JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.S.No.01 of 2019
Zaver Petroleum Corporation (Pvt.) Limited
Versus
Saif Energy Limited

Dates of Hearing:	29.03.2023 and 22.10.2024.
Applicant by:	M/s Salman Aslam Butt, Taimur Tufail, Anique Salman Malik, Waleed Khalid Zainab Janjua and Salaar Khan, Advocates.
Respondent by:	Syed Ahmad Hassan Shah and Mr. Badar Iqbal Chaudhary, Advocates.
Amici Curiae:	Barrister Hassan Ali Raza and Barrister M. Usama Rauf

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MIANGUL HASSAN AURANGZEB, J:- Through this judgment, I propose to decide the following cases:-

(i) Application (numbered and registered as Civil Suit No.01/2019) under Section 3 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (**"the 2011 Act"**) filed by Zaver Petroleum Corporation (Private) Limited (**"Zaver Petroleum"**) seeking *inter alia* a direction to the respondent, Saif Energy Limited (**"Saif Energy"**) to withdraw and not to pursue civil suit titled "Saif Energy Limited Vs. Zaver Petroleum Corporation (Private) Limited etc." filed before the Court of the learned Civil Judge, Kohat and also not to institute any proceedings aimed at circumventing the arbitration agreement between the said parties. Along with the said application, Zaver Petroleum also filed an application for interim injunction under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908 (**"C.P.C."**) and other enabling provisions of the law to *inter alia* restrain Saif Energy from utilizing or disbursing in any manner the sale proceeds from the Kohat Working Interest.

(ii) Application (Enforcement Petition No.02/2021) under Section 6 of the 2011 Act seeking the recognition and enforcement of the

arbitral award on jurisdiction dated 19.03.2021 rendered by George Burn of Bryan Cave Leighton Paisner LLP turning down Saif Energy's challenge to the jurisdiction of the Arbitral Tribunal and declaring that the seat of arbitration under the Letter Agreement dated 15.03.2018 ("the Letter Agreement"**) and the Farmout Agreement dated 19.04.2018 (**"the Farmout Agreement"**) is London, England; that the said agreements are governed by English law; that the governing law of the arbitration agreements embedded in the said agreements is English law; and that the Arbitral Tribunal has jurisdiction in respect of matters in dispute between Zaver Petroleum and Saif Energy under the said agreements.**

(iii) Application (Enforcement Petition No.06/2021) under Section 6 of the 2011 Act seeking the recognition and enforcement of the arbitral award dated 05.11.2021 regarding costs on the award on jurisdiction whereby costs to the tune of US Dollars 78,000 plus US Dollars 12,220 and Rs.227,084/- were imposed on Saif Energy.

(iv) Application (Enforcement Petition No.01/2022) under Section 6 of the 2011 Act seeking the recognition and enforcement of the final arbitral award dated 24.03.2022 declaring *inter alia* that Saif Energy is contractually obliged to transfer its working interest in the Kohat Petroleum Concession Block to Zaver Petroleum under the terms of the Farmout Agreement and the Letter Agreement and that Saif Energy's failure to transfer such interest constitutes an actionable breach under the said agreements. Furthermore, the Arbitrator ordered Saif Energy to immediately perform its obligations under the said agreements and submit the executed Deed of Assignment to the Directorate General of Petroleum Concession ("D.G.P.C.") for approval. The Arbitrator also declared the initiation of proceedings by Saif Energy before Courts in Pakistan to be in breach of the arbitration agreement contained in the Farmout Agreement.

Additionally, Saif Energy was ordered to pay US Dollars 3,827,126 to Zaver Petroleum for breach of clause 2.2 of the Farmout Agreement and clause 5 of the Letter Agreement; and US Dollars 100,000 and Rs.5,464,204/- for a breach of the arbitration agreement in clause 4.3 of the Farmout Agreement.

2. Zaver Petroleum and Saif Energy are companies engaged in the business of oil and gas exploration. Saif Energy held working interest rights in three petroleum concession blocks namely, (i) Kohat Block, (ii) Sari South Block, and (iii) Bannu West Block. On 10.01.2018, M/s Saif Holdings Limited, the holding company of Saif Energy, entered into an agreement with Zaver Petroleum for the sale of Saif Energy's entire share capital in Saif Energy for a price of US Dollars 10 million. Subsequently, the parties to the said agreement decided to change the structure of the transaction from the acquisition of Saif Energy's share capital to the assignment of its working interest in the said Blocks to Zaver Petroleum. For this purpose, an agreement captioned as the Letter Agreement was executed between Zaver Petroleum and Saif Energy on 15.03.2018, whereby the latter agreed to assign its working interest in the said Blocks to the former. The effective date of the assignment of Saif Energy's working interest was agreed to be 01.01.2018.

3. The consideration for the assignment of Saif Energy's working interest in Sari South Block was agreed to be US Dollars 3.6 million. It is an admitted position that the transaction for the assignment of Saif Energy's working interest in Sari South Block to Zaver Petroleum has been completed without any dispute.

4. As regards the Kohat and Bannu West Blocks, clause 4 of the Letter Agreement provides that in the Farmout Agreement, Kohat Block shall be allocated consideration of US Dollars 6.2 million whereas the Bannu West Block shall be allocated consideration of US Dollars 0.2 million. Furthermore, it was provided that Zaver Petroleum shall pay US Dollars 3.2 million upon execution of the Kohat Block Deed of Assignment along with reimbursement of cash calls paid by Saif Energy from the effective date; and that Zaver Petroleum shall pay US Dollars 3.2 million upon execution of

the Bannu West Block Deed of Assignment along with reimbursement of cash calls paid by Saif Energy from the effective date. It was Saif Energy's obligation to provide full access to the available data relating to the assigned working interest to Zaver Petroleum upon submission of each Deed of Assignment.

5. The parties had agreed to resolve their disputes in accordance with clause 7 of the Letter Agreement which is reproduced herein below:-

> ***"This Letter Agreement shall be interpreted under English Law and any dispute thereunder shall, if not settled amicably within a period of ninety (90) days, shall be settled through arbitration at the London Court of International Arbitration at London."***

6. Saif Energy along with Mari Petroleum Company Ltd., Oil and Gas Development Company Limited and Tullow Pakistan (Developments) Limited are parties to the Kohat Block concession documents comprising of an exploration licence, a petroleum concession agreement and a joint operating agreement. Saif Energy had 10% working interest in the Kohat Block. On 19.04.2018, the Farmout Agreement was executed between Saif Energy and Zaver Petroleum whereunder the former agreed to assign its entire working interest in the Kohat Block to the latter. Clause 2.1 of the said agreement provides that Zaver Petroleum shall pay (as reimbursement of the expenditures incurred by Saif Energy till the effective date with respect to the Kohat Block) a lumpsum amount of US Dollars 6.2 million to Saif Energy within fifteen days of the execution of the Kohat Deed of Assignment. Furthermore, it was provided that in case the Bannu West Deed of Assignment is not executed simultaneously, Zaver Petroleum shall pay US Dollars 3.2 million upon execution of the Kohat Deed of Assignment and the remaining US Dollars 3 million upon the execution of the Bannu West Deed of Assignment. Clause 2.3 of the Farmout Agreement provides that in addition to the payment of US Dollars 6.2 million, Zaver Petroleum shall also reimburse to Saif Energy all cash calls paid by Saif Energy from the effective date till the execution of the Kohat Deed of Assignment. It also provides that after the effective date, if the operator makes any cash call, Saif Energy will inform Zaver Petroleum of such cash call and the latter shall cause the required funds to be deposited in Saif Energy's designated

account for onward payment to the operator. Clause 2.7 of the said agreement obligated Saif Energy to obtain prior written consent of Zaver Petroleum before approving any work programme commitment, budget, expense, cash calls, etc.

7. Clause 2.2 of the Farmout Agreement also makes it Saif Energy's obligation to obtain approval of the Kohat Deed of Assignment from all the joint venture partners as well as the D.G.P.C. In furtherance of its obligations under the said clause, Saif Energy, vide letter dated 26.04.2018, applied to the D.G.P.C. for the Government's approval to the assignment of its 10% working interest in the Kohat Block to Zaver Petroleum. Saif Energy had also provided a draft of the Kohat Deed of Assignment to the D.G.P.C. Vide letter dated 16.11.2018, the D.G.P.C. conveyed to Saif Energy the Government's consent to the assignment of its entire 16.667% working interest in the Kohat Block to Zaver Petroleum with effect from 20.02.2018 in accordance with Rule 8 of the Pakistan Petroleum (Exploration and Production) Rules, 2001 ("the 2001 Rules"). Furthermore, the D.G.P.C. also approved the Kohat Deed of Assignment subject to the following conditions:-

> ***"a). In case of any miscommunication / misrepresentation, withholding of information and concealment of facts or any default thereof, the consent and approval shall render null and void and assignor and / or assignee shall be responsible for the same and will be liable to pay any penalty as decided by the Government / Authority.***
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> ***b). The Government's revenue will not be adversely affected after said Assignment.***
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> ***c). The Operator (OGDCL) of Kohat Exploration License and ZPCPL shall confirm in writing on judicial paper that the assigner has discharged all its applicable financial obligations i.e. Training, Social Welfare and Area Rentals with annual adjustments etc. in accordance with the provisions of the Petroleum Concession Agreement License and governing rules up till the effective date of the assignment.***
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> ***d). Before execution of Deed of Assignment, M/s ZPCPL will provide Bank Guarantee from Bank of International Repute acceptable to the Government against minimum financial commitment corresponding to its share's 16.667%, valid till days after the expiry of Exploration License."***

8. Clause 4.3 of the Farmout Agreement provides that the said agreement and the relationship between Zaver Petroleum and Saif Energy shall be governed and interpreted under English law and any dispute

thereunder shall, if not settled amicably within a period of ninety days, be settled through arbitration at the London Court of International Arbitration, United Kingdom (“LCIA”). Clause 10.2 of the said agreement provides that it shall survive even after the execution of the Deed of Assignment.

9. Admittedly, the Bannu West Deed of Assignment was executed between the parties on 06.12.2018 and an amount equivalent to US Dollars 3 million was paid by Zaver Petroleum to Saif Energy. The Kohat Deed of Assignment has till date not been executed between the parties. However, Zaver Petroleum asserts that US Dollars 3 million that had been paid to Saif Energy had been *“in accordance with the terms of the Kohat Farmout Agreement”* whereas Saif Energy asserts that the said payment was in respect of the assignment of the Bannu West Block Working Interest and not for the Kohat Block.

10. The parties are also in dispute as to the consideration for the assignment of the Kohat Block. Zaver Petroleum asserts that an amount of US Dollars 2.7 million remains to be paid after the payment to Saif Energy of an amount equivalent to US Dollars 0.5 million through cheque dated 28.05.2019 drawn on Standard Chartered Bank. Vide letter dated 30.05.2019, Saif Energy had acknowledged the payment of the amount equivalent to US Dollars 0.5 million as *“partial payment against consideration of the Kohat Block # 3371-10 for assignment of 16.67% working interest.”* Saif Energy had also informed Zaver Petroleum that it was processing the execution of the Kohat Deed of Assignment. Saif Energy asserts that the remaining consideration exceeds US Dollars 2.7 million and continues to increase with the passage of time on account of the unpaid cash calls.

CIVIL SUIT FILED BY SAIF ENERGY AGAINST *INTER ALIA* ZAVER PETROLEUM BEFORE THE CIVIL COURT AT KOHAT:-

11. On 28.08.2019, Saif Energy filed a civil suit (Suit No.868/I of 2019) for mandatory injunction and the cancellation of the Farmout Agreement dated 19.04.2018 against Zaver Petroleum and the D.G.P.C. before the Court of the learned Civil Judge, Kohat in the Province of Khyber Pakhtunkhwa. Along with the said suit, Saif Energy also filed an application for interim

injunction to restrain Zaver Petroleum from asserting rights under the Farmout Agreement. In the said suit, it was pleaded *inter alia* that clause 4.3 in the Farmout Agreement providing for the resolution of disputes between the parties by the LCIA is against the laws of Pakistan and unenforceable. No relief in the said suit had been sought against the D.G.P.C.

12. Vide ad-interim order dated 29.08.2019, the learned Civil Court directed status *quo* to be maintained until the next date of hearing. The operation of the said order was extended from time to time.

13. On 04.10.2019, Zaver Petroleum filed an application under Section 34 of the Arbitration Act, 1940 ("the 1940 Act") praying for the proceedings before the Civil Court at Kohat to be stayed on the basis of the arbitration clause contained in clause 4.3 of the Farmout Agreement. Saif Energy contested the said application by filing a written reply. In the said reply, the position taken by Saif Energy was that the arbitration agreement embedded in clause 4.3 of the Farmout Agreement was illegal. Furthermore, it was pleaded that the application filed by Zaver Petroleum under Section 34 of the 1940 Act was misconceived since the parties had never agreed to any local arbitration and there did not exist any agreement between the parties which was subject to the laws of Pakistan. On 16.11.2019, Zaver Petroleum filed an application before the Civil Court at Kohat for the withdrawal of the application under Section 34 of the 1940 Act by taking the plea that Saif Energy was correct in its assertion that the parties had never agreed to local arbitration. In the said application for withdrawal, it was also pleaded that since clause 4.3 of the Farmout Agreement requires arbitration proceedings to be held in London under the rules of the LCIA, therefore the provisions of the 2011 Act would be applicable to the case. Vide order dated 16.11.2019, the said application for withdrawal was allowed by the Civil Court at Kohat.

