JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.S. No.118 of 2016
China Water & Electric Corporation (CWE) P.R. China
Versus
National Highway Authority, Islamabad

Date of Hearing:	13.09.2023
Applicant by:	Barrister Aleem O. Shahid and Mr. Fazal Maula, Advocate
Respondent by:	Mr. Rizwan Faiz Muhammad and Muhammad Afzal Shinwari, Advocates
Assisted by:	Barrister M. Usama Rauf, Law Clerk.

MIANGUL HASSAN AURANGZEB, J:- Through the instant application under Section 6(1) of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 **("the 2011 Act")**, the applicant, China Water and Electric Corporation (CWE) P.R. China **("CWE")** seeks the recognition and enforcement of interim award dated 06.07.2016 **("Interim Award")** rendered by Mr. Peter H. J. Chapman **("the Arbitrator")** and approved on 30.06.2016 by the International Court of Arbitration of the International Chamber of Commerce **("ICC")**. For the purposes of clarity the prayer made in the said application is reproduced herein below:-

> *"The Petitioner humbly prays the hon'ble Court to most graciously allow this petition and recognize and enforce the appended arbitral Award in the same manner as a judgment or order of a court in Pakistan. Any other relief deemed appropriate under the circumstances may also be granted."*

Factual background:-

2. The record shows that on 03.12.2009, CWE and National Highway Authority **("NHA")** entered into a contract for the construction of Four Lane Faisalabad – Khanewal Project (M4), Package-1: Faisalabad – Gojra Section (58 KM) **("the Contract")**. This was an Asian Development Bank funded project. The documents that constitute part of the Contract were listed in clause 2 thereof and included the General Conditions of Contract **("GCC")** and Particular Conditions of Contract **("PCC")**.

3. The Contract provided for a completion period of 36 months, followed by a defects liability period of one year. The commencement date of the Contract was agreed to be 25.02.2010. It is not disputed that the completion period had been extended. It is also not disputed that works

under the Contract were completed on 29.01.2015 and that the defects liability period expired on 29.01.2016.

4. The parties had agreed to resolve their contractual disputes in accordance with the dispute resolution mechanism provided in the Contract. Any disputes which could not be amicably settled between the parties were required to be referred to the Dispute Board for a decision. A party aggrieved by the decision of the Dispute Board could give notice of its dissatisfaction with such decision to the other party, and thereafter refer the matter to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (“the ICC Rules”). In this regard, Clause 20.6 of the PCC is reproduced herein below:-

> ***“All disputes arising in connection with the Contract shall be finally settled by arbitration. In case of foreign contractor, arbitration shall be carried out in accordance with the Rules of Arbitration of the International Chamber of Commerce, and in case of domestic contractor, arbitration shall be carried out in accordance with the rules and provision of Arbitration Act 1940 of Islamic Republic of Pakistan.”***

5. At this stage, it is necessary to give a brief recital of the disputes that developed between the parties during the course of the works. The Engineer had granted an extension of time (“EOT”) to CWE, causing the time for completion to be extended to 31.12.2013. CWE had also made a monetary claim against NHA regarding costs associated with the EOT. The Engineer, in his decision dated 25.05.2012, had allowed CWE’s claim to the tune of Rs.744,068,695/-. NHA’s refusal to pay the said amount to CWE caused the latter to refer the dispute to the Dispute Board. As per the Dispute Board’s majority decision dated 19.05.2014, CWE was entitled to receive the amount which the Engineer had determined in CWE’s favour. Furthermore, it was decided that CWE would be entitled to receive payment of simple interest at the rate of 6% per annum on the unpaid amount of this claim starting from 18.08.2012. The Dispute Board’s said decision on CWE’s claim shall hereinafter be referred to as “dispute No.1.”

6. The Dispute Board comprised three members. As mentioned above, the said decision dated 19.05.2014 was a majority decision. The third member of the Dispute Board gave a dissenting report in which he had opined that the sum to be awarded to CWE should be approximately 50% of the amount determined by the other two members to be payable to CWE.

7. Vide letter dated 12.06.2014, NHA expressed its dissatisfaction with the Dispute Board's decision dated 19.05.2014 on dispute No.1 and invited CWE for an amicable settlement. NHA also gave notice of its intention to commence arbitration.

8. On 16.06.2014, CWE advised NHA that under clause 20.4 of the GCC, the Dispute Board's decision was binding on both parties who were required to promptly give effect to it unless and until it was revised through an amicable settlement or by an arbitral award. CWE requested NHA to comply with its contractual obligations and to immediately pay the amounts in accordance with the said decision of the Dispute Board.

9. On 16.06.2014, CWE also submitted Interim Payment Certificate ("I.P.C.") No.24 which included the amount that the Dispute Board had held CWE to be entitled to. Vide letter dated 18.06.2014, the Engineer informed CWE that the amount claimed by CWE in I.P.C. No.24 had not been approved by NHA. Furthermore, CWE was informed that since NHA had not accepted the Dispute Board's decision regarding CWE's claim, and since NHA had invited CWE for an amicable settlement, CWE's request to certify I.P.C.No.24 could not be accepted.

10. Since NHA failed to make payment in accordance with the Dispute Board's decision on dispute No.1 CWE, on 01.11.2014, referred the matter regarding NHA's said failure to the Dispute Board. CWE took the position that NHA was in breach of clause 20.4 of the GCC by not making prompt payment in accordance with the Dispute Board's decision on dispute No.1.

11. On 30.12.2014, the Dispute Board decided that NHA's failure to implement the Dispute Board's decision on dispute No.1 did *"not qualify to be treated as a fresh dispute under the Contract provisions"* since NHA had expressed its dissatisfaction with the said decision and also its intention to commence arbitration. This caused CWE to issue a notice dated 05.01.2015 regarding its dissatisfaction with the Dispute Board's said decision dated 30.12.2014. The Dispute Board's decision dated 30.12.2014 shall hereinafter be referred to as "dispute No.2."

12. Now, vide letter dated 28.11.2014, NHA expressed its intention to partially implement the Dispute Board's decision on dispute No.1 and to pay CWE just below half the amount that the Dispute Board had held CWE entitled to. The amount proposed to be paid by NHA was the same as the

one that the dissenting member of the Dispute Board had held CWE to be entitled to. Furthermore, NHA required CWE to provide an unconditional bank guarantee as security equal to the amount proposed to be paid.

