MT per month ENA and 2,300MT per month REN when all plants start running smoothly after long shutdown.*
>
> *If it is technically possible to start ENA obviously I will...*

(g) *Tradhol responded at 15.36hrs on 24 November 2015 reiterating that it wished Shakarganj to start producing ENA by 15 December 2015 at the latest, even if this meant delaying the start of REN production and asking if they could count on 2,500 MT ren per month, pro-rata from 15 December, allowing Shakarganj to "use balance to your other commitments" (that is, after Shakarganj had fulfilled their 2,500 MT commitment to Tradhol).*

(h) *At 10:30hrs on 25 November 2015, Shakarganj replied saying:*

> *"For purposes of clarity, I can allocate you 2,500MT per month REN capacity and 2,500 MT per month ENA capacity in good faith. Indicative start up date for REN is 15 December and for ENA plant is sometime in January. In case I commit any ENA quantity to you, it will not be in good faith and will create bad taste later... Also, as good faith, if you procure some 1,000-2,000T ENA from other suppliers, I can accommodate your expected discount in REN deal,"*

Shakarganj went on in that email to state that:

> *"I cannot continue to be pressured into making commitments that can embarrass me later, as such I can only commit a cargo once I am confident the plant is ready for production. As already promised, no cargo will be sold to anyone else before being offered to you so please do not worry that I will produce ENA and give to someone else...*
> *Also once our plants come online,* ***Mr. Akhtar Habib*** *will convey on daily basis production and stock figures".*

(i) *After further email exchanges on 25 November 2015, Tradhol wrote to Sharkarganj at 13.00hrs on 26 November saying:*

> *"Please revert to below so we can have a clear picture that min. 80 MT day of ren+80 MT day for ENA will be committed to us from the day you start production in each plant, and that of course no deliveries to others can be mode If said minimum vols not available for TRI."*

(j) In reply, on 26 November 2015, Sharkarganj said:

> *I have indicated our capacity of 80MT per day of REN and 80MT per day of ENA that will be allocated to Tradhol. However the actual production con vary and as such, any shipment dates we agree on will take into account margin for reduced production and also margin for transit time. Also, as part of repairing our relationship, I request that parcel negotiations should be as per market practice i.e. you indicate to me an estimated shipment period and a price indication. It is not productive to have never-ending discussions over startup dates and daily production capacities. It should be sufficient for you the capacities I have indicated above and the commitment that no sales will be made to any party without offering you first right of refusal. Also if for any reason you feel my price is too high or shipment period is not suitable, you can purchase from the market price and debit USD20 to me in spirit of our earlier agreement As committed earlier, I have no issue regarding booking my entire 2016 ENA production with Tradhol as I have currently no ENA commitments with anyone".*

(k) Later that afternoon, Tradhol replied saying:

> *"... ....*
> *2. Agree production can vary for reasons out of yr control, but pls confirm that if same happens no shipments will be done to others if this 80+80 for TRI not meet.*
> *3. Prices lets try to agree them, if not agreed there is already a provision in the contract on how to proceed, I just wanted to note the situation we are facing due to the inability to hedge as no clear vol nor load dates.*
> *Hope we can buy all yr ENA and ren production, both the 30k as per settlement and whatever on top you will produce."*

(l) Sharkarganj replied at 08.19hrs on 3 December 2015 saying:

> *"I intend to fulfill all my commitments that were made to other buyers before* ***we reached our contractual agreement of 11 November 2015****. After fulfilling these commitments, I have a net production capacity of approx 80 MT per day of ENA and approx 80MT per day of REN.*

> *I am confident I will be able to utilise these capacities [sic] as agreed, and will promise you cargo loads based on my idea of capacity utilisation. I am only waiting for production to come on line without difficulties so I can review these quantities to you and so that we may revise them if needed. It is our intention to fulfill our commitments without further disappointments and hope for the same.*
> *However we would suggest that as Buyer you make offers for our cargo based on our indicated production capacities, and your expected sales demand with a rice, volume and shipment period. We will negotiate this as before and reach conclusion In case the price cannot be agreed the contract provides for a price settlement formula. Our agreement covers discount and volume and it should be maintained that way. It is not efficient for you to attempt to manage our production capabilities just as it would not be efficient for us to manage your sales. Please let us have your demand for shipment during the end Jan period".*

(m) Tradhol responded at 10.37hrs on 3 December 2015, saying:

> *"You requested us to "start looking for customers AFTER plant start up because in case there are any delays in plant start up we do not wish to face another problem" and indeed we still do not have a clear picture of volume available and load dates despite it should have been informed by you on November 23rd, moreover after reading that you "intend to fulfill all my commitments that were made to other buyers before we reached our contractual agreement of 11 November 2015. After fulfilling these commitments, I have a net production capacity of approx 80 MT per day of ENA and approx. 80MT per day of REN" which we disagree in full and without prejudice we want to reserve our rights.*
> *So in summary and to go to the point... pls Inform to us clearly of ren and ENA availability by for example January 31" as we insist on our request that we intend to deliver all ethanol available, once we have your volume availability we will try to agree price with you, and if not agreement, price clause will apply".*

(n) At 12.40hrs on 4 December, Tradhol stated that they were:

> *"waiting for you to confirm our request for January 31st, being volume minimum 2,400 MT ENA and 3,600 MT ren".*

(o) Shakarganj responded at 08.05hrs on 7 December when they declined to confirm the quantities which could be supplied, saying:

> *"I can only make promise for firm quantity after plant startup te. 15 December for REN and 1 January for ENA.*
> *Also please note maximum possible in one shipment is 2,400 REN and 2,400 ENA due to shore tank limitation".*

(p) This produced a reply from Tradhol at 2.42pm on 7 December, in which it said:

> *"pls note you are already into settlement agreement breach as quantities available should have been informed by you not later than November 23rd. for what we reserve our rights.*
> *I wonder also how can you ask us to "make offers for our cargo based on our indicated production capacities" when, at same time, you request "start look for customers AFTER plant start up because in case there are any delays in plant start up we do not wish to face another problem", you intimate you will deliver to others before Tradhak, what we do not accept and also reserve our rights, and recently you double confirm you "(...) can only make promise for firm quantity after plant startup le. 15 December for REN and 1 January for ENA". Thus we are not having a clear picture at all on quantity availability and additionally Shakarganj, also in breach of the settlement agreement, is not having the capacity to deliver our quantities requested... how can we make any sales on the ground that such an attempt would in the circumstances have been impractical and commercially unreasonable: being so we also reserve our rights to claim any damages this may cause. Anyway, saved we are not waiving our right to claim damages, pls clarify if*
> *1. You will inform ren availability by December 15th or alternatively when ren plant starts production and ENA availability by January 1st or alternatively when ENA plant starts production or*
> *2. If you will inform ren and ENA availability by the time both Ren and ENA plant start production, this is, about January 1".*

(q) In reply at 14.50hrs that day, 7 December 2015, Sharkarganj said:

> *"I will inform availability by December 15 or alternatively when ren plant starts production and ENA availability by January 1" or alternatively when ENA plant starts production*
> *Please stop making references to damages etc. Also in case you face difficulties in making sales after I have advised of product availability. I can offer assistance as we are receiving many offers but we are declining all of them due to our commitments with you.*

(r) *Tradhol replied immediately saying that they were interested in all Sharkarganj's production. They again urged Sharkarganj to start ENA production before REN because, as Tradhol had made clear in earlier messages, they had an urgent need for that product.*

(s) *By email at 19.41hrs on 16 December 2015, Shakarganj confirmed that they had started production at their REN plant (not their ENA plant as Tradhol had requested) and that REN would be produced "after 3 days i.e. 18 December". Shakarganj also confirmed in that email that ENA production was to start on 1 January 2016 with the first product expected from 4 January 2016. They concluded*

> *"There too, [as regards ENA production] if we do not face any quality concerns. we can offer up to 2.400MT ENA in end January and then 2:400MT again at the end of each subsequent month"*

(t) *Tradhol responded to this message at 21.04hrs on 16 December 2015, saying in relevant part:*

"Now that picture it is more clear lets perform the settlement agreement, also pls sticking to its procedure, namely to follow chronologically points 1.a.), 1.c) and 1.e) so going to action and ref point 1.a) pls inform when 2.000 AT ENA will be available as we want to load them at the earliest."

The next day, 17 December 2015, Tradhol sent a chaser to Sharkarganj at 20.37hrs saying in relevant part:

"As per clause 1.a) we require 2,000 AT ENA to be loaded asap, pls inform when same available, once date confirmed we will move to points 1.c) and 1.e)…"

(u) *Having received no response, Tradhol wrote again to Shakarganj the following day, 18 December at 14:33hrs, in the following terms:*

> *"Pls revert to our firm ethanol request.., that we would like to deliver not later than 30 days from now, I remind you that you should have proposed us price and quantity (with its quality split) for the first lots on or before November 23rd, but we have nothing firm from you yet...*
> *Hope you understand we cannot wait forever as we need to move on the settlement performance and execution, what we cannot if you do not inform and confirm ACCURATE delivery dates for us to sell the ethanol, look for a vessel and afterwards, fix price with you or alternatively stick to monthly average price"*

(v) *Shakarganj replied by email at 17:00hrs on 18 December 2015 stating*

> *"Noted your firm request that loading is to be no later than 17 January 2016. Also noted your*

requirement for 2000MT ENA and I will inform you as soon as this cargo becomes available but please note this complete 2000MT ENA will only be possible some time AFTER 3rd week January.
You have reminded me about price and quantity for first lots but as I have informed you. I am restarting my plants after a shutdown of almost six months during which we have made several improvements to the process. I am not comfortable giving firm quantity and lifting date until I am confident about smooth process.
Hope you understand I am not asking you to wait forever..."

(w) *As 19.19hrs on the same day, 18 December, Tradhol wrote in reply:*

"Until we do not have an ACCURATE dote for the cargoes, this is a cargo laycan, we cannot look for a vessel, thus cannot negotiate freight nor loud dates, and not knowing that cannot sell and thus cannot offer to customer nor indicate a price to you...

(x) *At 19.39hrs on 28 December 2015, Tradhol wrote again to Sharkarganj saying that without accurate dates and volumes and price indications:*

"...in summary you are making it impossible for us to deliver anything from you while we insist we want to deliver all you can produce.
Pls revert asap."

(y) *At 13.01hrs on 30 December 2015, Tradhol wrote again to Sharkarganj in the following terms:*

"You should have informed us on accurate volumes, quality split and price indication since November 23...
We really need to know by today on the accurate volumes for ENA and ren by lets say, January 31st, or at least a final commitment from you on when will you give to us that information, saved this does not mean any waive of our rights due to your failure to inform to us when it was due.
Pls revert no later than noon today Madrid time"

(z) *Skarkarganj replied to Tradhol at 16.22hrs on 30 December 2015 in these terms:*

"As informed earlier, I will only be able to give firm information about ENA after the ENA plant is successfully restarted on 1 January 2016. For current discussion, no ENA is possible in January however after successful restart of operations I can offer positive quantities.
My firm and final commitment to convey to you accurate volume availability and quality split is Monday 7 January as I am facing some serious

production issues at my REN operations. Prices we can discuss mutually".

(aa) In reply to this, Tradhol asked Sharkarganj to:

"clarify if you are starting ENA prod on Jan 1" or not, the later will not be acceptable."

(bb) In the event, the documents presented by Tradhot do not show any further communication from Sharkargan).

(cc) On 12 January 2016, lawyers acting for Tradhol wrote to Sharkargan) saying:

"…In view of your continuing breach of the contract [that of 11 November 2015) and inability to supply the product required our clients have no choice but to exercise their rights pursuant to clause 2 of the agreement. No shipment has been made and the full rum of USD 600.000 is therefore outstanding Our clients therefore request and require immediate payment of the sum of USD600,000...

(dd) The following day, 13 January 2016, Tradhol wrote again to Shakarganj saying:

"…We still wish to work amicably with you but to do so we must have communication. Without prejudice to or waiver of any of our rights, if you wish to avoid the consequences of our demand, we insist that you confirm by return that 2.400 MT ENA will be available in shore tanks by 31 January 2016 for shipment on or after 14th February 2016.

We also require by return details of your current stock and daily reports on your production and latest stocks for both ENA and REN.