14. It ought to be borne in mind that at no material stage did Zaver Petroleum file an application under the provisions of the 2011 Act before the Civil Court at Kohat praying for the proceedings in the suit to be stayed. However on 16.11.2019, Zaver Petroleum filed an application under Order

VII, Rule 10 C.P.C. before the Civil Court at Kohat praying for the plaint in the respondent's suit to be returned *inter alia* on the ground that under Section 3 of the 2011 Act, the High Court had exclusive jurisdiction in the matter. The Civil Court at Kohat, vide order dated 08.12.2021, allowed Zaver Petroleum's application under Order VII, Rule 10 C.P.C. and returned the plaint to Saif Energy with the direction to approach the proper forum. The said order was assailed by Saif Energy in appeal (FAO No.220-P/2021) before the Hon'ble Peshawar High Court. The said appeal was dismissed vide judgment dated 21.10.2022. The Hon'ble Peshawar High Court, after making reference to Sections 3 and 4 of the 2011 Act, held that *"in terms of Section 3 of the [2011 Act], only the High Court has the exclusive jurisdiction to adjudicate and settle matters related to or arising out from the provisions of the [2011 Act]."* Reference in the judgment dated 21.10.2022 was also made to the case of Orient Power Company (Private) Limited Vs. Sui Northern Gas Pipelines Limited (PLD 2019 Lahore 607), wherein it was held that the jurisdiction of ordinary Civil Courts and the High Court under the 2011 Act are not concurrent, and that the High Court had the exclusive jurisdiction to recognize and enforce foreign arbitral awards. By the time the said appeal (FAO No.220-P/2021) was dismissed, the Arbitrator had already rendered the award. I am told that Saif Energy has assailed the said judgment dated 21.10.2022 before the Hon'ble Supreme Court in Civil Petition No.4210 of 2022.

CIVIL SUIT NO.01/2019 UNDER SECTION 3 OF THE 2011 ACT FILED BY ZAVER PETROLEUM AGAINST SAIF ENERGY BEFORE THIS COURT:-

15. Vide letter dated 31.10.2019, Saif Energy had informed the Oil and Gas Development Company Limited ("O.G.D.C.L."), which is the operator and one of the Working Interest Owners ("WIOs") in the Kohat Block, that due to breach committed by Zaver Petroleum, Saif Energy had called off the deal for the sale of its interest in the said Block to Zaver Petroleum, and that Saif Energy had filed a civil suit against Zaver Petroleum before the Civil Court at Kohat. Saif Energy expressed its intention of retaining its working interest of 16.67% in the Kohat Block.

16. On 20.11.2019, Zaver Petroleum filed an application (C.S.No.01/2019) under Section 3 of the 2011 Act before this Court praying for the

recognition and enforcement of the arbitration agreement contained in the Letter Agreement and the Farmout Agreement. Zaver Petroleum had also sought an anti-suit injunction to restrain Saif Energy from pursuing the civil suit filed against Zaver Petroleum and the D.G.P.C. before the Civil Court at Kohat or from taking any steps which may circumvent or frustrate the arbitration agreement between the parties. Zaver Petroleum also sought a direction to Saif Energy to deposit in this Court the sale proceeds from the Kohat Working Interest. It also sought the suspension of the respondent's letter dated 31.10.2019 to O.G.D.C.L.

17. On 15.01.2020, Zaver Petroleum filed an application (C.M.No.31/2020) under Order VI, Rule 17 C.P.C. for an amendment in its application under Section 3 of the 2011 Act seeking the addition of a prayer for referring the parties to arbitration in terms of the arbitration clauses contained in the Letter Agreement dated 15.03.2018 and the Farmout Agreement dated 19.04.2018. Vide order dated 22.01.2020, the said application was allowed.

18. By the time the said application was allowed, Zaver Petroleum had not filed its requests for arbitration. However, during the pendency of the proceedings before this Court, Zaver Petroleum, on 24.04.2020, filed requests for arbitration before the LCIA. With the filing of the requests for arbitration, Zaver Petroleum's prayer for referring the parties to arbitration was rendered infructuous. Even otherwise, there is no provision in the 2011 Act, similar in nature to Section 20 of the 1940 Act, empowering the Court to refer the parties to arbitration. The concept of arbitration with the intervention of the Court is not envisaged by any of the provisions of the 2011 Act and/or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("NY Convention").

PETITION FOR CONTEMPT OF COURT FILED BY SAIF ENERGY AGAINST ZAVER PETROLEUM BEFORE THE HONORABLE PESHAWAR HIGH COURT:-

19. After Zaver Petroleum filed requests for arbitration before the LCIA, Saif Energy, on 27.04.2020, filed a petition before the Hon'ble Peshawar High Court for Contempt of Court under the provisions of Contempt of Court Ordinance, 2003 against Kamran Ahmed, Tauqeer Ahmad Nayyar and Hassan Hashwani, who are the Chief Executive Officer, Director and

Officer, respectively of Zaver Petroleum. In the said petition, it was pleaded that Zaver Petroleum had conducted itself egregiously and in utter contempt of the Civil Court at Kohat by filing a request for arbitration before the LCIA and by asserting its rights in respect of the Farmout Agreement. In other words, it was Saif Energy's assertion that the filing of the request for arbitration before the LCIA was in violation of the status quo order passed by the Civil Court at Kohat and for this the respondents arrayed in the contempt petition needed to be punished. In the said petition, Saif Energy had also prayed for a declaration to the effect that the request for arbitration filed by Zaver Petroleum before the LCIA is without lawful authority and of no legal effect. Saif Energy also attempted to stop the arbitration proceedings from proceeding further by praying for an order to suspend the operation of Zaver Petroleum's request for arbitration.

20. Vide order dated 27.04.2020, the contempt petition was dismissed on the ground that since the status quo order had been passed by the Civil Court at Kohat, a contempt petition before the High Court was not maintainable in view of the law laid down by the Hon'ble Supreme Court in the case of M.O. Ghani, Vice Chancellor University of Dacca Vs. Dr. A.N.M. Mahmood (PLD 1966 SC 802). Saif Energy did not stop at this. It filed an Intra Court Appeal (ICA No.1-P/2020) against the said order dated 27.04.2020. In the said intra Court appeal as well, Saif Energy had sought the suspension of Zaver Petroleum's request for arbitration submitted before the LCIA. Vide order dated 15.07.2020, notices were issued to the respondents in the said appeal and the matter was adjourned to a date in office. Furthermore, it was ordered that *"till then, no adverse action shall be taken against [Saif Energy]."* Aggrieved by the said order, Zaver Petroleum filed Criminal Petition No.1039/2020 before the Hon'ble Supreme Court. Vide order dated 08.10.2020, the said petition was dismissed after the learned counsel for Zaver Petroleum stated that he would not press the petition and would approach the Hon'ble Peshawar High Court for an early hearing of the appeal.

ARBITRATION PROCEEDINGS INITIATED BY ZAVER PETROLEUM AGAINST SAIF ENERGY BEFORE THE LONDON COURT OF INTERNATIONAL ARBITRATION:-

21. As mentioned above, Zaver Petroleum, on 10.04.2020, filed a request for arbitration before the LCIA. It appears that since Zaver Petroleum, in its request for arbitration filed before the LCIA, had agitated disputes arising from or related to the Letter Agreement as well as the Farmout Agreement, the said request was not registered. Subsequently on 24.04.2020, Zaver Petroleum filed two requests for arbitration under the said two agreements before the LCIA which were registered as arbitration request No.204719 and arbitration request No.204720.

22. Zaver Petroleum, in its claim, had sought specific performance of the Farmout Agreement along with damages for breach of clause 2.2 thereof by failing to submit the Kohat Deed of Assignment for the D.G.P.C.'s approval. Zaver Petroleum had also made a claim for damages for breach of clause 2.7 of the said agreement against Saif Energy for failing to obtain Zaver Petroleum's prior written consent before approving any work programme commitment, budgets, expenses and cash calls *inter alia* pertaining to work done in the Kohat Block. Zaver Petroleum had also made a claim for damages for breach of the arbitration agreement set out in clause 4.3 against Saif Energy for initiating proceedings before the Civil Court at Kohat.

23. As regards the Letter Agreement, Zaver Petroleum made a claim against Saif Energy for breach of clause 5 by failing to submit the Kohat Deed of Assignment for the D.G.P.C.'s approval. Zaver Petroleum also made a claim for damages against Saif Energy for breach of the arbitration agreement in clause 7 of the Letter Agreement by initiating proceedings before the Civil Court at Kohat.

24. Zaver Petroleum sought US Dollars 3,827,126 as its share of sale proceeds, i.e. 16.67% of the total revenues (less royalties and OPEX) of US Dollars 22,958,165 due to Saif Energy not submitting the Kohat Deed of Assignment for the D.G.P.C.'s approval. Zaver Petroleum also sought damages in the amount of US Dollars 1,950,000 in respect of clause 2.7 of the Farmout Agreement and US Dollars 100,000 plus Pak Rupees 5,464,204/- for breach of the arbitration agreement.

25. On 30.06.2020, Saif Energy filed its jurisdictional objections and replies to the said requests before the LCIA and on 07.09.2020, Saif Energy submitted two applications before the Arbitrator for bifurcation of the proceedings into a jurisdictional stage and a merit stage in both the references. After Zaver Petroleum submitted replies to the said applications, the Arbitrator, on 16.10.2020, ordered the bifurcation of the cases into a jurisdictional stage and a merit stage. The jurisdictional hearing took place on 15.01.2021 and an award on jurisdiction was rendered by the Arbitrator on 19.03.2021. On 26.03.2021, Zaver Petroleum filed an application (Enforcement Petition No.2/2021) before this Court for the recognition and enforcement of the said arbitral award dated 19.03.2021.

26. The Arbitrator, in his award on jurisdiction dated 19.03.2021, had ordered that *"the costs and expenses occasioned by the application on jurisdiction are to be borne in their entirety by [Saif Energy]."* On 04.06.2021, Zaver Petroleum filed an application before the Arbitrator for quantification of costs and expenses related to the jurisdictional hearing. On 05.11.2021, the Arbitrator rendered the award entitling Zaver Petroleum the following costs and expenses occasioned on the application on jurisdiction between 06.11.2020 and 29.01.2021:-

> ***"a. USD 78,000 in respect of the legal costs of Cornelius, Lane & Mufti;***
> ***b. USD 12,220 in respect of the legal costs of Mr. Abbas Kazmi; and***
> ***c. PK 227,084 in respect of expenses."***

27. In addition to the above, the Arbitrator also entitled Zaver Petroleum to the reimbursement by Saif Energy of its share of the costs of arbitration occasioned by the application on jurisdiction, in an amount to be determined by the LCIA Court in due course. On 30.11.2021, Zaver Petroleum filed an application (Enforcement Petition No.6/2021) before this Court for the recognition and enforcement of the said arbitral award dated 05.11.2021.

28. The arbitration proceedings culminated in the final award dated 24.03.2022. Perusal of the said award shows that Saif Energy was due to submit its statement of defense and counter claim on 07.05.2021, but instead it informed the Arbitrator that it would take no further part in the

proceedings and its counsel ceased to act. Saif Energy took no further part in the substantive proceedings but it did file a response to Zaver Petroleum's application on costs and expenses submitted in relation to the jurisdictional proceedings. In the final award, Zaver Petroleum is referred to as the "Claimant" whereas Saif Energy as the "Respondent." The operative part of the award is in the following terms:-

"188. In respect of the Claimant's claims for relief, and in light of the findings I have set out above, I HEREBY ORDER AND DECLARE that:

(i) the Respondent is contractually obliged to transfer the Kohat Working Interest to the Claimant under the Farmout Agreement and the Letter Agreement;

(ii) the Respondent failed to do so, in that it failed to submit the executed Deed of Assignment to the DGPC for approval, which constitutes a breach of clause 2.2 of the Farmout Agreement and clause 5 of the Letter Agreement;

(iii) the Respondent's failure to transfer the Kohat Working Interest to the Claimant constitutes an actionable breach of the Farmout Agreement and the Letter Agreement;

(iv) the Respondent is ordered immediately to perform its obligations under clauses 2.2 and 5 of the Farmout Agreement and Letter Agreement respectively, and to submit the executed Deed of Assignment to the DGPC for approval;

(v) the Respondent is contractually bound to obtain the Claimant's prior written consent before approving any work programme commitment or expense at the Kohat Block and has failed to do so, in breach of Clause 2.7 of the Farmout Agreement;

(vi) the Respondent's initiation of the Pakistani Court Proceedings constitutes a breach of the Arbitration Agreement at clause 4.3 of the Farmout Agreement;

(vii) in respect of the above breaches, the Respondent is ordered to pay the Claimant:

(a) US$3,827,126 in respect of the Respondent's breach of clauses 2.2 and 5 of the Farmout Agreement and Letter Agreement respectively, and

(b) US$100,000 and PKR5,464,204 in respect of the Respondent's breach of the arbitration agreement at clause 4.3 of the Farmout Agreement.

(c) no award of damages is made in respect of the Clause 2.7 Claim, which is rejected.

(viii) the Claimant is entitled to its costs and expenses occasioned by these proceedings,

(ix) in respect of its costs, the Respondent is ordered to pay the Claimant:-

(a) the grand total of [PKR 997,300/- plus USD 164,480 plus GBP 20,429.71] in respect of its legal costs and expenses; and

(b) GBP94,745.52 in respect of the arbitration costs as determined by the LCIA Court."