13. It is an admitted position that on 31.12.2014, NHA paid an amount of Rs.338 million to CWE in partial implementation of the Dispute Board's decision on dispute No.1. On 06.01.2015 CWE furnished bank guarantee No.IGT087400000315 issued by Habib Bank Limited for an amount of Rs.338 million in favour of NHA.

14. Since CWE had not been paid the amount in terms of the majority decision of the Dispute Board, and since the negotiations between the contesting parties aimed at an amicable settlement of their disputes did not bear any fruit, CWE submitted a request for arbitration on 13.04.2015 to the Secretariat of the I.C.C. Mr. Peter H. J. Chapman of Somersby House Chambers was appointed as the Arbitrator pursuant to Article 13(2) of the I.C.C. Rules. The contesting parties and the Arbitrator signed the terms of reference on 06.09.2015.

15. While the matter was pending before the Arbitrator, CWE made a request for a decision on the preliminary issue regarding the contractual status of the Dispute Board's decision on dispute No.1, and whether the said decision was to be implemented immediately as required by clause 20.4 of the GCC. The Arbitrator was asked to determine whether NHA was in breach of Contract for not showing prompt compliance with the Dispute Board's decision regarding dispute No.1. The petitioner had sought an interim award to the effect that NHA was under an obligation to implement the Dispute Board's majority decision on dispute No.1 and pay CWE Rs.744,068,695/- in addition to interest. CWE also sought the bank guarantee furnished by it to be released, and the costs incurred in furnishing the bank guarantee to be reimbursed to it.

16. The Arbitrator agreed to determine the question regarding the implementation of the Dispute Board's decision on dispute No.1 as a preliminary issue before deciding the other substantive matters in the arbitration. Through the Interim Award, the Arbitrator decided the preliminary issue as to whether and to what extent a party is contractually bound to implement a decision of the Dispute Board and whether the Dispute Board's decision should be enforced by giving an award to that

effect. The Arbitrator held that if a notice of dissatisfaction is served within a period of 28 days of the Dispute Board's decision, such a decision is not final but remains binding, and in accordance with clause 20.4 of the GCC, the parties are required to promptly give effect to it. Furthermore, it was held that a party dissatisfied with a Dispute Board's decision, having issued a notice of dissatisfaction, cannot simply ignore such a decision or not make payment in accordance with it.

17. The Interim Award only determines the question as to whether NHA was in breach of contract by not implementing the Dispute Board's decision on dispute No.1. When the Interim Award was rendered, the merits of CWE's claim for costs associated with the EOT were yet to be determined by the Arbitrator. In the Interim Award, the Arbitrator has recorded that his observations on the preliminary issue will not influence his findings on the substantive matters that he was to decide at a future stage in the arbitration. Through the instant application, CWE is seeking the recognition and enforcement of the Interim Award which only deals with the said preliminary issue and not with the substantive matters that had been referred to arbitration.

Contentions of the learned counsel for CWE:-

18. Learned counsel for CWE, after narrating the facts leading to the filing of this application, submitted that CWE had sought an arbitral award requiring that the full amount that the Dispute Board had held CWE entitled to under dispute No.1 (i.e. Rs.744,068,695/- plus interest) be immediately paid to CWE; that under clause 20.4 of the GCC, NHA was under an obligation to show prompt compliance with the Dispute Board's decision on dispute No.1 irrespective of NHA's dissatisfaction with the said decision; that merely because NHA had issued a notice of dissatisfaction with the Dispute Board's decision on dispute No.1 did not mean that the said decision ceased to be binding or that NHA was absolved from giving effect to the said decision; that the issuance of a notice of dissatisfaction regarding a decision of the Dispute Board was a condition precedent for the review of such a decision either through amicable settlement or arbitration; that NHA's failure to implement the Dispute Board's said decision was a breach of contract; that the laws of Pakistan do not in any manner prevent the grant of an interim measure of the nature sought by

CWE; and that in essence, CWE was seeking the enforcement of NHA's contractual obligation to implement the Dispute Board's decision. Furthermore, it was submitted that NHA's letter dated 28.11.2014 was an admission that NHA was under the obligation to implement the Dispute Board's decision on dispute No.1 in full.

Contentions of the learned counsel for NHA:-

19. On the other hand, learned counsel for NHA submitted that the Dispute Board's decision awarding the above-mentioned amount in CWE's favour was in excess of its jurisdiction and a consequence of failure to adjudicate upon the dispute judiciously; that NHA had served a notice of dissatisfaction with respect to the Dispute Board's decision on dispute No.1; that the Dispute Board's said decision had not become final and binding because NHA had issued a notice to CWE expressing its dissatisfaction with the Dispute Board's said decision and signifying its intention to commence arbitration on the subject matter of the underlying dispute between the parties; that since the dispute between CWE and NHA had already been referred to arbitration, CWE should have waited for the final outcome of the arbitration proceedings; and that the Arbitrator should not have decided the issue of payment in accordance with clause 20.4 of the GCC prematurely.

20. Furthermore, it was submitted that the Dispute Board's decision on dispute No.1 had been revised by a settlement reached between the parties as evidenced by NHA's letter dated 28.11.2014; that CWE had accepted NHA's proposal contained in its letter dated 28.11.2014; that the Dispute Board's decision on dispute No.1 was superseded by the amicable settlement between the parties under which CWE agreed to accept partial payment of Rs.338 million on furnishing a bank guarantee in the said amount; that the said decision had been made to enable CWE to complete the project; that the payment pursuant to the said decision was made subject to the final settlement of the disputes between the parties; that the furnishing of a bank guarantee by CWE in the amount equivalent to the amount paid by NHA implied that CWE had accepted this sum as well as the terms of the settlement reflected in the said letter dated 28.11.2014; that the said settlement had superseded the Dispute Board's decision on

dispute No.1; that since NHA had paid an amount of Rs.338 Million, it was not in default of any of its obligations; and that since CWE accepted NHA's offer of a settlement contained in the latter's letter dated 28.11.2014, it is estopped from seeking the enforcement of the Dispute Board's decision on dispute No.1.

21. Learned counsel for NHA further submitted that NHA would be under an obligation to implement the Dispute Board's decision subject to law and only when such a decision became final and binding; that such a decision would become final and binding only when the learned Arbitrator finally decides the dispute between the contesting parties on merits, and an amount is definitively found to be due and payable by NHA to CWE; that the amount found payable by the Dispute Board under its decision on dispute No.1 cannot be implemented as an interim measure since monetary loss cannot be termed as irreparable; and that if the Dispute Board's decision on dispute No.1 is implemented and the amount of Rs.744,068,695/- is paid to CWE as an interim measure, it would be difficult to recover the said amount from CWE (which is an overseas contractor) in the event the learned Arbitrator finally decides the dispute in NHA's favour after appreciating all the evidence. Learned counsel for NHA prayed for the application to be dismissed.

22. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant application have been set out in sufficient detail in paragraphs 2 to 17 above, and need not be recapitulated.

23. Under Clause 20.4 of the GCC, either party to the Contract may refer a dispute arising from or in connection with the Contract to the Dispute Board. The said Clause also requires the Dispute Board to give its decision within 84 days of receiving the reference. More importantly, the said Clause makes the decision of the Dispute Board binding on the parties and obligates them to promptly give effect to it unless and until it is revised in an amicable settlement or an arbitral award. If either party disagrees with a decision of the Dispute Board, it must serve a notice of dissatisfaction within a period of 28 days to prevent such a decision from becoming final and to enable the parties to revise it through an amicable settlement or

arbitration. Where a decision of the Dispute Board is superseded by an arbitral award or by amicable settlement, such a decision loses its finality and binding nature. For the purposes of clarity, Clause 20.4 of the GCC is reproduced herein below:-

> ***"20.4 Obtaining Dispute Board's Decision***
> ***If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.***
> ***For a DB of three persons, the DB shall be deemed to have received such reference on the date when it is received by the chairman of the DB.***
> ***Both Parties shall promptly make available to the DB all such additional information, further access to the Site, and appropriate facilities, as the DB may require for the purposes of making a decision on such dispute. The DB shall be deemed to be not acting as arbitrator(s).***
> ***Within 84 days after receiving such reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. <u>The decision shall be binding on both Parties,who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award, as described below.</u> Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.***
> ***If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give a notice of its dissatisfaction to the other Party indicating its dissatisfaction and intention to commence arbitration. If the DB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction and intention to commence arbitration.***
> ***In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute, and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Board's Appointment"], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.***
> ***If the DB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DB's decision, then the decision shall become final and binding upon both Parties."***
> **(Emphasis added)**

24. Against CWE's claim for costs associated with the EOT, the Dispute Board on 19.05.2014 awarded Rs.744,068,695/- in its favour. This decision is being referred to in this judgment as the Dispute Board's decision on

dispute No.1. The Dispute Board's decision on dispute No.1 was a majority decision of two to one.

25. Two out of three members of the Dispute Board held that CWE was entitled to the payment of Rs.744,068,695/- along with interest as costs associated with the EOT. Clause 9(b) of the General Conditions of Dispute Board Agreement, which is an integral part of the GCC, provides that the Dispute Board shall endeavour to reach a unanimous decision and that if it proves impossible, the applicable decision shall be made by a majority of the members who may require the minority member to prepare a written report for submission to the employer and the contractor. In terms of clause 9(b) *ibid*, the decision by two members of the Dispute Board is to be treated for all intents and purposes as the decision of the Dispute Board unless and until it is superseded by an amicable settlement or an arbitral award. The minority member of the Dispute Board is required to prepare a written report but such report does not form part of the decision of the Dispute Board, and is therefore not binding on the parties.

26. With respect to the said decision NHA, on 12.06.2014, issued a notice of dissatisfaction and intention to commence arbitration. A notice of dissatisfaction simply leaves the door open for an amicable settlement or arbitration.

27. Subsequently, on 31.12.2014, NHA paid Rs.338 million to CWE in partial implementation of the Dispute Board's said decision. NHA, through its letter dated 28.11.2014, had required CWE to furnish a bank guarantee to secure repayment of the said amount. On 06.01.2015, CWE had furnished a bank guarantee in NHA's favour for the said amount.

28. CWE had applied to the Arbitrator to direct NHA to give prompt effect to the Dispute Board's decision on dispute No.1. CWE had requested the Arbitrator to determine this as a preliminary issue. The Arbitrator agreed to do so and in the Interim Award held that NHA was in breach of contract by not giving prompt effect to the Dispute Board's decision on dispute No.1, and that the said decision ought to be enforced as an Interim Award. Therefore, through the Interim Award, the Arbitrator obligated NHA to pay CWE Rs.406,068,695/- i.e. the difference between Rs.338 million paid by NHA on 31.12.2014 in partial compliance with the Dispute Board's majority decision on dispute No.1 and Rs.744,068,695/- being the amount awarded

by the Dispute Board in CWE's favour under that decision. Furthermore, NHA was also held liable to pay simple interest at the rate of 6% per annum for the period commencing from 18.08.2012 on any unpaid amounts of the delay costs claim as decided by the Dispute Board in its decision on dispute No.1.

29. CWE is seeking the recognition and enforcement of the Interim Award under Section 6(1) of the 2011 Act.

Whether the issuance of a notice of dissatisfaction with respect to the Dispute Board's decision on dispute No.1 absolved NHA from showing prompt compliance with the said decision:-

30. Where a notice of dissatisfaction has been given by a party dissatisfied with the Dispute Board's decision, clause 20.5 of the GCC requires the parties to attempt to settle the dispute amicably before the commencement of arbitration. Even if no attempt for an amicable settlement has been made, arbitration may be commenced on or after the 56th day after the date on which a notice of dissatisfaction and intention to commence arbitration was given. Where no notice of dissatisfaction is issued by any party with respect to a Dispute Board's decision, such decision becomes final.

31. NHA had given a notice of dissatisfaction on 12.06.2014 with respect to the Dispute Board's decision on dispute No.1, whereas CWE had given a notice of dissatisfaction on 05.01.2015 with respect to the Dispute Board's decision on dispute No.2. Since these notices were given within the 28-day period stipulated in clause 20.5 of the GCC, arbitration could be commenced on or after the 56th day after the date on which the notices of dissatisfaction were given. The parties do not allege any flaw in the commencement of the arbitration proceedings.