Detailed and accurate written agreement for this first delivery as per this mail request of course has to be agreed before 1700 GMT on Thursday, 14 January."

(ee) There was no reply from Shakarganj.

(ff) Tradhol produced evidence, in the form of copies of bills of lading, stating on their face that Shakarganj was the "shipper", that Shakarganj had shipped at Karachi:

(a) 1,899.307 MT of Hydrous Ethyl Alcohol on board the "Oriental Freesia" on 18 January 2016; and
(b) 1,987.912 MT of Fermentation Ethyl Alcohol on board the "Mid Osprey" on 8 February 2016."

22. The above communications were exchanged between the parties and were sent through an automated information system which squarely comes within the meaning of terms defined in the Electronic Transactions Ordinance, 2002, as well as within the meaning of "agreement in writing" defined in Article II Clause 2 of the *"NY Convention"*.

23. This position has further been supported by this Court in the case of "*LOUIS DREYFUS COMMODITIES SUISSE S.A. Versus ACRO TEXTILE MILLS LTD"* **(PLD 2018 Lahore 597)** as follows:

> *23. Therefore, the supply of the original arbitration agreement was held to concern the admissibility of enforcement proceedings which really seems to echo the enumerations of Article IV of the Convention and one cannot doubt the requirement to be essential to set in motion the proceedings for enforcement. However, Acro on the contrary, invites this Court to blur the line between the Article IV requirement and Article V defence of validity of agreement. The term "agreement in writing" has to be seen in the context of Article II and which specifies that the arbitral clause in a contract or an arbitration agreement may be either signed by the parties or alternately may be teased out of an exchange of letters or telegrams. By the passage of time and with the onset of far more innovate technology, emails and other forms of modern information systems can justifiably be included in the term "exchange of letters or telegrams" so as to enlarge and broaden the scope and to give effect to the Convention in present times. Otherwise the Convention will be rendered unworkable and pedantic and thus unsuitable for changing times. In essence, therefore, the claimant has merely to supply a copy of the agreement, whether signed or unsigned, or based on "exchange of letters or telegrams" and that is sufficient compliance of Article IV. All other questions are in the realm of validity or otherwise of the agreement, including the question of its proper execution as raised by Acro herein, and thus to be dealt with as a defence under Article V. In Smita Conductors Ltd. v Euro Alloys Ltd., Appeal (civil) 12930 of 1996, the Indian Supreme Court held that:*
>
> *"What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para 2 of Article II. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing."*
>
> *"If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard." (emphasis added)*

24. Although it was urged by the *"Shakarganj"* that the signatories of the *"Agreement"* were not authorized yet exchanging of emails, as mentioned above, have not been disputed therefore, the existence of the *"Agreement"* stands established as per provision of the *"Act"* and the NY Convention.

25. So far as objection of the *"Shakarganj"* with regard to the signatories/representative is concerned, the Tribunal in the *"Final Award"* noted that the persons who executed the *"Agreement"* had ostensible authority to enter into the same and observed that:

> *"26. On 30 November 2016, the Tribunal issued its Award on Jurisdiction, holding that it had jurisdiction to determine its own jurisdiction and to determine the substantive dispute between the parties. The Tribunal's was satisfied that the two individuals who executed the Agreement on behalf of Shakarganj certainly had ostensible, if not actual, authority to enter into the Agreement. At paragraphs 42 and 43 of the Award, the Tribunal said:*
>
> > *42. We also took note that Respondents [Sharkarganj] took certain steps in the arbitration, and by doing so, acted in a way that was inconsistent with challenging our jurisdiction to determine the substantive dispute between the Parties. On two separate occasions (20 June 2016 and 14 July 2016), Respondents applied to the Tribunal for an extension of time by which to serve their Defence submissions. And then, on 19 July 2016, the Respondents paid their share of the deposit of £10,000 that had been requested by the LCLA to cover estimated coats of the Tribunal in the context of this reference. It was not until 27 July 2016, that Respondents first gave notice to Claimants, the Court of the LCIA and the Tribunal that they were challenging our right to determine the substantive claims in London under the Rules of the LCIA. It seemed to us that Respondents had submitted to the jurisdiction by taking these steps in the action.*
> >
> > *43. In summary, we have found that we have the right to determine our own jurisdiction by reason of Statute, case law and the LCLA Rules and that Respondents had failed to raise their objections to our Jurisdiction in the correct forum: they should have referred their challenge to us. We also found that the Arbitration agreement is separable from the Contractual Agreement. We have found that the LCIA arbitration clause is a valid and subsisting Arbitration agreement which bound the Parties to have their disputes under the Contractual Agreement resolved through London arbitration at the LCIA and that Respondents had lost the opportunity in any event, to challenge our jurisdiction because they took steps in the reference before they served their letter of 27 July 2016 giving notice for the first time that they were challenging*

> *our jurisdiction in proceedings brought before the Court of Lahore.*
> *Finally, we have found that the Contractual Agreement itself was validly concluded."*
>
> *Underlying for emphasis*

26. Furthermore, it was decided in the *"Award of Jurisdiction"* that the *"Agreement"* was signed and stamped by the parties and following observations were made:

> *"Given that the Contractual Agreement, containing an Arbitration clause, was signed and stamped by both parties, and on Respondents' behalf by the same person who had signed a number of previous sales contracts (17 previous contracts, according to claimants) with Claimants, Respondents' case appeared, at first glance, unsustainable. We noted that Respondents did not contend that the Contractual Agreement had not been made, but rather that it had been made by persons without the authorization of the Board of Directors".*

It was further decided that

> *"35. It is not for Claimants to know who is or is not authorized to sign on behalf of Respondents, or whether the Contractual Agreement itself had to be ratified by the Board. Claimants' were entitled to deal with persons who it was reasonable for them to believe represented Respondents and had appropriate authorization to bind Respondents. In this case, Claimants had negotiated the Contractual Agreement with Mr. Ali Altaf Saleem, one of two Executive Directors of Respondents, as well as the General Manager of Sales and Marketing, Mr. Akhtar Habib. Both of them had previously negotiated several contracts with Claimants and there was no change or other indication from Respondents that neither Mr. Saleem nor Mr. Habib had ceased to be authorised to bind the company. Claimants described Mr. Saleem as one of the two key executives in Respondents' company: he was said to be a Member of the Executive Committee (comprised of himself and the Chief Executive) and a five man Business Strategy Committee, which Respondents' Annual Report (for the year end 30 September 2015, dated 8 January 2016 and published on Respondents' website), described as being "responsible for the formulation of business strategy, review of risks and their mitigation plan", It follows, and we had no hesitation in finding, that Mr. Saleem and Mr. Habib had ostensible authority, if not actual authority, to enter into the Contractual Agreement".*