29. For the recognition and enforcement of the final award dated 24.03.2022, Zaver Petroleum has filed application (Enforcement Petition

No.01/2022) under Section 6 of the 2011 Act. Along with the said application, Zaver Petroleum also filed an application for interim relief under Order XXXIX. Rules 1 and 2 read with Section 151 C.P.C. Zaver Petroleum's anxiety was that Saif Energy was not making payments against the cash calls made by the Operator of the Kohat Block, i.e. O.G.D.C.L. It was asserted that even though Saif Energy was not making payments against cash calls, it was receiving payments against invoices for natural gas supplied to Attock Refinery Limited ("ARL") and Sui Northern Gas Pipelines Limited ("SNGPL"). In this way, according to Zaver Petroleum, its liabilities qua its interest in the Kohat Block were mounting with every passing day. It was asserted that in the event this Court ultimately recognizes and enforces the final award, the same would be of no benefit to Zaver Petroleum as Saif Energy would have created liabilities by not making payments against cash calls. Zaver Petroleum, for the sake of preservation of the *lis*, sought a direction that the amount against the invoices raised before ARL and SNGPL to be deposited in an escrow account.

30. As mentioned above, under the final award dated 24.03.2022, Saif Energy was obligated to transfer the Kohat Working Interest to Zaver Petroleum pursuant to the terms of the Letter Agreement and the Farmout Agreement. Furthermore, Saif Energy had been ordered to perform its obligations under the provisions of the said agreements and to submit an executed Kohat Deed of Assignment to the D.G.P.C. for approval. For Saif Energy's failure to assign the Kohat Working Interest to Zaver Petroleum, Saif Energy was ordered to pay US Dollars 3,827,126 in addition to US Dollars 100,000 and Pak Rupees 5,464,204/- for Saif Energy's breach of the arbitration clause contained in the Farmout Agreement.

31. After hearing the learned counsel for Saif Energy, this Court, vide order dated 28.04.2022, directed Saif Energy to furnish by 10.05.2022 an irrevocable bank guarantee issued by a scheduled bank in Pakistan in favour of Zaver Petroleum for an amount of US Dollars 1.2 million plus US Dollars 100,000 and Pak Rupees 5,464,204/-. The said order dated 28.04.2022 was assailed by Zaver Petroleum through Intra Court Appeal

No.189/2022 which was dismissed with costs vide order dated 25.05.2022 passed by the Division Bench of this Court.

CONTENTIONS OF THE LEARNED COUNSEL FOR ZAVER PETROLEUM:-

32. Mr. Salman Aslam Butt, learned counsel for Zaver Petroleum, after narrating the facts leading to the filing of the aforementioned applications, submitted that on 23.11.2018, Zaver Petroleum signed the Kohat Deed of Assignment and handed it over to Saif Energy for approval of the Joint WIOs of Kohat Block; that the D.G.P.C. had, vide letter dated 16.11.2018, approved the Kohat Deed of Assignment subject to certain conditions; that in the Letter Agreement, the parties had agreed for the consideration for the Kohat Block to be US Dollars 6.2 million and for the Bannu West Block to be US Dollars 0.2 million; that the mechanism for the payment of the consideration, as agreed between the parties was such that if the Deeds of Assignment for the Kohat Block and the Bannu West Block are executed simultaneously, Zaver Petroleum would pay US Dollars 6.2 million within fifteen days of the execution of the said Deeds of Assignment, and if the Deeds of Assignment for the said Blocks are not executed simultaneously, Zaver Petroleum would pay US Dollars 3.2 million on execution of Kohat Deed of Assignment and US Dollars 3 million on execution of the Bannu West Deed of Assignment; that the consideration for the assignment of Saif Energy's share in the Bannu West Block was not US Dollars 3 million; that since Zaver Petroleum has already paid US Dollars 3.5 million to the respondent, an amount of US Dollars 2.7 million remained payable on execution of the Kohat Deed of Assignment; that Note 16.1 of Saif Energy's financial statement for the year ending on 31.12.2018 shows that the consideration for the assignment of its working interest in the Kohat Block was US Dollars 6.2 million; that the delay in the execution of the Kohat Deed of Assignment is operating to Zaver Petroleum's financial detriment inasmuch as Saif Energy's audited financial statement authorized by its Board of Directors on 08.05.2019 show that it is not a going concern, and has incurred a loss of Rs.910.15 million, and its current liabilities exceed its assets by Rs.2,441.19 million, and is unable to repay a loan amounting to Rs.2,653.94 million; and that it is imperative for this Court to pass an order

for securing the amount paid as part consideration for the assignment of Saif Energy's working interest in the Kohat Block.

33. Learned counsel for Zaver Petroleum further submitted that the parties had expressly agreed to the resolution of their disputes arising from or related to the Letter Agreement and the Farmout Agreement through arbitration at the LCIA in accordance with English law; that the institution of a civil suit by Saif Energy before the Civil Court at Kohat was in derogation of the arbitration clause in the said agreements; that the said suit was instituted by Saif Energy with the *malafide* objective to frustrate the arbitration agreements; that the disputes agitated by Saif Energy in the civil suit were within the scope of the arbitration agreements executed between the parties; that the disputes between the parties could not be resolved by any forum other than through arbitration by the LCIA; that the proceedings before the Civil Court at Kohat were *coram non judice* and wholly without jurisdiction; that Zaver Petroleum did not submit to the jurisdiction of the Civil Court at Kohat, and did not take any step in the proceedings pending before the said Court; that Zaver Petroleum had inadvertently filed an application under Section 34 of the 1940 Act before the Civil Court at Kohat; that Saif Energy was correct in taking a position in the reply to the said application that the parties had never agreed to any local arbitration; that Zaver Petroleum withdrew its application under Section 34 of the 1940 Act and simultaneously filed an application under Order VII, Rule 10 C.P.C. praying for the return of the plaint in the suit; that the Civil Court at Kohat has correctly allowed the said application under Order VII, Rule 10, C.P.C.

34. Furthermore, it was submitted that under Section 3(1) of the 2011 Act, the High Court has exclusive jurisdiction *"to adjudicate and settle matters related to or arising from"* the said Act; that the preamble of the said Act shows that it was enacted to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards; that accordingly the only Court in which Saif Energy could have challenged the arbitration agreements is the High Court and none other; that Zaver Petroleum had filed application (Civil Suit No.01/2019) before this Court under Section 3 of the 2011 Act for a conservatory measure in furtherance of and in support of

the arbitration agreements between the parties; that Zaver Petroleum had applied for interim relief so that the subject matter of this dispute was preserved until the final resolution of the disputes between the parties through arbitration; that by filing the said application, Zaver Petroleum was in fact seeking the enforcement of the arbitration agreements and had not waived its rights to have its disputes with Saif Energy resolved through arbitration; and that this Court had the jurisdiction to entertain the said application as all the agreements between Zaver Petroleum and Saif Energy were executed at Islamabad, all payments were made and received at Islamabad, and Saif Energy has offices in Islamabad. It was also submitted that none of the grounds enumerated in Article V of the NY Convention were satisfied in the case at hand to refuse recognition and enforcement of the award dated 19.03.2021 on jurisdiction, award dated 05.11.2021 on costs and final award dated 24.03.2022. Learned counsel for Zaver Petroleum prayed for the said awards to be recognized and enforced.

CONTENTIONS OF THE LEARNED COUNSEL FOR SAIF ENERGY:-

35. Syed Ahmad Hassan Shah, learned counsel for Saif Energy submitted that Saif Energy had not agreed to assign its entire working interest in the Kohat Block to Zaver Petroleum; that Saif Energy had 10% working interest in the Kohat Block; that another WIO namely, Tullow Pakistan (Developments) Limited had surrendered an additional working interest of 6.667% in favour of Saif Energy; that Zaver Petroleum delayed the performance of its obligation under the Farmout Agreement; that the D.G.P.C., vide letter dated 16.11.2018, granted a conditional approval for the assignment of Saif Energy's working interest in the Kohat Block to Zaver Petroleum; that Zaver Petroleum delayed the fulfillment of the conditions on which the said approval was granted; that since Zaver Petroleum failed to perform its part of the bargain, Saif Energy was constrained to withhold the submission of the Deed of Assignment to the D.G.P.C.; that the consideration for the assignment of Saif Energy's working interest in the Kohat Block was US Dollars 3.2 million plus unpaid cash calls, and not US Dollars 6.2 million as alleged by Zaver Petroleum;

that out of the total consideration of US Dollars 3.2 million, Zaver Petroleum has only paid US Dollars 0.5 million; that the other amounts paid by Zaver Petroleum pertained to other Blocks and not the Kohat Block; that the figure of US Dollars 6.2 million entered in clause 4 of the Letter Agreement as consideration for the assignment of Saif Energy's working interest in the Kohat Block *"was for allocation purpose for accounting reasons";* that Zaver Petroleum, in its letter dated 30.05.2019, had conceded that an amount of US Dollars 2.7 million remained payable for the Kohat Block; that the remaining consideration payable by Zaver Petroleum continues to increase with the passage of time on account of unpaid cash calls; and that through letter dated 31.10.2019, Saif Energy had only informed O.G.D.C.L. about the proceedings in the suit before the Civil Court at Kohat.

36. Furthermore, it was submitted that Zaver Petroleum had not filed an application under Sections 3(2) or 4(1) of the 2011 Act before the Civil Court at Kohat for the stay of the proceedings in the suit; that Zaver Petroleum had filed application (Civil Suit No.01/2019) before this Court to thwart the proceedings in the suit pending before the Civil Court at Kohat; that the provisions of the 2011 Act were not applicable to the dispute between the parties since they are both subject to Pakistan law and cannot agree to the ouster of jurisdiction of the Courts in Pakistan; that by unconditionally withdrawing its application under Section 34 of the 1940 Act, Zaver Petroleum is estopped from enforcing the arbitration clause in the Farmout Agreement; that this Court did not possess civil original jurisdiction in respect of the matter which was pending before the Civil Court at Kohat; that the arbitration clause in the Farmout Agreement was unenforceable having been repudiated by Zaver Petroleum's actions; and that the only Court which would be competent to adjudicate upon allegations of *malafide* would be the Courts in Pakistan.

37. It was further submitted that the application for the enforcement of the final award was not accompanied by a resolution of Zaver Petroleum's Board of Directors authorizing the person who had signed the application to file the same; that Zaver Petroleum has not complied with the mandatory requirement under Order VII, Rule 19 C.P.C. of filing the memorandum of

address *(fard pata);* that Zaver Petroleum did not comply with Section 5 of the 2011 Act read with Article IV of the NY Convention by filing a *"duly authenticated original award or a duly certified copy thereof"* along with its application for the recognition and enforcement of the final award; that Pakistan law does not permit domestic parties to select a foreign forum and/or foreign governing law to resolve their disputes; that the Exception to Section 28 of the Contract Act, 1872 does not envisage contracting parties from Pakistan agreeing to the resolution of their contractual disputes through arbitration in a foreign country; that it is against public policy to recognize a foreign award which has no international or foreign element attached to it; that the final award is an *ex-parte* award rendered without appreciating the material on the record; that Saif Energy did not voluntarily withdraw from the arbitration proceedings but due to the injunctive orders passed by the Hon'ble Peshawar High Court in I.C.A.No.24/2020 and the Civil Court at Kohat; that the final award has been made in contravention of the injunctive orders passed by the Courts in Pakistan; that the question of intrinsic validity of the disputed arbitration agreement was not agreed to be resolved through arbitration; that whether the underlying arbitration agreements are null and void, inoperative and/or incapable of being performed was a question to be determined by the Civil Court at Kohat; that Zaver Petroleum voluntarily submitted to the jurisdiction of Courts in Pakistan; and that the Arbitrator arrogated to himself the power to decide questions of jurisdiction and law that only the Courts in Pakistan could have done.

38. It was further submitted that the final award cannot be enforced in Pakistan as it violates Article 5 of the Constitution and different provisions of the Code of Civil Procedure, 1908, Contract Act, 1872, and the Specific Relief Act, 1877; that the final award conclusively opines on Pakistan law without considering expert evidence on Pakistan law; and that for the purposes of enforcement, this Court is required to frame issues and take evidence in order to make a just adjudication of the matter.

39. Learned counsel for Saif Energy ventured into the merits of the case by asserting that Saif Energy's rights in respect of the Kohat Block were in

the nature of a licence, which was not freely transferable; that the assignment of such rights was subject to the applicable licencing regime administered by the D.G.P.C.; that the conditional approval granted by the D.G.P.C. on 16.11.2018 expired by operation of law / efflux of time before the date of the final award; that Zaver Petroleum concealed this material fact from the Arbitrator in the *ex-parte* arbitration proceedings; and that the Arbitrator could not award damages without leading evidence and therefore the final award is contrary to the provisions of Sections 73 to 75 of the Contract Act, 1872. Learned counsel for Saif Energy prayed for the applications for the enforcement of the three awards to be dismissed.

40. Vide order dated 19.03.2020, this Court appointed Barrister Hassan Ali Raza as *Amicus Curiae.* He came up with a well-prepared brief on the case and the same has proven to be invaluable for deciding these applications.

41. I have heard the contentions of the learned counsel for the contesting parties as well as the learned *Amicus Curiae* and have perused the record with their able assistance. The facts leading to the filing of the instant application as well as enforcement petitions have been set out in sufficient detail in paragraphs 02 to 31 above and need not be recapitulated.