32. NHA is resisting the recognition and enforcement of the Interim Award by taking the plea that since NHA had issued a notice of dissatisfaction with respect to the Dispute Board's decision on dispute No.1, the said decision could not be termed as binding and therefore the Arbitrator could not have ordered NHA to make payment to CWE in accordance with the said decision. NHA asserts that this Court ought not to recognize and enforce the Interim Award as it had not become binding on the parties in terms of Article V(1)(e) of the United Nations Convention on the Recognition and

Enforcement of Foreign Arbitral Awards, 1958 (“the NY Convention”), which provides *inter alia* that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that *“the award has not yet become binding on the parties …”*

33. Clause 20.4 of the GCC makes it clear that the parties shall promptly give effect to the Dispute Board’s decision “unless” and “until” it is revised in an amicable settlement or an arbitral award. The binding nature of the Dispute Board’s decision can only be displaced when an amicable settlement is reached or an arbitral award is rendered which revises the decision of the Dispute Board. Until this happens, the Dispute Board’s decision remains binding and the parties are under an obligation to give prompt effect to it. The issuance of a notice of dissatisfaction, issued within the time limit of 28 days stipulated in clause 20.4 of the GCC, is that it gives the party dissatisfied with the Dispute Board’s decision the ability to challenge such decision on merits in arbitration or have it reviewed in the process of an amicable settlement. The notice of dissatisfaction does not displace the binding nature of the Dispute Board’s decision but only denudes it of finality. The mere fact that it is not final furnishes no ground for not giving prompt effect to it. Indeed, a decision of the Dispute Board can be revised in an amicable settlement or an arbitral award, but unless such revision takes place Clause 20.4 obligates the parties to promptly give effect to it. The Court of Appeal of Singapore in the case of PT Perusahaan Gas Negara (Persero) TBK Vs. CRW Joint Operation (2015 SGCA 30), held as follows:-

> ***“The fact that a DAB decision is immediately binding once it is made until and unless it is revised by either an amicable settlement or an arbitral award is significant. As will be evident shortly from our discussion of the second of the two points mentioned at [55] above in relation to cl 20.4, the process of amicable settlement under cl 20.5 or arbitration under cl 20.6 may only be initiated by a party with a view to having the DAB decision reviewed and revised if that party has issued an NOD. Hence, the issuance of an NOD self-evidently does not and cannot displace the binding nature of a DAB decision or the parties’ concomitant obligation to promptly give effect to and implement it.”***
>
> **(Emphasis added)**

34. A plain reading of clause 20.4 of the GCC shows that the mere fact that NHA had issued a notice of dissatisfaction with the Dispute Board's decision on dispute No.1 to CWE does not mean that it is absolved from its obligation to give effect to the decision unless, of course, it is revised in an amicable settlement or an arbitral award. The Arbitrator in no uncertain terms held that if a notice of dissatisfaction is served by a party dissatisfied with the decision of the Dispute Board, the decision is not final but remains binding and *"both parties shall promptly give effect to it."*

35. Now, a decision of the Dispute Board challenged in arbitration in accordance with clause 20.5 of the GCC may well be modified or even reversed by an arbitral award. But until such modification or reversal takes place, parties are bound by clause 20.4 of the GCC to give prompt effect to the Dispute Board's decision. In the same way, an interim award which is temporary in nature may well be revised or modified by the final award, but this does not denude the parties of their right to seek its recognition and enforcement during the period between the rendering of the interim award and the announcement of such final award.

36. True, it was within the realm of possibilities for the Arbitrator while rendering a final award to determine that an amount lesser than Rs.744,068,695/- or even nothing was payable to CWE against its claim for costs associated with the EOT. In such an eventuality, NHA could claim repayment against CWE but before the rendering of the final award could not avoid its obligation imposed by clause 20.4 of the GCC to promptly give effect to the Dispute Board's decision.

Whether, after the Dispute Board's decision on dispute No.1, the payment of Rs.338 million made by NHA to CWE and the furnishing of a bank guarantee in favour of NHA amounted to an amicable settlement of the dispute:-

37. The Dispute Board's majority decision dated 19.05.2014 on dispute No.1 was for payment of Rs.744,068,695/- in favour of CWE. NHA did not pay the said amount but issued a notice of its intention to challenge the said decision in arbitration. Vide letter dated 16.06.2014, CWE advised NHA that in terms of clause 20.4 of the GCC, NHA was bound to promptly give effect to the Dispute Board's said decision unless and until it was revised by an amicable settlement or by an arbitral award. On 16.06.2014, CWE had also submitted an application for the issuance of I.P.C. No.24, which included the

amount decided by the Dispute Board along with interest in CWE's favour. Vide letter dated 18.06.2014, the Engineer informed CWE that the amount claimed in I.P.C. No.24 had not been approved by NHA in accordance with clause 3.1, and that since the Dispute Board's decision on dispute No.1 was disputed by NHA through its letter dated 12.06.2014, its request to certify I.P.C. No.24 could not be accepted. On 01.11.2014, CWE referred to the Dispute Board the matter regarding NHA's failure to make prompt payment in accordance with clause 20.4 of the GCC of the amounts adjudged by Dispute Board in its favour.

38. It was in these circumstances that NHA, vide letter dated 28.11.2014, informed CWE of its decision to pay Rs.338 million to CWE in partial implementation of the Dispute Board's decision on dispute No.1. NHA had also required CWE to provide an unconditional bank guarantee as security in the said amount. NHA's decision to pay the said amount was in consonance with the dissenting report of the minority member of the Dispute Board but not the majority decision which, as mentioned above, was for payment of Rs.744,068,695/- to CWE. On 31.12.2014, NHA paid CWE Rs.338 million and on 06.01.2015, CWE provided a bank guarantee in the sum requested by NHA.

39. It is apt to mention that on 30.12.2014, the Dispute Board unanimously decided that since NHA had served a notice of dissatisfaction with respect to the Dispute Board's decision on dispute No.1, the matter regarding NHA's failure to make prompt payment of the amount adjudged in CWE's favour by the Dispute Board *"does not qualify to be treated as a fresh dispute under the Contract provisions."* On 05.01.2015, CWE issued a notice of dissatisfaction with respect to the Dispute Board's said decision dated 30.12.2014.

40. NHA asserts that the payment of Rs.338 million to CWE was the result of an amicable settlement after the Dispute Board's decision on dispute No.1 and therefore CWE is estopped from claiming the remaining amount of Rs.406,068,695/- along with interest against NHA. This assertion had also been made before the Arbitrator who had rejected the same on the ground that there was no evidence whatsoever that a matter of this importance was consensually and amicably settled between the parties. He had referred to NHA's letter dated 28.11.2014 addressed to CWE which shows that NHA

had agreed to *"partially implement"* the Dispute Board's decision dated 19.05.2014 on CWE's claim for costs associated with the EOT. NHA had agreed to such partial implementation on the condition that CWE provides an unconditional bank guarantee for an amount of Rs.338 million. The Arbitrator termed the acceptance of Rs.338 million by CWE as a pragmatic option to secure some immediate revenue to enable it to proceed with the works and to avoid being forced to take more drastic steps such as termination of the contract.