27. As noted above, the *"Shakarganj"* has argued about invalidity of the *"Agreement"* under Article V(1)(a) of the *"NY Convention"*. The said argument is not correct as the validity of the *"Agreement"*, under the aforesaid Article, has to be considered *"under the law to*

which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made" and in this case, the parties have clearly subjected to English law as per arbitration clause of the *"Agreement"* which itself states that "any dispute arising out of this contract shall be settled in accordance with English law and the governing law of the *"Agreement"* is subject to by English Law". From aforesaid, it is quite clear from the language used in the *"Agreement"* that it does not suggest any intention that the *"Agreement"* was to be subject to any other law than the law applicable to the *"Agreement".* In both the jurisdictions i.e. Pakistani and English law, it is presumed that the law applicable to a contract/agreement will also apply to an arbitration agreement contained within it, in the absence of any indication to the contrary. The said situation has already been dealt with by the Hon'ble Supreme Court of Pakistan in the case of *"Hitachi Limited Versus Rupali Polyester"* **(1998 SCMR 1618)** by holding that "if there is *no express agreement between the parties as to the law governing arbitration agreement, the law which governs the main agreement will also govern arbitration agreement if the arbitration clause is embedded as a part of the main agreement".*

The English Court in the case of *Enka Insaat Ve Sanayi AS v Insurance Company Chubb* [2020] UKSC 38, held that "*where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.*

Further in *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 held that "*once it is accepted that an express agreement as to the law which is to govern the arbitration agreement is not required and that any form of agreement will suffice, it seems difficult to resist the conclusion that a general choice of law clause in a written contract containing an arbitration clause will normally be a sufficient "indication" of the law to which the parties subjected the arbitration agreement.*

28. In view of above referred case laws and discussion, the objection of the *"Shakarganj"* with regard to invalidity of the *"Agreement"* is not valid. Even otherwise, the *"Shakarganj"* has not furnished any proof in its support regarding invalidity of agreement under the law as no document was filed with the reply.

Moot Point No.4 *(Unenforceability of "Final Award" contrary to public policy of Pakistan)*

29. The next objection of the *"Shakarganj"* is with regard to enforceability of the *"Agreement"* on the ground that it is contrary to the public policy of the Pakistan which is based on Article V 2(b) of the *"NY Convention"*. For brevity, the said Article is reproduced below:

> *2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:-*
>
> *(a) … … … ; or*
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country* (emphasis added).

Bare perusal of Section 7 of the "Act" read with Article V 2(b) of the *"NY Convention"* reveals that the recognition and enforcement of an arbitral award may also be refused if the competent authority in Pakistan finds that the recognition or enforcement of the award would be contrary to the "public policy" of Pakistan. Accordingly, to avail benefit of Article V 2(b) of the *"NY Convention"*, the *"Shakarganj"* must satisfy this Court that the recognition or enforcement of the award would be contrary to the "public policy" of Pakistan.

30. The Supreme Court of Pakistan has alluded to the concept of 'public policy' in the case of *"ORIENT POWER COMPANY (PRIVATE) LIMITED through Authorized Officer Versus SUI NORTHERN GAS PIPELINES LIMITED through Managing Director"* **(2019 CLD 1069)** by holding that:

> *"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"*.

31. The above case has also been relied by this Court in the case of *POSCO INTERNATIONAL CORPORATION supra*, which held as follows:

> *16. To recapitulate the said provision provides that the recognition and enforcement of an arbitral award may also be refused if the competent authority in the country finds that the award would be contrary to the public policy of that country. The term "public policy" has been subject of interpretation of courts all around the world and still remains an extremely fluid term not capable of definite meaning. It is notoriously slippery and inherently vague. .....*
>
> *20. The Supreme Court was clearly of the opinion that the definition of public policy even if invoked by a party is rarely granted and referred to the observations made by an English Judge to the effect that the public policy was an unruly horse and once you get astride it, you never know where it will carry*

you. Further that the courts all around the world have favored a restrictive approach to the question of public policy in arbitration and that Pakistan as a responsible nation has to develop jurisprudence while remaining cautious of the purpose of the parties to opt for arbitration and who are seeking speedy settlement of disputes which ought not be impeded by a party resorting to litigation once an award is rendered. In short, the Supreme Court of Pakistan favored an approach of non-interference and a pro-enforcement policy. Lastly, it was held that public policy exception could not be used as a back door to review the merits of a foreign arbitral award or to create grounds which were not available under Article V of the Schedule to the Act, 2011. The holding of the Supreme Court of Pakistan is the correct view and is currently the law of the country and I shall respectfully follow the views expressed in Orient Power Company rather than follow the Supreme Court of India.

21. In the context of the public policy defence, learned counsel for Rikans submitted that an application under section 4(2) of the Act, 2011 had been filed by POSCO and so POSCO could not have invoked the jurisdiction of SIAC simultaneously and ought to have awaited the final determination of the issues before the Civil Court at Lahore regarding section 4 application. On this basis it is contended that the reference to SIAC dated 17.9.2018 is contrary to section 4 of the Act, 2011. This argument has no basis and cannot prosper. It simply cannot succeed on the ground that the claim before the Civil Court had been filed by Rikans and it was the right of POSCO to file an application seeking stay of the proceedings and for referral of the matter to Arbitration under the arbitration clause. Section 4 of the Act, 2011 is in any case an obligation cast on the courts of Pakistan to see that in case the parties have entered into an arbitration agreement, the referral should on that basis be made to the Arbitration Tribunal and the claim should not be agitated before the Civil Courts. In the opinion of Rikans, having invoked the jurisdiction of the trial court under section 4 of the Act, 2011, POSCO was required to await the determination. This is a misplaced notion as POSCO had not invoked the jurisdiction of the Civil Court at Lahore who had merely filed an application to seek a stay of the proceedings and to enjoin the courts at Lahore to refer the parties to arbitration. POSCO was compelled to file the application and did not itself invoke the jurisdiction of the Civil Court at Lahore. A related argument raised by Rikans is that in the absence of referral by the trial court, the award which was issued by the Arbitration Tribunal falls afoul of the Pakistani law. Once again this argument is unsubstantiated and fanciful. It seems that Rikans by raising this argument invites this Court to hold that in every case a referral by a court in Pakistan is sine qua non for the arbitration proceedings to commence before the Arbitration Tribunal. There is no such requirement in law and the Civil Courts at Lahore were involved only because Rikans chose to file a claim before the Civil Court, Lahore contrary to its obligation under the arbitration agreement to refer the matter to Arbitration. There was no violation of Pakistani law or the public policy as alleged by Rikans since the public policy contained in section 4 of the Act, 2011 is very clear. It obliges