42. The first objection taken by Saif Energy to the recognition and enforcement of the final award is that Zaver Petroleum had not fulfilled the requirement in Article IV of the NY Convention by filing a *"duly authenticated original award or a duly certified copy thereof"* along with the application under Section 6 of the 2011 Act. Article IV(1)(a) of the NY Convention provides that to obtain the recognition and enforcement of an arbitral award, the party applying for recognition and enforcement shall, at the time of the application, supply the duly authenticated original award or a duly certified copy thereof. The burden of filing the arbitral award in the form required by Article IV(1)(a) is to be discharged *"at the time of the application."*

43. In the instant case, Zaver Petroleum, along with the enforcement petition No.01/2022 (through which it was seeking the recognition and enforcement of the final arbitral award dated 24.03.2022) filed a copy of the

said award accompanied by certification of the notary public, Simon Vargas-Colwill, to the effect that M/s Cornelius Lane & Mufti had verified the authenticity of the said award issued by the LCIA. The certificate of the notary public was also accompanied by an apostille confirming the authenticity of the signature, seal and stamp of the notary public. In the case of Namoos Zaheer Vs. Azfar Hasnain (PLD 2023 Islamabad 220), this Court has observed as follows:-

> ***"The Apostille was issued under the Convention Abolishing the Requirements of Legalisation for Foreign Documents-1961 ("the 1961 Convention"), which the Government of Pakistan has acceded to. The effect of an Apostille in terms of the 1961 Convention is to certify the authenticity of the signature, the capacity in which the person signing the document has acted, and identity of the seal or stamp which the document bears. The Apostille does not authenticate the content of the underlying public document."***

44. Although Zaver Petroleum had filed copies of the award on jurisdiction and award on costs duly certified by the LCIA, the final award had not been so certified. Its authenticity was verified by M/s Cornelius, Lane & Mufti and such verification was certified by the notary public. The NY Convention does not define the terms *"authenticated"* and *"certified"* and Courts have taken varying approaches on whether the authentication and certification of the award is to be made in accordance with the law of the country where the award is made or the laws of the country where its enforcement is sought. Ideally, a foreign award ought to be authenticated and certified either by the arbitrator(s) or the permanent arbitral body to which the parties had submitted, which in the instant case would be the LCIA. Be that as it may, in the case at hand, it is not Saif Energy's objection that a copy of the award on the record is not the one that was rendered by the arbitrator on 24.03.2022. As per the Guide on the Convention on the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 issued by the United Nations Commission on International Trade Law ("the UNCITRAL Guide"**), Swiss courts have adopted a more flexible approach and, in cases where the applicant had failed to show that the relevant document was duly authenticated or duly certified, have held that enforcement should be granted if the party opposing recognition and enforcement does not dispute the authenticity of**

that document. In the instant case, Saif Energy, in its objections to the final award, has not disputed the authenticity of the contents of the award brought on record by Zaver Petroleum. Therefore, it is my view that the mere fact that the final award was not authenticated or certified by the LCIA cannot pose as an obstacle to its recognition and enforcement.

45. Saif Energy has also taken an objection to the maintainability of enforcement petition No.01/2022 on the ground that it has been filed through Muhammad Shahid Malik who is neither a director nor a shareholder of Zaver Petroleum. Saif Energy relies on Article 71(1)(k) of Zaver Petroleum's articles of association to bring home the point that only the directors of Zaver Petroleum are authorized to institute legal proceedings on its behalf. Article 71(1)(x) of the said articles of association provides that a person who is not a director may institute legal proceedings on behalf of Zaver Petroleum subject to the execution of a power of attorney by the directors.

46. Zaver Petroleum committed a mistake by filing an extract of a board resolution of Orient Petroleum Inc. (which is one of the sister concerns of Zaver Petroleum) authorizing Tauqeer Ahmad Nayyar and Muhammad Shahid Malik to *"sign, handle, defend and/or file any suit, appeals, writ petitions, ICAs or CPLAs etc. in any Court(s) in Pakistan."* The Institution Branch of this Court should have raised an objection to the filing of enforcement petition No.01/2022 on the ground that it is not accompanied by a resolution of Zaver Petroleum's board of directors authorizing Muhammad Shahid Malik to institute or file the same. In order to overcome this defect in the institution of the said application, Zaver Petroleum along with its application (CM No.445/2022) filed an extract of board resolution dated 04.02.2020 of Zaver Petroleum through which three persons, including Muhammad Shahid Malik had been authorized to *"sign, handle, defend and/or file any suit, appeals, writ petitions, ICAs or CPLAs etc. in any Court(s) in Pakistan."* Zaver Petroleum ought to have filed this document along with its application under Section 6 of the 2011 Act but I am of the view that the subsequent filing of this resolution has cured the defect in the institution of the said application. This is because the

resolution pre-dates the filing of the said application and is specifically with respect to disputes between Zaver Petroleum and Saif Energy arising from or related to the Farmout Agreement. It cannot be said that the said resolution was passed in order to rectify or validate any action that had been taken by someone not duly authorized to do so. Muhammad Shahid Malik had been authorized on 04.02.2020 to institute legal proceedings prior to the filing of the application (enforcement petition No.01/2022) and therefore the said application cannot be rejected solely on the ground that such authorization had not been filed earlier.

47. It was asserted by Saif Energy that contracts made and to be performed in Pakistan between domestic parties could not provide for a foreign seated arbitration or for the arbitration clause to be governed by a foreign law. Saif Energy took the position that Pakistan law and public policy, particularly in the petroleum concessions sector, distinguishes between contracts made and to be performed in Pakistan between domestic parties and contracts made by or with a foreign party. The latter, according to Saif Energy, is permitted to agree a foreign seated arbitration but not the former. It asserts that an agreement between domestic parties providing for a foreign seated arbitration is in fact an agreement in restraint of legal proceedings because the Exception-1 to Section 28 of the Contract Act, 1872 applies only to arbitration agreements providing for arbitration before ordinary domestic tribunals. It further asserts that it is in cases where a contract involves an international setting or an element of foreign investment that parties are permitted to select a foreign forum for settling their disputes.

48. Saif Energy has stressed that since both the Letter Agreement and the Farmout Agreement were made in Pakistan and were also to be performed in Pakistan by domestic parties, the jurisdiction of the Courts in Pakistan cannot be held to have been ousted by clauses in the said agreements providing for a foreign seated arbitration. In support of this contention, Saif Energy places reliance on the law laid down in the case of M.A. Chowdhury Vs. Messrs Mitsui OSK Lines Ltd. (PLD 1970 SC 373). It was asserted that in the said judgment, it was held that a jurisdiction clause

in a contract providing for a foreign court was clearly an attempt to oust the jurisdiction of the Pakistani Courts.

49. The Hon'ble Supreme Court in the case of M.A. Chowdhury Vs. Messrs Mitsui OSK Lines Ltd. (*supra*) was mindful in preserving the sanctity of contracts providing for the disputes between the parties to be settled by a court in a foreign country. Foreign jurisdiction clauses in contracts were held to be in the nature of arbitration clauses and required to be dealt with in the same manner as arbitration clauses. It was also held that in cases where contracts provide for disputes to be settled through arbitration, the jurisdiction of the Courts is not altogether ousted and that the Courts merely stay their hands to allow the parties to resort to the form of adjudication to which they had previously agreed. It was explained that by simply staying the proceedings, the Courts still retain the jurisdiction to resume the case if the arbitration fails or the parties find it impossible to comply with the form of adjudication to which they had agreed. By no means was it held by the Hon'ble Supreme Court that the parties by contract cannot agree for their disputes to be resolved by a Court in another country or through a foreign seated arbitration.

50. Both Zaver Petroleum and Saif Energy are prudent commercial entities engaged in the business of petroleum exploration. They have consciously agreed to resolve their disputes through arbitration at the LCIA in the United Kingdom. They agreed to the said forum knowing fully well that they are both entities incorporated under the laws of Pakistan; the petroleum exploration blocks with respect to which the contracts were executed are located in Pakistan; and the evidence or documentation with respect to the dispute would be available in Pakistan. Saif Energy did not take the plea of unequal bargaining power when the contracts were executed. It had entered into the contracts on its own volition and therefore their sanctity has to be preserved. Where foreign arbitration is the agreed procedure for resolution of disputes arising between the parties, courts ought to rule in favour of the party invoking arbitration. Financial burden or legal non-viability are not adequate grounds on which the parties can be relieved from their bargain. A foreign seated arbitration cannot be thwarted

on the assertion that it would be inconvenient for one of the parties to be a part of arbitration proceedings conducted in a foreign country. The doctrine of *forum non conveniens*, in my view, has no place where the contract between the parties specifically provides for disputes to be settled through arbitration seated in a foreign country. Reference in this regard may be made to the following case law:-

(i) The Hon'ble High Court of Sindh in the case of Global Quality Foods (Pvt.) Ltd. Vs. Hardee's Food Systems, Inc. (PLD 2016 Sindh 169) has held as follows:-

> ***"The doctrine of Forum non conveniens means some other forum is more proper in the sense of more suitable ends of justice. At the same time the choice of forum selection clause is made in an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honoured by the parties and enforced by the courts. This clauses cannot be objected being improper because it tends to oust a court of jurisdiction is hardly more than a vestigial legal fiction"***

(ii) In the case of CGM (COMPAGNIE GENERAL MARITIME) Vs. Hussain Akbar (2002 CLD 1528), the agreement between the parties contained a clause providing for any claim or dispute to be governed by the laws of France and for all actions under the contract to be brought before Tribunal de Commerce in Paris to the exclusion of the jurisdiction of a court of any other country. The Hon'ble High Court of Sindh, after making reference to the law laid down in the cases of M.A. Chowdhury Vs. Messrs Mitsui O.S.K. Lines Limited and others (PLD 1970 SC 373) and Eckhartd & Company Vs. Muhammad Hanif (PLD 1993 SC 42) , *inter alia* held as follows:-

> ***"The choice is between Tribunal de Commerce in Paris or Karachi where the present suit has been filed. Both parties will have to bring their witnesses either to Karachi or Paris and incur expenditure in doing so. It is difficult to say which place would be less inconvenient and more expensive. It is, however, clear that the dispute shall be governed by the law of France on the basis of the jurisdiction clause. The law of France on the subject will have to be proved by production of expert witness in Karachi which would entail additional expense and inconvenience. A French Tribunal would be less inconvenient and better placed to decide the dispute under French law. The sanctity of the contract has also to be maintained and enforced as laid down by the two Supreme Court judgments referred above. In these circumstances, we are of the view that it would be proper to***

ask the respondent to refer his dispute for decision by Tribunal de Commerce in Paris as contemplated by the Bill of Lading. "

(iii) In the case of Jes & Ben Groupo (Pvt.) Limited Vs. Hell Energy (2019 SCC Online Delhi 10225), the plaintiff had taken a plea of the same nature as the one taken by Saif Energy in the instant case. The plaintiff tried to wriggle out of a foreign jurisdiction clause by asserting that no cause of action had arisen outside India and that the Hungarian Chamber of Commerce was not the appropriate or convenient forum to resolve the disputes between the parties. In the said case, it was held that *forum non conveniens* could not make a subject matter non-arbitrable or incapable of being performed.

(iv) The judgment in the case of Bremem Vs. Zapata Off–Shore Co. (407 U.S. 1 (1972)) is a recognition by the United States Supreme Court that businessing, dealing openly and without coercion, should be allowed to stand by their reasonable contractual selection of judicial forum. In the said case, it was held that a party seeking to avoid a forum-selection clause must show that enforcement would be unreasonable, unfair or unjust and that the remoteness of the forum was not to be viewed as the determinative factor when the parties had deliberately chosen a neutral ground.

51. Party autonomy is considered as the cornerstone of arbitration. There is indeed no prohibition on two Pakistani parties from opting for a foreign seat of arbitration. A foreign seated arbitration and an award rendered in such an arbitration attracts the provisions of the 2011 Act, which is premised on the NY Convention. The Geneva Convention on the execution of Foreign Arbitral Awards of 1927 ("the Geneva Convention") was expressly limited to agreements to arbitrate between parties that were nationals of different contracting States. This is not so under the NY Convention. Under the NY Convention, all awards which may arise out of arbitrations seated in countries that are signatories to the said Convention will be treated as foreign awards. Once Saif Energy and Zaver Petroleum consciously agreed to a foreign seated arbitration and for the arbitration agreement to be governed by English law, it was no longer open to any of

them to contend that the agreement was void or that the award rendered in such arbitration was unenforceable under the provisions of the 2011 Act.

52. Pakistan may well have at the stage of the drafting of the NY Convention suggested that it should apply to arbitral awards arising out of differences between persons, whether physical or legal, domiciled territories of different States but neither the NY Convention nor the 2011 Act restrict the application of the said Convention and statute only to those awards where the parties are domiciled in different territories. The mere fact that the petroleum concession agreement executed with respect to the Kohat Block between the President of Pakistan and the WIOs provides for disputes to be settled in accordance with the 1940 Act would be of no consequence in determining whether the parties to the Letter Agreement and the Farmout Agreement should not be permitted to deviate from their bargain to have their disputes settled through arbitration at the LCIA. This also holds true as regards the requirement of the D.G.P.C. for the Deed of Assignment to provide for disputes to be settled in accordance with the 1940 Act.

53. Section 28 of the Contract Act, 1872 provides that every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights, is void to that extent. Exception-1 to the said Section provides that the said Section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

54. The case at hand is clearly covered by Exception-1 to Section 28, which does not distinguish between domestic and foreign arbitration. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute(s) adjudicated by having the same referred to arbitration. Merely because the agreement provides for a foreign seated arbitration cannot by itself be

enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Exception to Section 28 of the Contract Act, 1872 does not distinguish between domestic and foreign arbitration. Exception to Section 28 of the Contract Act, 1872 expressly excepts arbitration from the clutches of Section 28, which is an express approval to party autonomy which in turn is the very basis of the 2011 Act.