41. The Arbitrator rejected NHA's contention that it was under no obligation to comply with the Dispute Board's decision on dispute No.1 as it had been revised by an amicable settlement reached between the parties and evidenced by NHA's letter dated 28.11.2014. Although CWE had accepted the partial payment of Rs.338 million and had also furnished a bank guarantee in the said amount in NHA's favour, the Arbitrator took the view that there was no evidence whatsoever that a matter of this importance was consensually and amicably settled and concluded by NHA's letter dated 28.11.2014. The Arbitrator held that the said letter was not in response to any proposal made by CWE and that it did not express that NHA's proposal was a consequence of inter-party negotiations or was an amicable settlement pursuant to clause 20.5 of the GCC. The Arbitrator noted that the said letter did not say that payment of Rs.338 million and the furnishing of the guarantee would substitute the Dispute Board's decision on dispute No.1. The said letter shows that NHA had agreed to *'partially implement'* the Dispute Board's decision on dispute No.1. This implies that there was a clear need for the implementation of the said decision in full. There is no provision in the Contract providing that compliance with the Dispute Board's decision may be subject to conditions precedent to payment imposed by the paying party. I have been given no reason by NHA to come to a conclusion different from the one arrived at by the Arbitrator.

42. It is an admitted position that no agreement had been executed between the parties to the effect that with the payment of Rs.338 million to CWE, NHA's liability to pay Rs.744,068,695/- under the Dispute Board's decision on dispute No.1 stood discharged. The need to execute an agreement reflecting a settlement between the parties became all the more necessary after CWE, in its letter dated 10.12.2014, denied that the Dispute

Board's decision on dispute No.1 had been superseded by receipt of the partial payment. The Dispute Board's decision on dispute No.1 has not been revised at any material stage whether through an amicable settlement or by an arbitral award. The partial payment of the amount found by the Dispute Board to be due and payable to CWE against its claim for costs associated with the EOT did not amount to a revision or supersession of the Dispute Board's decision on dispute No.1. The Arbitrator was correct in holding that the provisions of the GCC do not state that compliance with the Dispute Board's decision may be subject to conditions precedent to payment imposed by the paying party.

43. It is indeed illogical for a party to accept only half of the amount which the Dispute Board had adjudged in its favour. If NHA's position that the payment of Rs.338 million was the result of an amicable settlement which had superseded the Dispute Board's said decision for the payment of Rs.744,068,695/- to CWE, what rationale remains in requiring the bank guarantee to be kept alive unless, of course, NHA takes the position that nothing at all was payable to CWE against its claim for costs associated with the EOT. It does not appeal to reason why CWE would accept Rs.338 million (i.e. half the amount awarded in its favour by the Dispute Board) and that too on furnishing an unconditional bank guarantee in NHA's favour which, if encashed, would leave nothing in CWE's hands. It is untenable for NHA to assert that this was the agreed settlement between the parties which resulted in NHA's obligation to pay Rs.744,068,695/- being extinguished. The Arbitrator has aptly held that a valid settlement between two parties requires the agreement of both parties. The payment of the said amount did not discharge NHA from paying the remaining amount of Rs.406,068,695/- to CWE and that too promptly in terms of clause 20.4 of the GCC.

<u>Whether the Interim Award was enforceable under the provisions of the 2011 Act and the NY Convention</u>:-

44. NHA filed a written reply resisting CWE's application for the recognition and enforcement of the Interim Award primarily on the ground that the said award was interim or interlocutory in nature and had not become binding on the parties in terms of Article V(1)(e) of the NY Convention. Furthermore, it pleaded that the Interim Award was not an arbitral award for the purposes of Article I(2) of the NY Convention as it did

not determine or resolve the dispute in whole or in part in a final and binding manner. It has also been contended that the recognition and enforcement of the Interim Award would be contrary to public policy in terms of Article V(2)(b) of the NY Convention.

45. To bring home the point that the Arbitrator, while rendering the Interim Award had not finally decided the dispute between the parties regarding CWE's claim associated with the EOT and therefore, the said award could not be enforced, learned counsel for NHA relied on the judgment in the case of Resort Condominiums International Inc. Vs. Ray Bolwell and Resort Condominiums, Pty. Ltd. (XX Y. B. COM. ARB. 628 (1995)), wherein the Supreme Court of Queensland held that for a decision to be an *"arbitral award"* within the meaning of the NY Convention, it needs to finally determine all or at least some of the matters submitted to the arbitral tribunal. He also relied on the judgment in the case of Hall Steel Company Vs. Metaloyd Ltd. (XXXIII Y.B. COM. ARB 978 (2008)) wherein the District Court, Eastern District of Michigan, Southern Division, held that for a decision to be regarded as an *"award"* it needs to finally and definitely dispose of a separate independent claim. Reliance was also placed on the judgment in the case of Drummond Ltd. Vs. Instituto Nacional de Concesiones (XXXVII Y.B. COM. ARB 205 (2012)) wherein the Supreme Court of Justice, Colombia held that awards are final not because they put an end to the arbitration or to the tribunal's functions, but they settle in a final manner some of the disputes that have been submitted to arbitration. Additionally, he referred to the judgment in the case of Alcatel Space, S. A. Vs. Alcatel Space Industries (XXVIII Y.B. COM. ARB 990 (2003)) wherein the District Court, Southern Division of New York, held that an interim award that finally and definitely disposes of a separate, independent claim may be confirmed notwithstanding the absence of an award that finally disposes of all claims that were submitted to arbitration.

46. Article III of the NY Convention requires *inter alia* that *"each Contracting State shall recognize arbitral awards as binding and enforce them."* The NY Convention does not define an "award". More importantly, for the purposes of the instant case, it does not expressly restrict recognition and enforceability only to awards that are final. The award-creditor under the NY Convention has a *prima facie* right to seek recognition and

enforcement of an award. In order to be recognized and enforced under the 2011 Act, an award must be (i) an arbitral award for the purposes of the NY Convention; and (ii) a foreign arbitral award within the meaning of the 2011 Act. It is CWE's case that the Interim Award satisfies both these requirements.