> *and compels parties to an arbitration agreement to take their claims to the tribunals agreed for resolution of disputes by the parties and further requires the courts in Pakistan to refer the parties to arbitration. This is the public policy of Pakistan and must be adhered to.*

32. The US Courts have taken a conservative approach to interfere with international arbitration and the issue of public policy. The seminal case highlighting the American pro-arbitration approach in the case of **Scherk v Alberto-Culver Co, 417 US 506 (1974)** by holding that:

> *"The invalidation of such an agreement in the case before us would reflect a parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts".*

33. In England, the enforcement and recognition of foreign arbitral awards under the New York Convention are governed under the Arbitration Act, 1996, Ss. 100-103. In *Russell on Arbitration, 24th edition*, the concept of refusal of recognition and enforcement, in the paradigm of the policy of the Convention, has been stated thus:

> *"Refusal of recognition and enforcement. The grounds on which recognition of New York Convention awards will be refused under ss. 101-103 of the 1996 Act are very limited. Section 103 accordingly embodies a pro-enforcement approach. So unless the ground for refusal falls within the terms of s.103, the court must recognize and enforce a New York Convention award. The court also apparently has a very limited discretion to enforce the award even where one or more of the grounds are made out."*

34. The Supreme Court of Pakistan in the case of *"Orient Power Company (Private) Limited* (supra) has alluded to the concept of public policy in the following words:

> *"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.*
>
> *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".*

35. In the context of the public policy defence, learned counsel for the "Shakarganj" Ms. Deeba Tasneem Anwar, Advocate submitted that the *"Shakarganj"* had approached the Civil Court in Pakistan which had granted interim injunction and the Tribunal ought to have awaited the final determination of the issues before the Civil Court. This argument has no basis and cannot prosper. It is also unsubstantiated and fanciful. There is no such requirement in law and the Civil Court was involved only because the *"Shakarganj"* chose to file a claim before the Civil Court, contrary to its obligation under the arbitration agreement to refer the matter to Arbitration. The *"Shakarganj"* was in breach of the arbitration agreement by

commencing proceedings at Civil Court, and this action of the *"Shakarganj"* was also against the Pakistani law, as held earlier, only the High Court has jurisdiction to entertain such matters. There is no known public policy which constrains this Court from enforcing the award on the premise that one of the parties has brought a claim in the local courts. This is necessary to maintain the integrity of international commercial contracts and the trust in Pakistani courts to enforce foreign awards. That trust will be shaken irretrievably if the courts of Pakistan were to evince an anti-enforcement policy by seeking shelter in the nebulous concept of 'public policy'. Accordingly, this objection is also baseless because there was no violation of Pakistani law or the public policy as alleged by the *"Shakarganj"*. The *"Act"* obliges and compels parties to an arbitration agreement to take their claims to the tribunals agreed for resolution of disputes by the parties and further requires the courts in Pakistan to refer the parties to arbitration. This is the public policy of Pakistan and must be adhered to.

Moot Point No.5 *(Pro-Enforcement Bias or Policy)*

36. Before passing any determination on the above moot questions, it is essential to discuss the vision behind enactment of the *"Act"*, i.e. the NY Convention. It is to be noted that the *"NY Convention"* was passed in New York in 1958 to provide a uniform and effective legal framework for the recognition and enforcement of international arbitration agreements and foreign arbitral awards. The aims of the *"NY Convention"*, generally, are to promote international trade and commerce by ensuring that parties to an arbitration agreement could enforce their rights and obligations under that agreement in any of the countries that have ratified the *"NY Convention"*; to establish a comprehensive legal framework for the recognition and enforcement of foreign arbitral awards by national courts around the world; and to reduce uncertainty and risk in international commerce for the growth of international trade and investment.

37. Since Pakistan ratified the NY Convention in 2005, it passed the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 to fulfil its international commitments under the *"NY Convention"*. The said Ordinance was re-promulgated in 2006, 2007, 2009 and 2010, and finally the *"Act"* was enacted in 2011. The *"Act"* has repealed the earlier Arbitration (Protocol and Convention) Act, 1937, and is conspicuous for its brevity and shortness.

38. Here, it would also be advantageous to highlight the purpose and policy of the "Act", which is mentioned in its Preamble. The preamble means an introductory statement in a constitution, statute or act, and it explains the basis and objective of such a document. Though the preamble to a statute is not an operational part of the enactment but it is a gateway, which discusses the purpose and intent of the legislature to necessitate the legislation on the subject and also sheds clear light on the goals that the legislator aims to secure through the introduction of such law. The preamble of a statute, therefore, holds a pivotal role for the purposes of interpretation in order to dissect the true purpose and intent of the law. Reliance in this regard is placed on ***"****DIRECTOR GENERAL, FIA AND OTHERS Versus KAMRAN IQBAL and others"* **(2016 SCMR 447).**

39. The Preamble of the Act duly notes that Pakistan is a signatory to the NY Convention. As per its Preamble, the Act has been passed to provide a framework "*for the recognition and enforcement of arbitration agreements and foreign arbitral awards pursuant to [NY] Convention and for matters connected therewith*". The purpose of the "Act" has further been elaborated in the case of *"Orient Power Company Versus Sui Northern Gas Pipelines"* **(PLD 2019 Lahore 607)** wherein it has held that *"the purpose of the Act is to facilitate recognition and enforcement of foreign arbitral award in order to curtail litigation related to foreign arbitral awards which in turn delays the enforcement of awards and negates the very purpose for using arbitration as a dispute resolution mechanism. The Convention is based on a pro-enforcement policy which sets out to*

facilitate and safeguard the enforcement of foreign arbitral awards which is the mandate of the Act. The emphasis on pro-enforcement is highlighted by the inclusion of Section 8 of the Act which provides that in the event of any inconsistency between the Act and the Convention, the Convention shall prevail to the extent of the inconsistency".