55. I would tend to agree with Zaver Petroleum that there is no express bar upon two domestic parties opting for arbitration to be conducted in a foreign country or for the contract to be governed by a foreign law. In the case of Atlas Export Industries Vs. Kotak & Company (AIR 1999 SC 3286 = 1999 (7) SCC 61), a company incorporated in India was resisting enforcement of a foreign arbitral award in favour of another company which was also incorporated in India on the very same grounds as the ones which have been agitated by Saif Energy to resist the enforcement of the three awards rendered by the arbitral tribunal in Zaver Petroleum's favour. In the said case, even though an Indian company had entered into a contract with a company incorporated in Hong Kong, the goods were to be supplied through an Indian company namely, Kotak & Co. in Mumbai. As per the arbitration agreement contained in the contract, the arbitration was to take place in London in accordance with the Arbitration Rules of Grain and Feed Trade Association. Disputes arose between the parties and an award was rendered. The respondent moved an application under the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 before the High Court seeking enforcement of the award. The award was made a rule of the court and subsequently a decree was passed in terms of the award, against which an appeal was filed by Atlas taking the ground that the award is unenforceable on account of being contrary to Sections 23 and 28 of the Contract Act, 1872. The principal contention of the appellant was that the parties between whom the dispute arose, being Indian parties could not have resorted to a foreign seated arbitration so as to impliedly exclude the remedy available under ordinary Indian law. It was asserted that the parties between whom the dispute arose were Indian parties, and the contract which had the effect of compelling them to resort to arbitration by foreign

arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy. This argument was rejected. The Indian Supreme Court observed that agreements entered into between two parties domiciled in India providing for a foreign seated arbitration would not be in violation of public policy since they would qualify under Exception-1 to Section 28 of the Contract Act, 1872. Furthermore, it was held that merely because the arbitration was in a foreign country that by itself cannot be a reason to nullify the arbitration agreement, when the parties with their eyes open, willingly entered into an arbitration agreement. For the purposes of clarity, paragraph 11 of the said report is reproduced herein below:-

> ***"The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willingly initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award..."***

56. Recently, the question whether there is anything in the public policy of India which interdicts the party autonomy of two companies incorporated in India from referring their disputes to arbitration at a neutral forum outside India came to be considered by the Indian Supreme Court in the case of PASL Wind Solutions Private Limited Vs. GE Power Conversion India (Private) Limited (AIR 2021 SC 2517). In the said case, a dispute arose between two Indian parties pertaining to supply and warranties of certain converters. The seat for arbitration was Zurich, Switzerland but the hearings in the arbitration were held in Mumbai, India. After the passing of the final award, GE called upon PASL to pay the amounts awarded in its favour. Since PASL failed to oblige, GE initiated enforcement proceedings under the provisions of the Arbitration and Conciliation Act, 1996 before the High Court of Gujarat, within whose jurisdiction PASL's assets were located. PASL resisted the enforcement of the award on the ground that two Indian parties cannot designate a seat of arbitration outside India as

the same would be contrary to Sections 23 and 28 of the Contract Act, 1872. The Indian Supreme Court, after citing numerous judgments on public policy and referring to Sections 23 and 28 of the Contract Act, came to the conclusion that the balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favour of freedom of contract as there was no clear and undeniable harm caused to the public in permitting two Indian nationals from referring their dispute to arbitration at a neutral forum outside India. The argument of PASL that since two Indian parties cannot opt out of the substantive law of India and therefore, ought to be confined to arbitrations in India was spurned. Furthermore, it was held that Exception-1 to Section 28 of the Contract Act, 1872 specifically saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration; and that it is for this reason that the said Court in the case of Atlas Export Industries Vs. Kotak & Company (*supra*) referred to the said Exception and found that there is nothing in Sections 23 and 28 which interdicts two Indian parties from getting their disputes arbitrated at a neutral forum outside India. While holding that *"nothing stands in the way of party autonomy in designating a seat of arbitration outside India even where both parties happen to be Indian nationals"* reliance was placed on the law laid in the case of Centrotrade Minerals & Metal Inc. Vs. Hindustan Copper Ltd. (2017 (2) SCC 228) wherein it was held as follows:-

> ***"44. For the present we are concerned only with the fundamental or public policy of India. Even assuming the broad delineation of the fundamental policy of India as stated in Associate Builders we do not find anything fundamentally objectionable in the parties preferring and accepting the two-tier arbitration system. The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration – either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration –***

the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open."

57. The case of Dholi Spintex (Private) Limited Vs. Louis Dreyfus Company India (Private) Limited (2020 SCC OnLine Del 1476) pertained to a contract executed in India between Indian parties and to be performed in India. The party resisting the enforcement of a foreign arbitral award had asserted before the Delhi High Court that in terms of Section 23 of the Contract Act, 1872, the contract of such a nature would be unlawful and void as it would defeat the provisions of law or would be opposed to public policy. It was also asserted that two Indian parties could not have avoided the Indian law by choosing a foreign seat of arbitration and a specific foreign system of law. The said assertion was rejected in the following terms:-

"31.5 The issue raised by learned counsel for the plaintiff that whether two Indian parties can choose a foreign system of law as the substantive law of the contract i.e. whether two Indian parties can agree to contract out of substantive Indian law is no more res-integra having been decided by the Supreme Court, Madhya Pradesh High Court and this Court as well. In the decision reported as 1999 (7) SCC 61 Atlas Export Industries vs. Kotak & Company Supreme Court dealing with this issue, referring to Exception 1 to Section 28 of the Indian Contract Act held that an agreement to refer the disputes to arbitration does not imply that there is an exclusion by the agreement to have recourse to legal proceedings. It was further held that merely because arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement."

The Madhya Pradesh High Court in the case of Sasan Power Limited Vs. North American Coal Corporation (2015 SCC OnLine MP 7417) held that two Indian parties can arbitrate outside India. An appeal against this judgment was dismissed with costs by the Indian Supreme Court.[1]

58. As mentioned above, there is no bar imposed by any statute or judge-made law barring entities established or incorporated in Pakistan from agreeing to resolve their contractual disputes through a foreign seated arbitration. Saif Energy having agreed to such arbitration under the terms of the Latter Agreement and the Farmout Agreement cannot resist the enforcement of the awards on the ground that the disputing parties were both incorporated in Pakistan.

[1] Sasan Power Limited Vs. North American Coal Corporation (AIR 2016 SC 3974) = (2016 (10) SCC 813)

59. Saif Energy has taken the plea that Zaver Petroleum could not have filed a request for arbitration before the LCIA without the *status quo* order dated 29.08.2019 issued by the Civil Court at Kohat having specifically been vacated or without an order staying the proceedings before the said Court. Saif Energy also asserts that Zaver Petroleum, by withdrawing its application under Section 34 of the 1940 Act, had in effect abandoned its right to have its disputes with Saif Energy resolved through arbitration in accordance with clause 7 in the Letter Agreement and clause 4.3 in the Farmout Agreement. It was also asserted that Zaver Petroleum never filed an application under Section 4 of the 2011 Act praying for the proceedings in the suit instituted by Saif Energy to be stayed. These factors, according to Saif Energy, add credence to its stance that the Civil Court at Kohat was not denuded of jurisdiction to adjudicate upon the suit instituted by Saif Energy.

60. Saif Energy's plea that Zaver Petroleum had submitted to the jurisdiction of the Civil Court at Kohat was rejected by the Arbitrator in his first award dated 19.03.2021. The Arbitrator found that Zaver Petroleum did not submit to the jurisdiction of the Courts in Pakistan and that it had taken a continuous and consistent position that Saif Energy had instituted the suit in Pakistan in breach of the arbitration agreement between the parties. The Arbitrator gave no weight to the withdrawal of the application under Section 34 of the 1940 Act since the application for withdrawal was filed without submitting to the jurisdiction of the Civil Court at Kohat or taking any step in the suit.

61. Now, it needs to be determined whether after the filing of the civil suit by Saif Energy, Zaver Petroleum's conduct was such as to amount to a waiver of its right to arbitrate. On 28.08.2019 Saif Energy, in derogation of the arbitration clause in the Farmout Agreement, filed a two-page suit against Zaver Petroleum before the Civil Court at Kohat. Through the said suit, Saif Energy sought a declaration to the effect that the Farmout Agreement including the arbitration clause embedded therein is liable to be cancelled and to restrain Zaver Petroleum from asserting rights under the said agreement. Along with the said suit, Saif Energy filed an application for

the grant of an interim injunction to restrain Zaver Petroleum from asserting any rights with respect to the arbitration clause contained in the Farmout Agreement dated 19.04.2018. On 29.08.2019 the Civil Court at Kohat issued summons to Zaver Petroleum and directed the parties to maintain *status quo.* The said order is reproduced herein below in its entirety:-

> ***"Fresh civil suit submitted by learned counsel for plaintiff. Be placed before learned Senior Civil Judge on his arrival for further entrustment on 03.09.2019.***
> ***Along with the plaint, there annexed an application for issuance of ad interim status quo. Preliminary arguments over the same heard.***
> ***Status quo be maintained till the date fixed."***

62. A bare read of the said order shows that it is devoid of reasons and passed with no application of mind. The operation of the said status quo order was mechanically extended from time to time through equally unreasoned orders. Such orders go against the very mandate in Article II(1) of the NY Convention which requires each contracting State to recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. As mentioned above, the NY Convention not just stands incorporated as a part of the laws of this country by virtue of the 2011 Act but on account of Section 8 thereof has primacy over the provisions of the said Act. I am of the view that it is in order to avert Courts other than the High Court from doing what the Civil Court at Kohat did by passing the ad-interim status quo order that the legislature in its wisdom has vested the High Court with exclusive jurisdiction to adjudicate and settle matters related to or arising from the 2011 Act.

63. Coming back to the civil suit instituted by Saif Energy, on 29.08.2019, the Civil Court at Kohat adjourned the matter to 03.09.2019 and on 03.09.2019 to 17.09.2019. The order sheet dated 17.09.2019 shows that no one had tendered appearance for Zaver Petroleum which caused the Court to re-issue summons to Zaver Petroleum. The matter was adjourned to 04.10.2019 on which date, Zaver Petroleum filed an application under Section 34 of the 1940 Act praying for the proceedings in the suit to be

stayed. In the said application, it was explicitly pleaded that the parties had agreed to resolve their disputes through arbitration in accordance with the Rules of the LCIA. It is not disputed that Zaver Petroleum did not file a written statement / defence to the suit. In the reply to the said application, Saif Energy took an objection to its maintainability *inter alia* on the ground that *"the parties had never agreed to any local arbitration nor does there exist (or ever existed) any agreement between the parties which may be subject to Pakistan law."* Zaver Petroleum, in its application dated 16.11.2019 for the withdrawal of the application under Section 34 of the 1940 Act, explicitly made reference to Saif Energy's said objection and pleaded that clause 4.3 of the Farmout Agreement requires the arbitration proceedings to be held in London under the Rules of the LCIA which does not attract the provisions of the 1940 Act but those of the 2011 Act. On the same day, i.e. 16.11.2019, Zaver Petroleum filed an application under Order VII, Rule 10 C.P.C. praying for the return of the plaint in the civil suit. The primary ground taken in the said application was that under Section 3(1) of the 2011 Act, the High Court was vested with exclusive jurisdiction to adjudicate and settle matters related to or arising from the 2011 Act which was enacted to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards pursuant to the NY Convention and matters connected therewith. As mentioned above, the said application under Order VII, Rule 10 C.P.C. was finally allowed by the Civil Court at Kohat and the plaint in Saif Energy's suit was returned.

64. The parties' autonomy and freedom to choose the venue or seat of arbitration is not against the law or public policy. Where a contract, which has a dominant or complete nexus with Pakistan, contains a clause providing for disputes to be settled through a foreign seated arbitration at a venue in a foreign jurisdiction, and one of the parties in derogation of such an arbitration clause institutes legal proceedings before Courts in Pakistan such proceedings are not *coram non judice*. The other party to such contract against whom the legal proceedings are instituted in Pakistan will have the option of either contesting the legal proceedings on merits and thereby forego its right to apply for the proceedings to be stayed or

insisting on the enforcement of the arbitration clause by applying for the proceedings to be stayed. Where such party adopts the latter course by filing an application under Section 4 of the 2011 Act, it will be obligatory on the Court to stay the proceedings and leave the parties to settle their disputes in accordance with the dispute resolution mechanism provided in the contract. Even in cases where any or all the witnesses who are to give evidence in arbitration seated in a foreign jurisdiction are present in Pakistan and even where the relevant record or the site in question is also in Pakistan, the parties cannot be relieved from their bargain of having their disputes resolved through arbitration in a foreign jurisdiction. Arbitration is a specie of contract and Courts in Pakistan are not empowered to re-write the contract between the parties.