47. The 2011 Act and the NY Convention do not make any distinction between interim awards and final awards. The parties had agreed for the arbitration to be conducted in accordance with the ICC Rules. Article 2(v) of the ICC Rules defines an *"award"* to include an interim, partial or final award. Therefore, the word *"award"* employed anywhere in the ICC Rules would also mean an interim award. Article 28 of the ICC Rules provides for the power of the arbitral tribunal to order interim or conservatory measures which can take the form of an order or an award. By agreeing to arbitration in accordance with the ICC Rules, the parties *ipso facto* also agreed to the power of the arbitral tribunal to issue an interim award.

48. In the case of CE International Resources Holdings LCC Vs. SA Minerals Ltd. (2012 US Dist. Lexis 176158 (SDNY)), the United States District Court for the Southern District of New York confirmed its long-standing jurisprudence that *"an award of temporary equitable relief ... was separable from the merits of the arbitration"* and was therefore capable of immediate recognition and enforcement. In the said case, the sole arbitrator, seated in New York, had issued an interim award ordering the furnishing of pre-judgment security or, in default of that, restraining the respondent from transferring any assets, wherever located. The respondent argued that the type of interim relief granted by the Arbitrator was not available under the law of the seat of arbitration and that the Arbitrator thus exceeded his powers, manifestly disregarding the law and breaching public policy. Although the said Court in New York acknowledged that the relief awarded would not have been available from a Court in New York, it did not find that the sole arbitrator exceeded his powers by granting the relief. The Court relied on the parties' agreement to resolve their dispute under the International Centre for Dispute Resolution Arbitration Rules of the American Arbitration Association, which allowed the Arbitrator to take *"whatever interim measures [he] deems necessary, including injunctive relief and measures for the*

protection or conservation of property." **The said Court further held that nothing about enforcing an order rendered in accordance with the procedures to which parties agreed offends either the law or public policy of New York.**

49. NHA does not deny that the Terms of Reference ("**TORs**"**) were issued by the Arbitrator on 06.09.2015. The TORs encapsulate the parties' agreement on the mode and manner in which the arbitration is to proceed. Article 23(2) of the ICC Rules requires the TORs to be signed by the parties to the dispute. The TORs dated 06.09.2015 were indeed signed by the arbitrator as well as the representatives of NHA and CWE. Paragraph 36 of the TORs provides that *"the Arbitrator shall be free to decide any procedural issue by way of an order, or any other issue by way of a partial or interim award, or by final award, as it may deem appropriate."* The issue whether, pending a final decision in the arbitration, NHA is bound to give effect to the Dispute Board's decision dated 19.05.2014 was decided by the Arbitrator through the Interim Award. The Arbitrator had the power to do so not just in terms of Article 28 of the ICC Rules but also paragraph 36 of the TORs.**

50. Under Article V(1)(e) of the NY Convention, this Court can refuse recognition and enforcement of a foreign arbitral award which *"has not yet become binding on the parties."* The Interim Award in the instant case was not conditional or contingent on the materialization of an eventuality in order for it to become binding. Until the Interim Award was *"set aside or suspended by a competent authority of the country in which, or under the law of which"* it was made, it remained binding on the parties. Additionally, by agreeing for the arbitration to be conducted in accordance with the ICC Rules, the parties have in effect agreed that the Interim Award was binding on them. I say so because Article 35(6) of the ICC Rules provides *inter alia* that every award shall be binding on the parties, and that by submitting the dispute to arbitration under the said Rules, the parties undertake to carry out any award without delay.

51. What good would an interim award rendered under the ICC Rules be if it is not enforceable under the provisions of the NY Convention? There is nothing either in the 2011 Act or the NY Convention which bars an interim award from being recognized and enforced. It is only in cases enumerated

in Article V of the NY Convention where enforcement of an award can be refused by the High Court in Pakistan. In this regard, Section 7 of the 2011 Act provides that *"the recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the [NY] Convention."* This checklist in Article V of the NY Convention would also apply to interim awards, whether they completely dispose of a part of the dispute severable from other disputes between the parties or are of a temporary, interim or conservatory nature.

52. The Interim Award resolves the dispute whether NHA was bound to give prompt effect to the Dispute Board's decision that NHA was liable to pay Rs.744,068,695/- along with interest on account of costs associated with the EOT. In the Interim Award, the Arbitrator had stated time and again that the underlying merits of the Dispute Board's decision on dispute No.1 were not relevant in deciding the question whether NHA was under an obligation to give prompt effect to the said decision. The question whether the said decision was correct on merits was to be determined by the Arbitrator in due course while rendering the final award. It is the question whether NHA was bound to give prompt effect to the said decision in terms of clause 20.4 of the GCC that had finally been determined by the Arbitrator in the Interim Award.

53. Although the question whether NHA was liable to pay CWE Rs.744,068,695/- plus interest pursuant to the Dispute Board's decision on dispute No.1 was to be finally determined when the Arbitrator was to render the final award, it is the question whether NHA was bound to give prompt effect to the Dispute Board's said decision that has been finally determined by the Arbitrator in the Interim Award. This determination is in consonance with clause 20.4 of the GCC which requires the parties to give prompt effect to the Dispute Board's decision regardless of the fact that a notice of dissatisfaction or intention to commence arbitration has been given by the party aggrieved by such decision.

54. The Arbitrator, in his Interim Award, has neither varied nor confirmed the Dispute Board's decision on dispute No.1. In other words, the Arbitrator has not determined as to what amount, if any, is due and payable by NHA to CWE against the latter's claim for costs associated with the EOT. The Arbitrator, in his Interim Award, has just decided the

preliminary issue of whether NHA is obligated in terms of clause 20.4 of the GCC to give prompt effect to the Dispute Board's said decision.

55. Had there been no requirement in clause 20.4 of the GCC for the decision of the Dispute Board to be promptly given effect to by the parties, there would have been no reason for CWE to apply to the arbitrator for an order directing NHA to make payment in accordance with the Dispute Board's decision on dispute No.1 at the early stages of the arbitration and consequently there would have been no reason for the arbitrator to render the Interim Award.

56. Just as under clause 20.4 of the GCC, the parties are bound to give prompt effect to a decision of the Dispute Board, an interim award ordering an interim award-debtor to make prompt payment in accordance with a Dispute Board's decision is equally binding, and its binding nature is not offset by the fact that the arbitration proceedings are still pending. Therefore, NHA cannot assert that the interim award was not binding or that its enforcement could be refused under Article V(1)(e) of the NY Convention.