40. It is also imperative to highlight another case of the honorable Sindh High Court, titled "*DHANYA AGRO-INDUSTRIAL (PVT.) LIMITED through Attorney Versus QUETTA TEXTILE MILLS LTD. through Chief Executive"* **(2019 CLD 160)** which mentions that very intention of the Act is to expedite the process. By giving fast-track enforceability to the arbitral award granted between members of the NY Convention, the parties affected by misadventures of others could seek expeditious disposal of their cases and remedies were made forthcoming in an expeditious manner without any unnecessary loss of time.

41. Accordingly, the Preamble of the *"Act"* provides an expeditious mechanism for the recognition and enforcement of foreign arbitral agreements and foreign arbitral awards pursuant to the "*NY Convention"*. Since the *"Final Award"* has been made by the *"LCIA"* against the parties who belong to the consented countries and are bound by the *"NY Convention"* therefore, comes within the meaning of Section 2(e) of the *"Act"* which states *"a foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government in the official Gazette."* Article III of the *"NY Convention"* provides that *"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the follows articles."*

42. Interestingly, the Pakistani superior courts have recognized the concept of "pro-enforcement policy" or "pro-enforcement bias" in a number of judgments. It has been held in the case of "*ABDULLAH Versus Messrs CNAN GROUP SPA through Chief*

Executive/Managing Director and another" **(PLD 2014 Sindh 349)**

as follows:

> *5. One point that has been widely recognized in relation to the Convention is its pro-enforcement "bias". The Convention is designed to facilitate speedy enforcement of awards made in Convention countries in other States party to it. Thus, in the (English) Court of Appeal, in Lombard-Knight and another v. Rainstorm Pictures Inc [2014] EWCA Civ 356, Tomlinson, LJ observed as follows:--*
>
> *"35. ... The International Council for Commercial Arbitration (ICCA) has produced a Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (May 2012 edition) ("ICCA Guide") which sets out the questions to be answered and the steps to be followed by the courts when applying the Convention. The Guide summarises the overall object and purpose of the New York Convention as follows:*
>
> *"The Convention is based on a pro-enforcement bias. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards and in doing so it serves international trade and commerce. It provides an additional measure of commercial security for parties entering into cross-border transactions."*
>
> *36. The pro-enforcement basis of the New York Convention is also supported by Van den Berg in his work to which I have already referred above, as did Mance LJ in [Dardana Limited v. Yukos Oil Company [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326], at page 4:*
>
> *"As far as the object and purpose of the New York Convention are concerned, they are to facilitate the enforcement of arbitration agreements within its purview and of foreign arbitral awards. This object and purpose must, in the first place, be seen in the light of enhancing the effectiveness of the legal regime governing international commercial arbitration."*
>
> *(The Guide abovementioned is available on the Internet: http:// www.arbitration-icca.org/publications/NYC_Guide.html.) Reference may also be made to a recent decision from Australia, that of the Supreme Court of Victoria (in its Court of Appeal division) in IMC Aviation Solutions Pty Ltd. v. Altain Khuder LLC [2011] VSCA 248. The Court was there considering the Convention in light of a commonwealth statute, the International Arbitration Act, 1974, which implements the Convention in Australia. In their joint judgment, Hansen JA and Kyrou AJA made a number of observations of which the following can be usefully cited (internal citations omitted):--*
>
> *"128. Secondly, the Act, and the Convention, reflect what is often described as a `proenforcement bias' or policy. What that means is this. The Act, and the Convention, recognising the role and importance of arbitration in*

international trade and commerce and the certainty and finality of awards, has simplified the procedure for enforcing foreign arbitral awards while also limiting the grounds upon which the enforcement of such an award may be resisted and placed the onus of establishing those grounds upon the party resisting enforcement. In Redfern and Bunter on International Arbitration, it is said of the expression a pro-enforcement bias' that it 'means that whilst it may be possible to challenge an arbitral award, the available options are likely to be limited. Sir Anthony Mason has described the objective of the Convention as being 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced.'

129. The Act's pro-enforcement policy is relevant to the interpretation of particular provisions of the Act. Hence, in Parsons & Whittemore Overseas Co. Inc v. Societe Generale de L'Industrie du Papier (Rakta) [508 F. 2d 969, 974 (US Court of Appeals, 2nd Cir, 1974), I YCA 205 (1976)], it was held that the public policy ground of resistance to the enforcement of an award was to be given a narrow construction as meaning contrary to the basic notions of morality and justice of the forum. That is consistent with the attainment of the objects of the Act and the Convention. It would be inappropriate, however, for this Court to give to a provision of the Act a meaning which is not supported by the words used by the Parliament, construed in accordance with conventional principles of statutory interpretation, for the purpose of giving effect to the pro-enforcement policy.

130. Thirdly, as the Act gives effect to the Convention, decisions of overseas courts on the meaning of provisions of domestic legislation that adopt the wording of the Convention may be of assistance in the interpretation of the Act. Apart from promoting comity, there are obvious advantages in consistency in the interpretation of legislation that gives effect to an international convention. In that regard, however, it will be important to note any relevant differences in the legislation of another jurisdiction."

I respectfully agree. Reference may also be made to Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co. 284 F. 3d 1114 (US Court of Appeals, 9th Cir, 2002), XXVII YCA 922 (2002), where it was observed as follows:--

> *"The Convention and its implementing legislation have a pro-enforcement bias, a policy long-recognized by the Supreme Court:*
>
> *`The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory*

> *countries. Scherk v. Alberto-Culver Co., 417 U.S. 506,520 n. 151".*
>
> *13. The foregoing conclusion as regards the interpretation of section 7 is also borne out by the pro-enforcement bias of the Convention, as noted above. It is quite clear that, wherever possible, the Convention seeks to reduce the manner and stage of challenging an award. Of course, this does not mean that such a challenge is eliminated altogether. What it does mean, in my view, is that if the relevant statute in the lex fori does not so provide either expressly or by necessary implication, then a challenge or objection to an award must be regarded as being limited to proceedings brought by the award-creditor. I cannot, with respect, agree with what appears to be the rather more expansive approach suggested in Kronke (op. cit.). Certainly, in my view, the case law cited above does not support such a conclusion. Secondly, section 8 of the 2011 Act must also be kept in mind. It is a highly unusual provision. The normal rule of interpretation is of course that if there is any inconsistency between the main provisions of a statute and any schedule thereto, the former are to prevail (see, e.g., the well known observations of the Supreme Court in Excise and Taxation Officer, Karachi and another v. Burmah Shell Storbge and Distribution Company of Pakistan and others (1993 SCMR 338). Section 8 expressly reverses the normal rule: in case of any inconsistency, the Convention is to prevail and the provisions of the 2011 Act must yield. The inclusion of such a section in the 2011 Act also points, in my view, towards the conclusion that I have arrived at in relation to section 7.*

43. Similarly, in the case of "*LOUIS DREYFUS COMMODITIES SUISSE S.A. Versus ACRO TEXTILE MILLS LTD"* **(PLD 2018 Lahore 597)**, this Court has again recognized this concept as follows:

> *16. Thus the general pro-enforcement bias which permeates the Act, 2011 is the policy of the law and must be the underlying thrust to liberalise procedures for enforcing foreign arbitral awards. The courts, on a proper objective analysis must give effect to the intention of the legislature and the purpose of the New York Convention, in the enforcement of foreign arbitral awards. The centrality of the statutory enterprise consists in shunning a tendency to view the application with scepticism and to consider the arbitral award as having a sound legal and foundational element. This presumption is for the respondent to rebut upon proof being furnished. More importantly, the policy of the Act, 2011 requires this Court to dispose of issues by the usual test for summary judgment, and not by a regular trial.*

44. Likewise, the same principle has also been adopted by the Supreme Court of Pakistan in the case of *ORIENT POWER COMPANY (PRIVATE) LIMITED (supra)* as follows:

> *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".*
>
> *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."*

45. In addition, this Court has very recently reiterated this principle in the case of *POSCO INTERNATIONAL CORPORATION supra*, as follows:

> *20. The Supreme Court was clearly of the opinion that the definition of public policy even if invoked by a party is rarely granted and referred to the observations made by an English Judge to the effect that the public policy was an unruly horse and once you get astride it, you never know where it will carry you. Further that the courts all around the world have favored a restrictive approach to the question of public policy in arbitration and that Pakistan as a responsible nation has to develop jurisprudence while remaining cautious of the purpose of the parties to opt for arbitration and who are seeking speedy settlement of disputes which ought not be impeded by a party resorting to litigation once an award is rendered. In short, the Supreme Court of Pakistan favored an approach of non-interference and a pro-enforcement policy. Lastly, it was held that public policy exception could not be used as a back door to review the merits of a foreign arbitral award or to create*

> *grounds which were not available under Article V of the Schedule to the Act, 2011. The holding of the Supreme Court of Pakistan is the correct view and is currently the law of the country and I shall respectfully follow the views expressed in Orient Power Company rather than follow the Supreme Court of India.*

46. The *"NY Convention"* in Article V advocates 'pro-enforcement bias' policy in dealing with applications of recognition and enforcement of international arbitral awards. It sets forth the general principle that each contracting state shall recognize arbitral awards as binding and enforce them. As a result, foreign awards are entitled to a prima facie right to enforcement in the contracting states. Essentially, it means the pro-enforcement attitude of the national courts enforcing foreign award. Enunciating the same, the Court of Appeal of England and Wales in the case of Yukos Oil vs. Dardana, *[2001] EWCA Civ 1077* held that, "pursuant to pro-enforcement bias principle, foreign arbitral awards are entitled to a prima facie right to recognition and enforcement." As Pakistan is also a signatory of the *"NY Convention"*, the Pakistani arbitration framework should be in line with the principle of pro-enforcement bias. The Pakistani legislature, furthering the same, introduced the "Act" in 2011. In order to develop this doctrine, this Court examined the preamble of the *"Act"* which provides for the recognition and enforcement of arbitration agreements and foreign arbitral award. The foreign arbitral awards are mentioned under Section 2(e) of the *"Act"* which means a foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government. The jurisprudence developed in Pakistan after ratifying the *"NY Convention"* and enactment of the *"Act"*, the Courts have enforced the awards through pronouncements of judgments and such enforcement casts upon a duty on the Courts to build the confidence of investors by protecting the sanctity of arbitration agreements and the same has already been dealt with by this Court in the case of *"M.C.R. (PVT.) LTD. FRANCHISEE OF PIZZA HUT Versus MULTAN DEVELOPMENT AUTHORITY and others"* **(2021 CLD 639)** by observing that:

"26. With each passing day, the World is becoming more global and more inter-connected, particularly in the affairs of trade and commerce. The volume of foreign investment and number of such business initiatives are taken as one of the determining traits for measuring economic growth of a country and it has also a direct bearing upon the financial prosperity of the citizens of a country.

27. Article 4 of the Constitution guarantees equal protection of law and fundamental right to be treated in accordance with law as inalienable right of every citizen "wherever he may be, and of every other person for the time being within Pakistan". Simultaneously, Article 5 of the Constitution unequivocally laid down that obedience to the Constitution and law is the inviolable obligation of "every citizen wherever he may be, and of every other person for the time being within Pakistan". It is thus evidently clear that the enjoyment of rights is made subject to abiding of the law and fundamental right of inviolability of equality before the law is equally corresponded with the obligation of obedience to the Constitution and the law, both for the citizen and for any other person who is for the time being in Pakistan. The Constitution is grundnorm of the country and law is the command of sovereign body, which is established and mandated under the Constitution to promulgate and enact laws either in the form of primary legislation i.e., Acts and Ordinance etc. or in the form of delegated legislation. Similarly, under Article 189 and Article 201 of the Constitution, the decisions of the Supreme Court and High Courts to the extent of decision on a question of law or enunciation on the principle of law, are also binding on all the Courts of the country and in the particular Province, as the case may be. It is therefore imperative and obligatory upon the citizen as well as any person of foreign nationality, who is for the time being in Pakistan, to adhere and abide by the Constitution, the law and judgments of the constitutional Courts of the country and on the other hand, he has a fundamental inviolable right of equal protection of the law.

28. Undoubtedly freedom of trade, business and commerce is a fundamental right guaranteed under Article 18 of the Constitution which states that every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business. One of the basic purposes behind provision of this fundamental right is certainly to advance culture of socio-economic progress and to protect and promote business and trade activities and, at the same time, to encourage simplification of the process of establishing and carrying out new business ventures throughout the country because activities of business and trade create opportunities for the masses around and provide job options, financial stability and progress in the area.

> *29. Since the Pizza Hut is an international chain and entered into lease agreement with WASA, it is the duty of the Courts in Pakistan to see the rights of the parties and to protect their interest in order to build confidence of investors in Pakistan but at the same time the interest of government functionaries has also to be examined regarding financial interest of the Government. The learned Civil/Commercial Court is, therefore, directed to decide the case expeditiously but not later than 60 days from the receipt of copy of this judgment in accordance with law."*

47. Accordingly, in view of the above, it remains clear that a pro-enforcement policy under the *"NY Convention"* refers to a legal approach that favors the recognition and enforcement of foreign arbitral awards. This approach is based on the principle of comity, which requires countries to show respect and deference to the legal systems and decisions of other countries and arbitral tribunals. Pro-enforcement policy under the *"NY Convention"* is important because it promotes the finality and enforceability of arbitration awards. When parties agree to resolve their disputes through arbitration, they expect that the resulting award will be final and binding. A pro-enforcement policy helps to ensure that parties can rely on the arbitration process to resolve their disputes and that the resulting awards will be enforced in other countries. In practice, a pro-enforcement policy means that courts should apply a narrow standard of review when considering applications for recognition and enforcement of foreign arbitral awards. This standard requires courts to limit their review to procedural matters and to refrain from re-examining the substance of the dispute. This approach ensures that the recognition and enforcement process is swift and efficient, which benefits both parties and promotes international trade and commerce. Overall, a pro-enforcement policy under the *"NY Convention"* is essential to promote the recognition and enforcement of foreign arbitral awards. This approach reflects the importance of promoting finality and enforceability in the arbitration process, which in turn contributes to the stability and predictability of international commerce. Therefore, this Court is bound to implement it as such.

IX. Conclusion

48. In view of above, it is unequivocal that the *"Shakarganj"* has failed to defend its foreign arbitration award on the grounds raised under Section 7 of the *"Act"* read with Article V 2(b) of the *"NY Convention"* neither by its conduct while appearing before the *"LCIA"* nor by filing proper documents under the *"Act"* and even the reply filed before this Court. It is to be examined that the *"Shakarganj"* filed reply (four pages only) without any document/annexure by taking preliminary objections which have been discussed in details above, whereas, the *"Tradhol"* filed the *"Application"* under Section 6 of the *"Act"* read with Article IV of the *"NY Convention"* and met with all requirements for enforcement of the *"Final Award".* Section 6 is reproduced below:

> ***6. Enforcement of foreign arbitral award.****-- - (1) Unless the Court pursuant to section 7, refuse the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognize and enforce the award in the same manner as a judgment or order of the Court in Pakistan. ....*

While Section 6 read with Article III of the "NY Convention" is subservient to Section 7 of the "Act" read with Article IV and V of the "NY Convention", which if satisfied, the Court shall recognize and enforce the foreign arbitral award in the same manner as a judgment or order of the Court in Pakistan.

51. As deliberated in detail by this Court in the case of *"LOUIS DREYFUS COMMODITIES SUISEE supra* which has held that:

> *8. It is clear upon a reading of section 7 above that the recognition and enforcement of a foreign arbitral award shall not be refused except in terms of Article V of the Convention. It follows ineluctably that ordinarily the court will grant recognition and enforcement to a foreign arbitral award and any refusal is hedged in by the mandate of Article V of the Convention which forms part of the Act, 2011. This is the intention of the legislature and encapsulates what has been described as the underlying theme of the Convention which "can be said to have a pro-enforcement bias and a strong case can be made out that the grounds under Article V are to be applied*

> *restrictively and construed narrowly". (Redfern & Hunter, et. Al., Law and Practice of International Commercial Arbitration, 4th ed. 2004).*
>
> *9. Sections 6 and 7 of the Act, 2011 are the pivot around which the entire Act, 2011 revolves. These provisions direct themselves to the recognition and enforcement of the award and not the arbitration agreement. This is the crucial aspect which needs to be hammered in. The enumeration made in section 7 captures the entire intention of the legislature. This enumeration will be kept in view by the court and take precedence over any other construction sought to be put on the scheme of the Act, 2011 or on the basis of the New York Convention which is appended as a schedule. The schedule will have relevance so far as it is referred to in the primary enactment itself. The ineluctable inference upon reading of section 7 is that the only grounds of refusal for recognition and enforcement of the award shall be those given in Article V of the Convention and no other. By necessary corollary, therefore, any challenge premised on Article II read with Article IV stand ousted. Sections 6 and 7 of the Act, 2011, when read in combination, oblige the court to recognize and enforce an award unless it finds the award to run foul of Article V of the Convention".*

49. To conclude this matter, this Court by relying on the judgment of Supreme Court of Pakistan cited in *"Orient Power Company (Private) Limited* (supra) whereby it has categorically held that *"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.".* Accordingly, the Court finds that all requirements for the enforcement of the *"Final Award"* have been satisfied. The *"Application"*, is therefore, allowed and there will be an order as follows:

1) *The "Final Award" is hereby recognized as a binding and enforceable award and enforced through this order.*
2) *The "Applicant is granted judgment in the amount represented in the "Final Award", which shall be executed as decree of this Court.*
3) *The "Applicant" shall have costs of the "Application"*
4) *In terms of Order XXI, Rule 10 of the Code of Civil Procedure, 1908 (C.P.C.) this Application is converted into execution proceedings.*

50. To come up for further proceedings on 02.06.2023.

(JAWAD HASSAN)
JUDGE

Announced in open Court on 28.04.2023

Approved for Reporting

JUDGE

*"Usman**