65. A defendant against whom a civil suit is filed with respect to a matter which was to be resolved with the plaintiff through a foreign seated arbitration will have the right to apply to the Court where such suit is pending for the proceedings to be stayed so that the disputes which are the subject matter of the suit are resolved by the forum to which the parties had agreed. Where such application is filed, the Court will be under an obligation to stay the proceedings in the suit unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. In the case of Ovex Technologies (Pvt.) Ltd. Vs. PCM PK (Pvt.) Ltd. (PLD 2020 Islamabad 52), this Court held as follows:-

> ***42. Where parties have agreed to refer a dispute to arbitration, and one of them notwithstanding that agreement commences an action to have the dispute determined by a Court, prima facie, the leaning of the Court would be to stay the action and leave the plaintiff to the tribunal to which he has agreed. This consideration is stronger in cases where there is an agreement to submit the disputes arising under a contract to a foreign arbitral tribunal. The case at hand is one such case. In the case of "Travel Automation (Pvt.) Ltd. Vs. Abacus International (Pvt.) Ltd." (2006 CLD 497), the Hon'ble Mr. Justice Khilji Arif Hussain, while at the High Court of Sindh, made a comparative analysis of Section 34 of the 1940 Act and Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005 (which was in pari materia to Section 4 of the 2011 Act) and held that under the former, the Court had the discretion whether or not to stay the proceedings in the suit instituted by a party to an arbitration agreement whereas under the latter, such discretion did not vest in the Court while deciding an application under Section 4 of the 2011 Act."***

66. Where law makers intend to make a provision mandatory, they use the word *"shall."* The word *"shall"* used in Section 4(2) of the 2011 Act and Article II(3) of the NY Convention signifies that it is the duty of the Court and not its discretion to stay the proceedings in the suit where the defendant through an application asserts its right to arbitrate. But in the event the defendant makes no such application, the Court cannot on its own motion either stay the proceedings in the suit or reject the plaint. As per the UNCITRAL Guide, pursuant to Article II(3) of the NY Convention, the Courts' obligation to refer the parties to arbitration is triggered by the *"request of one of the parties."* Arbitration, by definition, is premised on consent, and the parties are always at liberty to waive their prior agreement to arbitrate. In the case of Ovex Technologies (Pvt.) Ltd. Vs. PCM PK (Pvt.) Ltd. *(supra)*, this Court held as follows:-

> ***"31. The right to arbitration, like any other contractual right, can be waived. Waiver of a contractual right to arbitration is ordinarily a question of fact. A waiver of the right to arbitrate may properly be implied from any conduct which is inconsistent with the exercise of that right. Acquiescence to the jurisdiction of a Court may amount to waiver of the right to claim arbitration. There are countless examples of Courts refusing to stay legal proceedings at the instance of a party which had conducted itself in a manner as to constitute a waiver of its right to arbitrate."***

67. I feel the need to reiterate that while a court of law derives jurisdiction from statute, the arbitrator derives jurisdiction from agreement. It is a private procedure established by an agreement between the parties. The parties to such an agreement can vary, amend or waive either expressly or impliedly/by conduct the procedure established by the agreement. In the UNCITRAL Guide, it has been explained that as arbitration, by definition, is premised on consent, the parties are always at liberty to waive their prior agreement to arbitrate, and that if neither party alleges the existence of an arbitration agreement, the court will not *ex officio* refer the parties to arbitration but rather will, as a result, uphold its own jurisdiction. Apparently when the NY Convention was initially drafted, the court of a Contracting State, seized of an action in a matter in respect to which the parties had made an arbitration agreement, had been empowered to refer the parties to arbitration of its own motion. The UNCITRAL Guide explains that the *travaux preparatoires* (the official documents recording

negotiations etc. during the process of creating a treaty) with respect to the NY Convention show that the drafters had specifically deleted the expression *"of its own motion"* from the earlier draft of Article II(3) in order to leave greater freedom to the parties and to preserve the possibility for the parties to waive their right to have a particular dispute resolved through arbitration.[2] A party to an arbitration agreement against whom legal proceedings have been brought before a court in Pakistan may well opt to waive its right to arbitrate and participate in the litigation. It is only in circumstances where the party submits to the jurisdiction of the Courts in Pakistan and thereby waives its right to arbitration that the Courts will retain jurisdiction and none other.

68. Since the arbitration clause in the Farmout Agreement provided disputes between the parties to be settled through arbitration at the LCIA in the United Kingdom, Zaver Petroleum had the option of filing an application under Section 4 of the 2011 Act before the Civil Court at Kohat praying for the proceedings in the suit to be stayed and for the said Court to refer the parties to arbitration. For the purposes of clarity, Section 4(1) of the 2011 Act is reproduced herein below:-

> ***"A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter."***

69. Zaver Petroleum did not file an application under Section 4 of the 2011 Act but one under Section 34 of the 1940 Act (praying for the proceedings in the suit to be stayed) to which Saif Energy took an objection to the effect that since the contract between the parties does not provide for domestic arbitration, an application under the provisions of the 1940 Act was not maintainable. Being faced with this objection, Zaver Petroleum, on 16.11.2019, withdrew its application under Section 34 of the 1940 Act and simultaneously filed an application for the return of plaint in Saif Energy's suit under Order VII, Rule 10 C.P.C. Given the fact that Zaver Petroleum, at the first opportunity in the proceedings before the Civil Court at Kohat, had

[2] Para 69 Article II (3) of the UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

agitated its right to arbitrate by filing an application under Section 34 of the 1940 Act, and after Saif Energy took an objection to the maintainability of the said application, Zaver Petroleum withdrew the same and simultaneously filed an application under Order VII, Rule 10 C.P.C. for the return of the plaint, I am of the view that Zaver Petroleum did not actively participate in the proceedings before the said Court or adopt a posture inconsistent with its right to arbitrate and therefore it cannot be held that it abandoned its right to have its disputes with Saif Energy resolved through the foreign seated arbitration envisaged by clause 4.9 of the Farmout Agreement. In the case of Anna Dockeray Vs. Carnival Corporation (724 F.Supp. 2d 1216), the District Court, Southern District of Florida, Miami Division held that the parities waive their right to arbitrate when they substantially participate in litigation. In the case of Cornell Company Vs. Barber Ross (360 F.2d 512), it was held that a party waives his right to arbitrate when he actively participates in a law suit or takes other action inconsistent with that right. In assessing whether the conduct of the parties amounted to a waiver of their right to arbitrate, the Court of Justice of the State of Rio de Janeiro in the case of Companhia Nacional de Cemento Portland – CNCP Vs. CP Cimentio e Participacoes S/A held that such waiver must be clearly established, i.e. all the parties had to act in a manner that unequivocally demonstrated their wish to waive the arbitration agreement.

70. In the case of Pakistan Refinery Limited Vs. Mst. Shahida Sultan (1988 MLD 1150), Shahida Sultan had filed a suit against Pakistan Refinery Ltd. with respect to a dispute regarding a lease deed which contained an arbitration clause. Pakistan Refinery Ltd. filed a written statement / defence in which it raised a preliminary objection to the effect that the suit was not maintainable in view of the arbitration clause in the lease deed. At the same time, it also filed an application under Section 34 of the 1940 Act praying for the proceedings in the suit to be stayed. The Hon'ble High Court of Sindh held that since the written statement was filed by the Pakistan Refinery Ltd. *"without prejudice"* to the preliminary objection taken therein, it could not be held to have waived its right to seek the proceedings in the suit to be stayed. Zaver Petroleum, in its application under Order VII, Rule 10 C.P.C.,

had also pleaded that the said application was being filed 'without prejudice' to its right to file any appropriate application, if and when required, for referral of any dispute with Saif Energy to arbitration under the 2011 Act.

71. Zaver Petroleum instead of withdrawing its application under Section 34 of the 1940 Act could have simply requested the Civil Court to treat that application as an application under Section 4 of the 2011 Act or even as an application for the return of plaint. It did not do so but instead withdrew that application and simultaneously filed an application under Order VII, Rule 10 C.P.C. praying for the return of the plaint. What is crucial is that in both its applications, Zaver Petroleum had asserted its right to arbitrate. Since Zaver Petroleum had not expressly indicated that it wished to resolve its disputes in the proceedings before the Civil Court at Kohat, I am also of the view that it did not act in a manner that unequivocally demonstrated its wish to waive its rights under the arbitration agreement.

72. Learned counsel for Zaver Petroleum tried to justify the filing of the application for the return of the plaint instead of an application under Section 4 of the 2011 Act by asserting that *"Court"* is defined in Section 2(d) of the 2011 Act to mean *"a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette"* and that since by virtue of Section 3(1) of the said Act, the *"Court"* has exclusive jurisdiction to adjudicate and settle matters related to or arising from the said Act, an application under Section 4 could only have been filed before the High Court and not the Civil Court at Kohat. He further submitted that even though the term *"court"* appearing in Section 4 is not capitalized, it had to be given the same meaning as the one given to the term *"Court"* in Section 2(d) of the 2011 Act. He also submitted that since Section 3(1) contains a *non-obstante* clause, the term *"court"* appearing in Section 4 would mean the High Court.

73. Of late the Hon'ble Lahore High Court has had the occasion to interpret Section 4 of the 2011 Act and in particular the question whether the term *"court"* appearing in the said Section has reference to a High Court or to the court in which legal proceedings have been brought in

respect of a matter which is covered by the arbitration agreement. In the case of M/s Tradhol International SA Sociedad Unipersonal Vs. M/s Shakarganj Limited (2023 CLD 819), the Hon'ble Lahore High Court, after referring to Sections 2(d), 3 and 4 of the 2011 Act, held as follows:-

> ***"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)……"***
>
> **(Emphasis added)**

74. I cannot bring myself to subscribe to the said view taken by the Hon'ble Lahore High Court. Section 4(1) of the 2011 Act is explicit in its terms that a party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, *"apply to the court in which the proceedings have been brought"* to stay the proceedings insofar as they concern that matter. In

the instant case, since the proceedings (i.e. the civil suit) had been brought by Saif Energy before the Civil Court at Kohat, it is that very Court to which Zaver Petroleum could have applied under Section 4(1) to stay the proceedings. The legislature has been conscious in not using the term *"court"* in capitalized form in Section 4 unlike other provisions of the 2011 Act including Sections 3, 5 and 6 of the said Act. It is only where the term *"Court"* is used in capitalized form in the 2011 Act that it would be given the meaning as given to it in the definition Section of the said Act. Thus, where a party to an arbitration agreement brings legal proceedings before a court other than the High Court, it is the court where the legal proceedings have been brought that the other party to the arbitration agreement is to file an application for stay of the proceedings. To hold that the term "court" used in Section 4 only means the High Court would amount to attributing surplusage to the expression *"apply to the court in which the proceedings have been brought"* appearing in Section 4(1).

75. The mere fact that Section 3(1) contains a *non-obstante* clause would also not mean that an application under Section 4 for stay of legal proceedings could only be brought in the High Court. This is because the *non-obstante* clause in Section 3(1) reads thus: *"notwithstanding anything contained in any other law for the time being in force".* Therefore, the High Court is to have the exclusive jurisdiction to adjudicate and settle the matters related to or arising from the 2011 Act regardless of *"any other law"* which expression is relatable to other statutes presently in force but would certainly not include the other provisions of the 2011 Act, including Section 4 thereof.

76. It could be argued that an application under Section 3(2) of the 2011 Act to stay legal proceedings could be brought before the High Court because the legislature has used the term "Court" in the said Section in capitalized form. Closer scrutiny of the said provision leads one to a different conclusion. Section 3(2) reads thus:-

> ***"3(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."***

77. Where the legal proceedings have been brought in the High Court, it is indeed the High Court where an application under Section 3(2) to stay legal proceedings can be filed. However, where the legal proceedings have been brought in a court other than the High Court, it is the court in which the legal proceedings have been brought where the application to stay the legal proceedings has to be filed. To hold otherwise would also amount to attributing redundancy to the expression *"an application to stay legal proceedings ... may be filed in the Court, in which the legal proceedings are pending."*

78. Now, Section 3(2) is to be read with Article II(3) of the NY Convention which obligates the Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement to submit to arbitration, to refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. For the purposes of clarity, Article II(3) of the NY Convention is reproduced herein below:-

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

79. The expression *"the court of a Contracting State, when seized of an action"* used in Article II(3) has an obvious reference to the court where an action is instituted or in other words where the legal proceedings have been brought. One cannot accept the argument of the learned counsel for Zaver Petroleum that an application under Section 3(2) for staying legal proceedings brought before a civil court is to be filed in the High Court because in such a situation, the High Court would obviously not be the court *"in which the legal proceedings are pending."* Therefore, it is my view that it is only in circumstances where the legal proceedings have been brought by a party to an arbitration agreement before the High Court that the application under Section 3(2) will have to be filed in the High Court but not where the legal proceedings have not been brought or are not pending in the High Court. In the latter case, the term "*Court*" used in Section 3(2)

need not be given the meaning given to it in the definition Section, otherwise it would lead to a manifest absurdity. Reference in this regard may be made to the following case law:-

(i) In the case of Muhammad Khan Vs. Obaidullah Jan Babat (PLD 2016 SC 492), it was held as follows:-

> ***"Usually, definition clauses in the Statutory Instruments are scribed subject to the rider that the words and expressions so defined will carry the meaning ascribed to them where the context and the subject so permit. Where the defined meaning being employed results in an obvious anomaly or absurdity, it is not permissible to mechanically and mindlessly inflict such meaning regardless of repugnancy to the context or the subject, to the words or expressions in the provision sought to be interpreted."***

(ii) In the case of Abdul Majid Vs. Province of Sindh (PLD 1974 Karachi 417), it was held that the object of incorporation of definition clause or section in a Statute is generally to declare what certain words or expressions used in that Statute shall mean, and that the definition clause is not meant to be the operative clause of the Statute.