57. The facts in the case of PT Perusahaan Gas Negara (Persero) TBK Vs. CRW Joint Operation (Indonesia) ([2015] SGCA 30) have glaring similarities to the case at hand. In *Persero,* the contractor had referred a number of contractual claims against the employer to the Dispute Board and had sought the enforcement of the Dispute Board's decision to promptly pay the adjudicated sum by way of arbitration. In that case as well, the contract between the parties was the FIDIC form of contract (Pink Book), clause 20.4 whereof had placed a duty on the party to swiftly implement a Dispute Board's decision. In the said case, the interim award had finally resolved the question whether the sum adjudicated by the Dispute Board to be payable to the contractor should be paid quickly. The contractor had sought the enforcement of the interim award in Singapore. The Court in Singapore held that an interim award which disposed of a preliminary issue was enforceable. The interim award had made a final decision on the employer's obligation to promptly pay to the contractor the sums mentioned in the Dispute Board's decision. In appeal, the Court of Appeal of Singapore considered the terms of the FIDIC contract and noted that clause 20.4 imposed an obligation on the parties to promptly give

effect to the Dispute Board's decision and held that this obligation continued unless and until the decision was revised either by amicable settlement or by an arbitral award. It was also held that a notice of dissatisfaction might lead to the Dispute Board's decision being revised but does not displace the binding nature of the Dispute Board's decision, and that the employer's failure to fulfill its obligation to promptly comply with the Dispute Board's decision was a dispute in its own right which was capable of being finally settled by arbitration. Furthermore, it was held that the arbitral tribunal was entitled to make an interim or partial award which finally disposed of the question whether the sum adjudicated by the Dispute Board should be promptly paid. It was also observed that if the contractor had been found to be overpaid at the stage of the final award, then an order for repayment could be made but in the meantime, the interim award was final and binding as regards the issue of prompt payment in accordance with the Dispute Board's decision. For the purposes of clarity, paragraphs 100, 109 and 110 are reproduced herein below:-

> ***"100. … Much of the confusion in this case seems to us to have stemmed from a failure to differentiate between, on the one hand, interim or partial awards, which entail a final determination of the parties' substantive rights or a final determination of preliminary issues relevant to the resolution of the parties' claims and, on the other hand, provisional awards, which neither entail nor aid in a final determination of the parties' substantive rights. On no basis was the Interim Award a provisional award. On the contrary, it was a final determination of whether PGN had an immediate and enforceable contractual obligation to comply with DAB No 3 even though it had issued an NOD in respect of that decision. This point was answered in the affirmative by the 2011 Majority Arbitrators in the Interim Award, and that answer is not susceptible to change regardless of whatever award the 2011 Tribunal might eventually make on the parties' Underlying Dispute over the merits of DAB No 3. The only thing that is provisional in this context is the set of financial effects and consequences of the Interim Award, and that is so because the Conditions of Contract provide that in certain circumstances, a DAB decision may be revised by an arbitral award that settles the underlying merits of that decision. If and when an award on the merits of DAB No 3 is eventually made, that award would not alter the Interim Award or render it any less final, even though it might alter the financial effects and consequences that flow from the Interim Award."***
>
> ***"109. Additionally, in our judgment, it would not be commercially sensible to read cl 20.4 as entailing that DAB No 3 will cease to be binding as soon as the 2011 Tribunal makes any determination on any aspect of the merits of the parties' Underlying Dispute. The key point is this: the Interim Award is a final decision requiring PGN to make prompt payment of the Adjudicated Sum awarded to CRW under DAB No 3 pending the resolution of the Underlying Dispute. That award may be enforced against PGN on its***

terms, save only if there are grounds to set it aside or to resist enforcement under the applicable legal framework. The Interim Award, at pain of repeating the point, concerns PGN's obligation under cl 20.4 to make prompt payment of the Adjudicated Sum to CRW even though PGN has issued an NOD in respect of DAB No 3 and the arbitration of the merits of that DAB decision is still ongoing. That obligation remains valid and binding regardless of any subsequent award on the merits of the Underlying Dispute. If the Interim Award had never been made and the parties had proceeded (in the absence of an amicable settlement) straight to an arbitration of the Underlying Dispute, and if, in that arbitration, DAB No 3 had been set aside, there would no longer be any basis for CRW to seek an award or order for the enforcement of that DAB decision. But, where, as here, the Interim Award requiring prompt payment of the Adjudicated Sum awarded under DAB No 3 has already been made, that award remains enforceable. When the merits of the Underlying Dispute (and, as a corollary, the state of the final accounts between the parties) have been resolved, if there is, as a result, no longer a net sum payable to CRW (the receiving party under the Interim Award), then in those circumstances, there may be nothing left for CRW to enforce. But, that simply is not the position at the present point in time.

110. In our judgment, this is the commercially sensible way of reading cl 20.4 of the Conditions of Contract and the related provisions. In the present case, there has not been a final determination of the parties' Underlying Dispute over the merits of DAB No 3, and nothing has transpired to invalidate or affect the Interim Award or CRW's long overdue right to receive payment thereunder."

58. Similarly, in the case of Tabular Holdings Pty Ltd v DBT Technologies Pty Ltd [2013] ZAGPJHC 155, the South Gauteng High Court in Johannesburg held that a binding but not final decision of the Dispute Board must be complied with pending arbitration.

59. I do not subscribe to the proposition that in order for an interim or an interlocutory award to be recognized and enforced under the provisions of the 2011 Act it has to be final in all respects and not amenable to any change of modification in the arbitration proceedings. There is nothing in the NY Convention or the 2011 Act to support this proposition. The parties had agreed in clause 20.6 of the PCC for the arbitration to be carried out in accordance with the Rules of Arbitration of the ICC. Article 2 of the said Rules defines an *'award'* to include an interim award, whereas Article 28(1) empowers an arbitral tribunal to order any interim or conservatory measure. In the case of Abdul Qayyum Vs. Niaz Muhammad (1992 SCMR 613), the Hon'ble Supreme Court has held that *"the word `interim' inter alia means one for the time being; one made in the meantime and until something is done; an interval of time between one event, process or period and another; belonging to or taking place during an interim;*

temporary; something done in the interim; a provincial arrangement adopted in the meanwhile; done, made, occurring etc. in or in the meantime; provisional." **If this Court were to hold that it is only those interim awards that could be enforced in Pakistan that finally decide a certain dispute and are not susceptible to any change in the final award, it would amount to relieving the parties of their bargain, i.e. the adoption of the ICC Rules which empowers the Arbitrator to render interim awards which are temporary in nature.**

60. In the case of Ch. Muhammad Siddique Vs. Anwar Shah (1991 CLC Note 368), the Hon'ble Lahore High Court relied on the meaning of the expression *"interim"* given in Webster's New International Dictionary (2nd Edition) as *"meanwhile; meantime; time intervening; interval between; belonging to an interim; done, made, occurring for an interim or meantime; temporary".* According to the Black's Law Dictionary (4th Edition) *"interim"* means *"for an intervening time; temporary or provisional" "in the meantime; meanwhile", whereas "interim order" means "one made in the meantime, and until something else is done."* The parties in the case at hand, by agreeing for the arbitration to be carried out in accordance with the ICC Rules and the TORs dated 06.09.2015, would be deemed to have acceded to the power of the arbitrator to render an interim award which is temporary in nature and susceptible to confirmation, modification or vacation at the stage of the announcement of the final award.

61. Much emphasis was laid by the learned counsel for NHA on the case of Resort Condominiums International Inc. Vs. Ray Bolwell and Resort Condominiums Pty. Ltd. (XX Y.B. COM. ARB. 628 1995) in furtherance of his plea that an interim award that does not finally decide a dispute cannot be enforced. In the said case a claimant from the United States had initiated arbitration in the State of Indiana against an Australian respondent. The dispute arose under an agreement for reciprocal rights to use time share properties controlled by each party. The arbitrator issued an interim award requiring the respondent to continue performing the agreement and to refrain from entering into a similar agreement with another entity during the pendency of the arbitration proceedings. The claimant sought to enforce this interim award against the respondent in Australia. The Supreme Court of Queensland, Australia refused to enforce the interim

award by holding that an award under the NY Convention must be binding on the parties in the sense that it determines at least all or some of the matters referred to the arbitrator. And this had to be distinguished from an interim measure which by its nature could be rescinded, suspended, varied or reopened by the tribunal which pronounced it.

62. The view taken by the Supreme Court of Queensland, Australia in the said case has been rejected by Courts in the United States which enforce interim awards even if such awards do not finally resolve part of the dispute. For instance, the case of Polydefkis Corp. Vs. Trans Continental Fertilizer Co. (1996 WL 683629 (E.D.Pa. Nov. 26, 1996) involved disputed implementation of a charter-party contract between a Greek shipowner and US trader. A Federal Court in Pennsylvania confirmed an award by arbitrators sitting in London, directing the respondent provisionally to pay a portion of the compensation sought by the claimant in to an escrow account which was to be jointly controlled by the counsel for both the parties. Similarly, in the case of British Ins. Co. of Cayman Vs. Water Street Ins. Co. (93 F.Supp. 506), an interim security award was confirmed even though the respondent had argued that it equals approximately 85% of the available assets of Water Street, and about 140% of its net worth and would have the effect of putting Water Street out of business. In the case of Blue Sympathy Shipping Co. Ltd. Vs. Serviocean Int'l (1994 WL 597144), the Court confirmed an interim security award fully within the arbitrators' power to impose despite the respondent's representation that it was financially incapable of furnishing the security.

63. In May 2018, the Cairo Court of Appeal became the first Egyptian Court to recognize and enforce an arbitral order for interim measures issued by a foreign tribunal which was seated in Paris. The arbitral tribunal had issued an interim order enjoining one of the parties to cease and desist from Egyptian court proceedings that sought the encashment of a performance bond. The Cairo Court of Appeal held that arbitral interim measures finally resolve the parties' dispute with respect to the provisional measures sought in the arbitration and were therefore capable of enforcement. The Cairo Court of Appeal held that enforcement of orders for interim measures issued by arbitral tribunals was consistent with the objectives of the New York Convention, namely to favour the enforcement

of arbitration agreements and arbitral awards, to ensure predictability in international commercial dealings and consistency among jurisdiction.[1]

64. The case of CVG v CVH [2022] SGHC 249 concerned the enforcement of an interim award for provisional measures made by an emergency arbitrator. The General Division of the Singapore High Court held that the term "foreign award" in section 29(1) of the Singapore International Arbitration Act applied to foreign awards made by emergency arbitrators and that the award was binding within the meaning of section 29(2) of the said Act. It was also held that the International Centre for Dispute Resolution International Arbitration Rules made it clear that an interim award shall be binding on the parties. It ought to be borne in mind that awards made by emergency arbitrators are subject to review and modification after an arbitral tribunal is constituted.

65. Article I(2) of the NY Convention merely states that *"the term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."* In the case at hand, the parties submitted to the Court of Arbitration of the ICC and agreed for the arbitration to be conducted in accordance with the ICC Rules which empower arbitral tribunals to issue interim awards. These Rules do not restrict the powers of the arbitral tribunal to issue such interim awards as would finally determine any question. They empower the arbitral tribunal to issue interim awards which are purely temporary in nature. An interim injunction issued by an arbitral tribunal as an interim award is by its very nature temporary and subject to modification, rectification or vacation at the stage of final award. Therefore, I am of the view that recognition and enforcement of such interim awards cannot be refused simply on the ground that they do not finally determine any question or substance.

66. After the arguments of the contesting parties were heard by this Court, the final award dated 30.06.2019 was rendered. Initially, this Court took the view that with the rendering of the final award (which also included a decision on CWE's claim for costs associated with the EOT) CWE's application for the recognition and enforcement of the Interim Award had been rendered infructuous but upon deeper appreciation, this

[1] Cairo Court of Appeal, 7th Commercial Circuit, Case No.44/134 JY, Decision dated 9 May 2018

Court took the view that CWE's application for the recognition and enforcement of the final award, to which NHA had filed detailed objections, would be decided on its own merits and this could not cause this Court to stay its hands from deciding the question whether the Interim Award could be enforced or not. Hence, the matter was fixed for re-hearing on 13.09.2023 and after obtaining the views of the learned counsel for the parties, this Court deemed it necessary to decide CWE's application for the enforcement of the Interim Award.

67. In the case at hand, the burden was on NHA to furnish proof on the grounds listed in Article V(1) of the NY Convention of having been satisfied in order for the recognition and enforcement of the Interim Award to be refused. This burden NHA has not been able to discharge. Consequently, the instant application is accepted and the Interim Award is hereby recognized, and the same shall be executed by this Court as though it is a decree. NHA is directed to pay Rs.406,068,695/- along with interest at the rate of 6% per annum from the date of the award till the date of payment. The said amount shall be paid by the next date of hearing which is fixed for 30.10.2023. NHA shall bear CWE's costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 27/09/2023

(JUDGE)

Qamar Khan ***APPROVED FOR REPORTING***