(iii) In the case of Bank of Bahawalpur Ltd. Vs. Chief Settlement & Rehabilitation Commissioner (PLD 1977 SC 164), it was held as follows:-

> ***"Although normally an expression if defined in a Statute has to be given the same meaning wherever it occurs therein, yet there is ample authority for the principle of interpretation that a definition of a term in a Statute is merely declaratory in nature and should not be unnecessarily inflicted where it does not fit in with the subject or context and might lead to anomalies and absurd results. Further strength is lent to this justifiable invocation of the above principle by the express qualification or exception with which section 2 was prefaced, namely "unless there is something repugnant in the subject or context". From this, it is abundantly clear that the definition of "house or of "possession" like any other definitions contained in section 2 would apply only where it is in consonance and fits in with the subject and the context and not otherwise."***

(iv) In the case of Pratap Singh and Ors. Vs. B. Gulzari Lal and Ors. (AIR 1942 Allahabad 50), Dar J. took the following view:-

> ***"It cannot be said that the interpretation clause must necessarily apply wherever the word interpreted is used in the statute and in spite of the fact that there are indications in the statute and in the section where it occurs to control and modify and explain the meaning of the word in a different sense than what is borne out by the interpretation clause"***

80. In the case at hand, the Court of a Contracting State, seized of an action was the Civil Court at Kohat where Saif Energy had filed the civil suit. Had an application under Section 3(2) or Section 4 of the 2011 Act been filed by Zaver Petroleum, the use of the word *"shall"* in Article II(3) of the NY Convention would have left the Civil Court at Kohat with no option but to have referred the parties to arbitration unless it found the arbitration clause in the Farmout Agreement to be null and void, inoperative or incapable of being performed. But the Civil Court at Kohat could not have stayed the proceedings in the civil suit on its own motion. It could, however, have stayed the proceedings if Zaver Petroleum, which was also a party to the arbitration agreement, had applied to the Court to stay the proceedings. The form or manner in which a party is to inform the Court as to its intention to assert its right to arbitrate is immaterial. Whether an application is captioned as having been filed under Section 34 of the 1940 Act; under Section 4 of the 2011 Act; or even under Order VII, Rule 10 C.P.C. is also immaterial. As long as the Court seized of an action is made aware of the arbitration agreement between the parties and the intention of the party against whom the jurisdiction of the Court is invoked to insist on having disputes resolved in accordance with the arbitration agreement, it is immaterial whether such party files an application captioned as having been filed under Section 34 of the 1940 Act; under Section 4 of the 2011 Act; or even under Order VII, Rule 10 C.P.C. In the case of Tallahasee Resources Incorporated Vs. Director General Petroleum Concessions (2021 CLC 423), the agreement between the parties provided for disputes between the President of Pakistan and the foreign WIOs of a petroleum concession block to be resolved through a foreign seated arbitration. After the foreign WIOs instituted a civil suit at Islamabad against the President of Pakistan, the latter filed an application under Section 34 of the 1940 Act praying for the proceedings in the suit to be stayed so that the disputes could be resolved through the agreed foreign seated arbitration. One of the objections taken by the foreign WIOs was that an application under Section 34 of the 1940 Act was not maintainable since the provisions of the said Act

could not be made applicable to a foreign seated arbitration. This objection was spurned by this Court in the following terms:-

> ***"39. If one is to accept the contention of the learned counsel for the appellant that the applicability of the provisions of the 1940 Act to a dispute between the President and a local WIO would, by implication, oust the applicability of the said Act to a dispute between the President and a foreign WIO, this would not denude the learned Civil Court of its power to stay the proceedings in the appellant's suit. It is the substance of the application that has to be seen, and not just its form. The learned Civil Court had ample jurisdiction to treat respondent No.1's application seeking a stay of the proceedings in the appellant's suit as an application under Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("the 2011 Act").***"

81. It ought to be borne in mind that Saif Energy, in its civil suit, had not made a claim or agitated a dispute arising from or related to the Letter Agreement or the Farmout Agreement. Saif Energy had challenged only the arbitration clause contained in the Farmout Agreement. One must appreciate the distinction between a case where one of the parties to a contract providing for a foreign seated arbitration makes a claim under such contract against the other party in a civil suit or proceedings instituted before Courts in Pakistan and a case where one such party challenges the validity of a clause in a contract providing for a foreign seated arbitration or even the very contract containing such a clause through a civil suit or proceedings before Courts in Pakistan. In the former case, if the defendant asserts its right to arbitration through an application under Section 3(2) or 4 of the 2011 Act filed before the Court where the proceedings are pending, the Court will have no discretion but to stay the proceedings unless it finds that the arbitration agreement is null and void or incapable of being performed. In the latter case, the Court will, in my view, have two options. It can either stay the proceedings and leave the matter regarding the validity of the arbitration agreement to be adjudged by the Arbitral Tribunal under the principle of *competence competence* or it can return the plaint by invoking the provisions of Order VII, Rule 10 C.P.C. leaving the plaintiff with the option to file a suit questioning the validity of the arbitration agreement before the High Court under Section 3(1) of the 2011 Act.

82. As regards the first option, Redfern and Hunter (Sixth Edition) explains that an Arbitral Tribunal that is appointed pursuant to an

arbitration agreement can decide its own jurisdiction – including any objection with respect to the existence or validity of the arbitration agreement itself. The Tribunal, in other words, is competent to adjudge its own competence. It is also explained that *"the usual practice under modern international and institutional rules of arbitration is to spell out in express terms the power of an arbitral tribunal to decide upon its own jurisdiction, or (as it is often put) its competence to decide upon its own competence."* In the case at hand, it is not disputed that the arbitration clauses in the Farmout Agreement and the Letter Agreement provided for the disputes between the parties to be settled through arbitration at the LCIA. The parties' choice of the LCIA Arbitration Rules, 2020 ("LCIA Rules"**) imports into their contracts the conduct of the arbitration proceedings to be in accordance with such Rules, including Rule 23.1 which provides that *"the arbitral tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement."* Having adopted the LCIA Rules and thereby having conferred on the Arbitral Tribunal, the power to determine any objection on the validity of the arbitration agreement, Zaver Petroleum was well within its rights to have applied for the proceedings in Saif Energy's suit to be stayed so that the challenge to validity of the arbitration agreement could be determined by the Arbitral Tribunal in accordance with the LCIA Rules.**

83. As regards the second option, Section 3(1) of the 2011 Act provides that *"notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from [the 2011 Act]." "Court"* has been defined in Section 2(d) of the said Act to mean *"a High Court and such other superior Court in Pakistan as may be notified by the Federal Government in the official Gazette."* Now, the 2011 Act was enacted to provide for the recognition and enforcement of not just foreign arbitration awards but also arbitration agreements. The expression *"matters related to or arising from"* in Section 3(1) *ibid* is of the widest amplitude and would, in my view, also encompass a challenge to the validity of an arbitration agreement. This is a

matter which the 2011 Act places within the exclusive jurisdiction of the High Court. The expression *"exclusive jurisdiction"* read with the *non-obstante* clause in Section 3(1) *ibid* would imply that proceedings instituted by a party to challenge the validity of an arbitration agreement providing for a foreign seated arbitration before a Court other than the *"Court"* defined in Section 2(d) would be without jurisdiction. The defendant in such proceedings can apply to the Court before which the proceedings have been brought to return the plaint so that it could be filed before the High Court. In the case at hand, Zaver Petroleum, after having been made to realize by Saif Energy that an application under Section 34 of the 1940 Act was not maintainable, applied for the withdrawal of the said application and simultaneously filed an application for the return of the plaint. Zaver Petroleum's stance, in its application under Order VII, Rule 10 C.P.C., was that *"the subject matter of the suit is within the scope of the 2011 Act and in light of Section 3 thereof, within the exclusive jurisdiction of the High Court of competent jurisdiction."* It was also pleaded that the suit could not have been instituted before the Civil Court and that the plaint was liable to be returned to Saif Energy.

84. The Civil Court at Kohat, vide order dated 08.12.2021, allowed Zaver Petroleum's application under Order VII, Rule 10 C.P.C. and returned the plaint in the suit to Saif Energy with the direction to approach the proper forum. The said order was assailed by Saif Energy in appeal (FAO No.220-P/2021) before the Hon'ble Peshawar High Court. By the time the said appeal was dismissed on 21.10.2022, the Arbitrator had already rendered the awards. The Hon'ble Peshawar High Court, after making reference to Sections 3 and 4 of the 2011 Act, held that *"in terms of Section 3 of the [2011 Act], only the High Court has the exclusive jurisdiction to adjudicate and settle matters related to or arising from the provisions of the [2011 Act]."* Reference in the judgment dated 21.10.2022 was also made to the case of Orient Power Company (Private) Limited Vs. Sui Northern Gas Pipelines Limited (PLD 2019 Lahore 607), wherein it was held that the jurisdiction of ordinary Civil Courts and the High Court under the 2011 Act are not concurrent, and that the High Court had the exclusive jurisdiction to

recognize and enforce foreign arbitral awards. I am told that Saif Energy has assailed the said judgment dated 21.10.2022 before the Hon'ble Supreme Court in Civil Petition No.4210 of 2022.

85. It ought to be borne in mind that Saif Energy, in its suit, had sought the cancellation of the Farmout Agreement as well as the arbitration clause embedded therein. Saif Energy had not made a claim against Zaver Petroleum or agitated a dispute arising from or related to the agreement between the parties. Had it done so, Zaver Petroleum would have been well within its rights to have filed an application for the proceedings in the suit to be stayed so that the disputes between the parties could be resolved through arbitration at the LCIA. When an application for the stay of the proceedings in the suit is filed and the court comes to the conclusion that the arbitration agreement between the parties is not null and void or inoperative or incapable of being performed and the subject matter of the suit was one with respect to which the parties had made an agreement to arbitrate, it would be obligatory for the court to stay the proceedings pursuant to Sections 3(2) and 4 of the 2011 Act. Such a case has to be distinguished from the one where a party to an arbitration agreement institutes proceedings solely for the purpose of challenging such an agreement.

86. In the case at hand, as mentioned above, Saif Energy had filed the suit before the Civil Court at Kohat to seek the cancellation of the arbitration agreement between the parties on the ground that the same is against the prevailing laws of Pakistan. Zaver Petroleum filed an application under Order VII, Rule 10 C.P.C. praying for the plaint in Saif Energy's suit to be returned on the ground that the agreement between the parties contained an arbitration clause providing for a foreign seated arbitration and therefore the Civil Court did not have jurisdiction to proceed further in the matter. Although under the principle of *competence competence* the arbitrator also has the power to determine his own jurisdiction which would include the question of whether there was a valid and subsisting agreement between the parties, Section 3(1) of the 2011 Act gives the "*Court*" exclusive jurisdiction to adjudicate and settle matters related to or arising

from the 2011 Act. As per the preamble to the said Act, it was enacted to provide for *inter alia* the recognition and enforcement of arbitration agreements. A challenge to the validity of an arbitration agreement providing for a foreign seated arbitration would indeed be a *"matter arising from or related to the [2011 Act]."* Due to the *non-obstante* clause in Section 3(1), the exclusivity of the High Court's jurisdiction would be irrespective of the provisions of the Specific Relief Act, 1877 or Section 9 C.P.C. or for that matter any other statute which is not in conformity with Section 3(1). Therefore, it is my view that if a party is desirous of challenging the existence or validity of an arbitration agreement providing for a foreign seated arbitration, it is the High Court which would have exclusive jurisdiction in the matter. In this view of the matter, the Civil Court at Kohat did not commit any illegality by returning the plaint to Saif Energy so that the challenge to the arbitration agreement could be made before the High Court.

87. Now that the order passed by the Civil Court at Kohat for the return of plaint was upheld by the Hon'ble Peshawar High Court, it needs to be determined whether or not the proceedings prior to such order before the Civil Court at Kohat were without jurisdiction. In the case of Sherin Vs. Fazal Muhammad (1995 SCMR 584), it was held that *"the provisions of Order VII, Rule 10 are mandatory and when the Court has no jurisdiction to hear the suit, it is under a compulsion to return the plaint for presentation before the proper Court."* In the case of Saleem Mehtab Vs. Refhan Best Food Company Limited (2010 MLD 1015), Muhammad Ali Mazhar, J. speaking for the Hon'ble High Court of Sindh, held that *"the provisions of Order VII, Rule 10, C.P.C. are mandatory in nature and adjudication by a Court without jurisdiction is a determination coram non judice and in such case, the plaint is to be returned for presentation to the proper Court and this Court cannot pass any judicial order except that of return the plaint."* An order passed by a Court lacking jurisdiction would be *coram non judice*. If a Court has no jurisdiction on the subject matter on which it assumes to act, it has no power to proceed at all, for it is an accepted principle of law

that the proceedings of a Court without jurisdiction are a nullity and its order or judgment without legal effect either on the person or property.

88. It appears that Saif Energy was fully cognizant of the legal position that a suit to challenge the validity of an arbitration agreement providing for a foreign seated arbitration could not be instituted before a Court other than the "*Court*" defined in Section 2(d) of the 2011 Act. It is perhaps for this reason that it challenged the *vires* of Section 2(d) and Section 7 of the 2011 Act before the Hon'ble Peshawar High Court in writ petition No.2364-P/2020. The Federation of Pakistan, through Secretary, Law and Justice Division, which was respondent No.1 in the said petition, contested the matter by filing a written reply. It defended the *vires* of the provisions under challenge in the said petition and referred to several judicial precedents setting out guidelines as to how a challenge to the *vires* of a statute is to be dealt with by the Superior Courts. Vide order dated 22.06.2022, the Hon'ble Peshawar High Court disposed of the said petition in terms of the written comments filed by respondent No.1 in the said petition.

89. Saif Energy asserted that Zaver Petroleum could not have filed the requests for arbitration to the LCIA without obtaining an order from the Civil Court at Kohat for staying the proceedings in the suit. Furthermore, it was asserted that the requests for arbitration had been filed in disobedience of the status quo order granted by the Civil Court at Kohat. In the suit instituted by Saif Energy before the Civil Court at Kohat, it is only the Farmout Agreement and the arbitration clause embedded therein that were challenged. Saif Energy had not sought the rescission of the Letter Agreement or the arbitration clause embedded therein. Saif Energy cannot have a grouse as regards the filing of the requests for arbitration with respect to the Letter Agreement when the said Agreement was not the subject matter of the civil suit before the Civil Court at Kohat.

90. Perhaps Saif Energy has Section 35 of the 1940 Act in mind when it asserts that requests for arbitration could not have been filed without obtaining an order for staying the proceedings in the suit. Section 35 of the said Act provides that no reference or award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject

matter of the reference but when legal proceedings upon the whole of the subject matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the Arbitrator or Umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under Section 34, be invalid.

91. In the 2011 Act, there is no provision in *pari materia* to Section 35 of the 1940 Act. The 1940 Act applies to domestic and not international arbitration. Since Pakistan law is neither the law chosen by the parties to govern their rights and obligations under the Letter Agreement or the Farmout Agreement nor the law governing the arbitration agreements embedded therein nor the curial law governing the arbitration proceedings, it would have no application in determining the question whether Zaver Petroleum could have filed the requests for arbitration without obtaining an order from the Civil Court at Kohat to stay the proceedings in the suit. Hence, mere pendency of a civil suit at Kohat did not pose as a legal obstacle before Zaver Petroleum in instituting the arbitration proceedings before the LCIA. In holding so, reliance is placed on the following case law:-

(i) In the case of M/s Tradhol International SA Sociedad Unipersonal Vs. M/s Shakarganj Limited (PLD 2023 Lahore 621), one of the objections taken to the recognition and enforcement of a foreign arbitral award before the Hon'ble Lahore High Court was that the party that was resisting such award had filed a civil suit challenging the jurisdiction of the LCIA before the Civil Court at Lahore and had obtained an injunctive order. This ground was spurned by the Hon'ble Lahore High Court in the following terms:-

> ***"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."

(ii) In the case of POSCO International Corporation Vs. Rikans International (PLD 2023 Lahore 116), Rikans filed a civil suit before the Civil Court at Lahore against POSCO. Subsequently, POSCO filed a request for arbitration before the Singapore International Arbitration Centre against Rikans. The arbitration proceedings culminated in an award against Rikans, which sought to resist its enforcement by *inter alia* taking the plea that in the absence of a referral by the Civil Court, the award fell foul of the Pakistani law. The Hon'ble Lahore High Court termed the said plea as *"unsubstantiated and fanciful"* and held as follows:-

"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."

(iii) In the case of Messrs Hasan Ali Rice Export Co. Vs. Flame Maritime Ltd. (2004 CLD 334), the Hon'ble High Court of Sindh rejected the contention that the award during the pendency of a suit was a nullity in the eye of law. In the said case, the Hon'ble High Court dismissed the suit as infructuous primarily on the ground that during the

pendency of the suit, an arbitration award had been rendered and for its enforcement, an application under the provisions of the Arbitration (Protocol and Convention) Act, 1937 had already been filed. In the said report, it was also held that once arbitration proceedings are commenced in a foreign country then such proceedings are regulated and controlled by the law at the seat or venue of arbitration and the High Court in Pakistan, in exercise of its civil original jurisdiction, cannot have control or domain over such foreign arbitration proceedings.

92. As regards Saif Energy's grievance that the requests for arbitration were filed by Zaver Petroleum before the LCIA during the subsistence of the status quo order issued by the Civil Court at Kohat, this issue need not be delved into in these proceedings as the Hon'ble Peshawar High Court has already dismissed contempt petition filed by Saif Energy against the officers of Zaver Petroleum. At best if the status quo order was to be treated as an anti-suit injunction restraining Zaver Petroleum from initiating the arbitration proceedings with respect to the disputes arising from or related to the Farmout Agreement, this, by itself, would not be a fetter on an international arbitral body like the LCIA from entertaining a request for arbitration and appointing an Arbitrator for conducting the arbitration proceedings. Be that as it may, with the return of the plaint in Saif Energy's suit by the Civil Court at Kohat, the operation of the status quo order came to an end.

93. On behalf of Saif Energy, it was contended that although Article 16.2 of the LCIA Rules provides for a default seat of arbitration to be in England but under Section 3 of the English Arbitration Act, 1996, the seat is to be determined having regard to the *"parties' agreement and all the relevant circumstances."* It was also asserted that the choice of the parties in the Farmout Agreement and the Letter Agreement to submit to arbitration under the LCIA Rules was not a choice as to the seat of arbitration. Saif Energy's stance was that as the arbitration clauses embedded in the Farmout Agreement and the Letter Agreement were more closely

connected with Pakistan than any other jurisdiction, it is Pakistan law which was the curial law of arbitration.

94. The arbitration clauses in the Letter Agreement and the Farmout Agreement are not identical. For the purpose of a comparative analysis, these clauses are reproduced herein below:-

Clause 7 of the Letter Agreement	**Clause 4.3 of the Farmout Agreement**
This Letter Agreement shall be interpreted under English Law and any dispute thereunder shall, if not settled amicably within a period of ninety (90) days, shall be settled through arbitration at the London Court of International Arbitration <u>at London</u>.	**This Agreement and the relationship between the Parties shall be governed and interpreted under English Law and any dispute thereunder shall, if not settled amicably within a period of ninety (90) days, shall be settled through arbitration at the London Court of International Arbitration, <u>United Kingdom</u>.**

95. The parties had agreed that the Letter Agreement and the Farmout Agreement are to be interpreted and governed under English Law. Section 3 of the English Arbitration Act, 1996 defines the seat of arbitration to mean the juridical seat of the arbitration designated (a) by the parties to the arbitration agreement, (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitration tribunal if so authorized by the parties, or determined, in the absence of such designation, having regard to the parties' agreement and all relevant circumstances. It is only failing an agreement between the parties regarding the seat of arbitration that the seat is to be determined having regard to all the relevant circumstances.

96. The words *"at London"* in clause 7 of the Letter Agreement have been interpreted by the Arbitrator to mean that the arbitration of disputes arising under the Letter Agreement is to take place in London. This caused him to hold that London was the seat of arbitration expressly chosen by the parties in the Letter Agreement which means that the English Arbitration Act, 1996 governs arbitral proceedings brought under the Letter Agreement, and the English Courts had supervisory jurisdiction. I have not been persuaded by the learned counsel for Saif Energy to take a view different from the one taken by the Arbitrator on this matter.

97. As regards the Farmout Agreement, clause 4.3 does not provide for the arbitration to take place at any particular place and the phrase *"arbitration at the London Court of International Arbitration, United Kingdom"* in the said clause has been interpreted by the Arbitrator not to mean anything in terms of determining the seat of arbitration. Unlike the Letter Agreement, in which the phrase *"at London"* is used, there is nothing in the Farmout Agreement indicating where the arbitration is intended to take place. The mere fact that there is no choice as to the seat of arbitration indicated in the Farmout Agreement would not mean that the seat is to be determined having regard to the *"relevant circumstances*." Regard has to be given to the parties' agreement and the parties in the instant case agreed for the arbitration to be at the LCIA where the arbitration is to be conducted under the LCIA Rules.

98. Article 16.1 of the LCIA Rules provides that parties may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal, and after such formation, with the prior written consent of the Arbitral Tribunal. In the case at hand, the Farmout Agreement does not contain an agreement of the parties regarding the seat of arbitration. Even after the disputes arose between the parties, they did not agree to a seat of arbitration. Article 16.2 of the LCIA Rules caters for the situation where there is no agreement between the parties regarding the seat of arbitration. It provides *inter alia* that in default of any such agreement, the seat of the arbitration shall be London (England) unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written submissions to the Arbitral Tribunal, that another arbitral seat is more appropriate. The parties' choice of the LCIA Rules, according to the Arbitrator, imports into the Farmout Agreement a mechanism for determining the seat of arbitration. Accordingly, it was held that in the absence of an express choice as to the seat of arbitration in the Farmout Agreement, the choice of the LCIA Rules meant that London was the default seat of arbitration. Learned counsel for Saif Energy was not able to impeach the said finding of the arbitrator.

99. Saif Energy impeaches the said finding of the Arbitrator by making reference to paragraph 170(viii) of the judgment in the case of Enka Insaat Ve Sanayi AS Vs. OOO Insurance Co. Chubb ([2020] EWCA Civ 574) and submitting that where there is no choice then the law governing the arbitration agreement is the law with which the arbitration agreement is most closely connected and that will most likely be the seat. This is not quite what paragraph 170(viii) of the said judgment sets out. For the purpose of clarity, the said paragraph is reproduced herein below:-

> ***"viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations."***

100. Saif Energy is conflating the law governing the arbitration agreement with the curial law or procedural law applicable to the arbitration. Where the parties do not agree on the law governing the arbitration agreement, the law governing the underlying contract in which the arbitration agreement is embedded is to govern the arbitration agreement. However, as regards the curial law or the procedural law applicable to the arbitration, failing an agreement between the parties, that law is to be the law of the seat of arbitration. In the case of Enka Vs. Chubb ([2020] UKSC 38), it is clearly stated that where an international commercial contract contains an agreement to resolve disputes by arbitration, at least three systems of national law are engaged when a dispute occurs. These are the law governing the substance of the dispute; the law governing the agreement to arbitrate; and the law governing the arbitration process. The law governing the substance of the dispute is generally the law applicable to the contract from which the dispute has arisen. The law governing the arbitration process (curial law) is generally the law of the seat of arbitration, which is usually the place chosen for the arbitration in the agreement. Since clause 7 of the Letter Agreement provides for the arbitration to be *"at London"* and since by virtue of Article 16.2 of the LCIA Rules, the parties would be deemed to have agreed for the seat of arbitration under clause 4.3 of the

Farmout Agreement to be London, the curial law governing the arbitration would be English law and not Pakistan law.

101. Nothing worth the name was submitted on behalf of Saif Energy to object to the enforcement of the award dated 05.11.2021 on costs. The finding of the arbitral tribunal on its jurisdiction has been dealt with herein above and such finding has been held not to suffer from any legal infirmity. Saif Energy had made an effort to delve into the merits of its dispute with Zaver Petroleum but such effort did not satisfy any of the grounds envisaged by Article V of the NY Convention to refuse recognition and enforcement of the awards in question. It may be mentioned that of late the Hon'ble Supreme Court in the case of Taisei Corporation Vs. A.M. Construction Company (Pvt.) Ltd.(2024 SCMR 640) has held as follows:-

> ***"Through an arbitration agreement, the parties undertake to submit to arbitration their disputes, present or future, for resolution. By doing so, they make a choice to have their disputes resolved through a medium that is alternate to the traditional mode of dispute resolution through litigation in courts. Over the years, the courts however expanded the scope of their jurisdiction to examine the validity of an award, under the 1940 Act, to such an extent that arbitration which was an alternate mode of dispute resolution became an additional process before the regular litigation in courts, and thus almost lost its efficacy. Without appreciating the objective of the parties in adopting the alternate mode of arbitration, the courts started examining the merits of the decision made by the arbitrators, as a first appellate court, treating it just a decision of a trial court open to full scrutiny in first appeal on all points of facts and law. Similarly, in the 1937 Act there was a scope for the courts to enter into the merits of the award; for it provided that the enforcement of a foreign award would be refused if its enforcement was contrary to the law of Pakistan, in addition to the ground of its being contrary to the public policy. The New York Convention implemented in Pakistan by the 2011 Act, contains no ground as to the invalidity of a foreign award or its being against the law of the Contracting States, to refuse its recognition and enforcement and thus leaves no room for the courts of a Contracting State to enter into the exercise of examining the merits of a foreign award on the points of facts or law."***
>
> **(Emphasis added)**

102. During the pendency of Application (numbered and registered as Civil Suit No.01/2019), Zaver Petroleum filed the requests for arbitration and in the proceedings pursuant to such requests, awards have already been rendered by the arbitral tribunal. The plaint in the civil suit filed by Zaver Petroleum before the Civil Court at Kohat has been returned and the Hon'ble Peshawar High Court has upheld the order for the return of the

plaint. On account of these developments, Civil Suit No.01/2019 has been rendered infructuous. Furthermore, the reliefs sought by Zaver Petroleum in the said suit have been addressed and answered by the arbitrator, particularly in the award dated 19.03.2021 on jurisdiction, and the final arbitral award dated 24.03.2022.

103. In view of the above, Application (Enforcement Petition No.02/2021), Application (Enforcement Petition No.06/2021), and Application (Enforcement Petition No.01/2022) filed by Zaver Petroleum for the recognition and enforcement of award dated 19.03.2021 on jurisdiction, award dated 05.11.2021 regarding costs on the award on jurisdiction, and final arbitral award dated 24.03.2022, respectively, are allowed in that the said awards are hereby recognized and shall be enforced. Saif Energy's objections to the said awards are dismissed. The said awards shall be executed by this Court in the same mode and manner as decrees. Saif Energy is accordingly directed to show compliance with the said awards by the next date of hearing which is fixed for 25.11.2024. Saif Energy shall bear Zaver Petroleum's costs in all the three enforcement applications.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 24.10.2024

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING