ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Adm. Suit 07 of 2013

Date Order with signature of Judge

For hearing of: CMA Nos. 46, 68, 69 and 98, all of 2013

Dates of hearing: 26 and 28.11.2013

Mr. A. H. Mirza, Advocate for the plaintiff.
Mr. Anwar Mansoor Khan along with
Mr. Syed Ahmad Hassan Shah and
Ms. Umaimah Anwar Khan, Advocates
for the defendant Nos. 1, 2, 3 and 5.
Mr. Amjad Ali Shah, DPG NAB along with
Mr. Zamin Hussain Mirza, Senior Prosecutor NAB.

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Munib Akhtar, J.: The applications that fall for determination raise several important issues relating, *inter alia*, to the admiralty jurisdiction of this Court under the Admiralty Jurisdiction of High Courts Ordinance 1980 ("1980 Ordinance"), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (commonly known as the New York Convention and herein after the "NY Convention"), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (commonly known as the "ICSID Convention") and generally, matters relating to international arbitration. CMA 46/2013 has been moved by the plaintiff. It was filed along with the suit and seeks the arrest of the defendant-vessel Nos. 1 to 4. The defendant No. 5 is a Turkish company (herein after "Karkey"). On 28.05.2013 an *ad interim* order of arrest was made in respect of all four vessels. CMA 68/2013 has been filed by Karkey under section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, and seeks stay of the present proceedings (with the consequence that the plaintiff's claim would be referred to arbitration). The aforementioned Act gives effect to the NY Convention in Pakistan and is herein after referred to as the "2011 NYC Act". CMA 69/2013 has also been filed by Karkey, seeking rejection of the plaint under Order 7, Rule 11 CPC. The last application, CMA 98/2013, has been filed by the plaintiff seeking (in circumstances explained below) a variation in the order of arrest in respect of the defendant-vessel No. 1, being a temporary suspension thereof. Finally, I may note that the ICSID Convention has also been given effect in Pakistan by the Arbitration (International Investment Disputes) Act, 2011, to the extent and in terms as stated therein (herein after referred to as the "2011 ICSID Act").

2. I begin with an overview of the facts. Pakistan is, and has been for the past several years, facing an acute power crisis. Demand for electricity has far outstripped the power actually being supplied.

Sometime in 2008, the Federal Government initiated a program for increasing the available generation capacity by inviting proposals for the setting up of rental power plants. Karkey responded to this invitation and ultimately a contract was executed between it and the plaintiff on or about 23.04.2009. Briefly stated, this contract, termed the Rental Services Contract (and herein after the "Contract"), committed Karkey to make available, for a period of 60 months from the commercial operations date, 231.8 MW of power (in terms as specified) on rental basis. The Contract was subsequently amended on or about 08.12.2009. The rental power was to be made available by utilizing Karkey's "equipment", and the second recital to the Contract made reference to "Reciprocating Generation Sets and Balance of Plant on barge mounted powerships". According to the Wikipedia:

> "A **powership** (or **power ship**) is a special purpose marine vessel, on which a power plant is installed to serve as a power generation resource. It is an existing ship that has been modified for power generation, a marine vessel, on which a power plant is installed to serve as a power generation resource. Converted from existing ships, powerships are self-propelled, ready to go infrastructure for developing countries that plug into national grids where required. Unmotorised powerships, known as **power barges**, are simply conventional power plants installed on a deck barge. These are sometimes called "floating power plants" or "barge mounted power plants"." (Emphasis in original; accessed 13.12.2013)

The Wikipedia article in fact also refers to Karkey, and specifically identifies the defendant-vessel Nos. 1 and 2 (respectively, the mv *Karadeniz Powership Kaya Bey* and the mv *Karadeniz Powership Ali Can Bey*) as two power ships that belong to and are operated by Karkey. I may note that there is some ambiguity with regard to the other two defendant-vessels. The plaint identifies them also as power ships. However, from an order made by an ICSID tribunal (as explained below), it seems that the defendant No. 4 may be a tanker intended to service these two defendant-vessels, and the defendant No. 3 a barge. For present purposes, I accept (provisionally) the description given by the plaintiff of the defendant-vessel Nos. 3 and 4. The plaintiff, a power generation company in the public sector with suitable infrastructure and facilities, was the entity through which the power being rented under the Contract was to be supplied to the grid.

3. It is common ground that the defendant-vessel Nos. 1 and 2 came to Pakistan (and docked at Karachi, where they are presently berthed) for purposes of the Contract, although as shall be seen, the parties are seriously at odds as to the legal connection or nexus (if any) between these defendants and the Contract.

4. Although it appears that Karkey was the only company that agreed to supply rental power through power ships, there were in fact a number of other companies that also executed contracts for rental power with the Federal Government or federally controlled entities. A common feature was that these companies were made advance payments for the rental power. This was initially 7% of the total rental payments and was later increased to 14%. The Contract provided that the total rental payments for the 60 months were to be USD 564,640,043.76. Fourteen percent of this came to USD 79,049,606.12 and this amount (or

thereabouts) was disbursed to Karkey.

5. Soon after the Federal Government launched the rental power program, the Supreme Court, in exercise of its jurisdiction under Article 184(3) of the Constitution, started proceedings (in 2009) to examine the program and the contracts entered into pursuant thereto. In particular, the advance payments made to the rental power suppliers came under close scrutiny. The Supreme Court sought to satisfy itself with regard to the lawfulness, transparency and regularity of the contracts, since grave allegations of corruption and corrupt practices had been leveled in the approval, sanctioning and awarding thereof. The Supreme Court held extensive hearings and eventually gave judgment on 30.03.2012. The decision is reported as in re: *Alleged Corruption in Rental Power Plants* 2012 SCMR 773 (herein after the "*Rental Power* case"). Karkey was one of the power suppliers whose Contract was scrutinized by the Supreme Court, and it was represented by counsel at some (at least) of the hearings. In conclusion, the Supreme Court (see pp. 851-4) declared all the contracts—including the Contract—to have been awarded "in contravention of law/PPRA Rules, which, besides suffering from other irregularities, violated the principle of transparency and fair and open competition". It declared the contracts to be "non-transparent, illegal and *void ab initio*" and ordered them to be rescinded forthwith. It also held that the public functionaries as well as the "sponsors (successful bidders)" who had "derived financial benefits" from the contracts were "*prima facie*, involved in corruption and corrupt practices". Civil and criminal action was ordered to be taken against those concerned. The Chairman of the National Accountability Bureau ("NAB", the principal federal anticorruption authority in Pakistan) was directed to initiate proceedings in light of the judgment and submit fortnightly progress reports for the Supreme Court's consideration.

6. It will be convenient to pause here and before proceeding further, to take a look at the ICSID Convention. This is a multilateral treaty that was opened for signature in 1965 and entered into force on 14.10.1966. Pakistan was one of the earliest signatories, ratifying the treaty on 15.09.1966. The Convention created the International Centre for Settlement of Investment Disputes (hence ICSID; herein referred to as the "Centre") and by Article 18 gave it "full international legal personality". The Centre was also granted certain immunities and privileges. These provisions have been given the force of law in Pakistan: see section 8 of the 2011 ICSID Act. The Centre has an Administrative Council and a Secretariat. Article 6 empowers the Administrative Council to, *inter alia*, adopt rules with regard to the arbitration and conciliation proceedings, for which purpose the Centre was established and the ICSID Convention agreed upon. The Administrative Council has framed certain rules with respect to arbitrations under the Convention (herein after the "Arbitration Rules"). The Secretariat is charged with the duty of maintaining panels of arbitrators and conciliators.

7. The two parts of the ICSID Convention most relevant for present purposes are Chapter II (Articles 25-27), which deals with the jurisdiction of the Centre, and Chapter IV (Articles 36-55), which deals with arbitration. Article 25, as relevant, provides as follows:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

Article 26, as relevant, provides as follows: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy".

8. The ICSID Convention itself does not define the term "investment" nor does it specify the manner in which the "parties" (i.e., the host State in which the investment is made, which is invariably the respondent and the national of the other State, who is the investor and is invariably the claimant) are to consent to arbitration. Article 36 simply provides, in material part, as follows: "Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party". The manner in which recourse is usually had to ICSID arbitration has developed as a result of international practice and this also needs to be considered.

9. Almost all States have entered into bilateral investment treaties (known as "BITs"). As its name implies, a BIT is a bilateral treaty concerned with investments made in each State by nationals of the other. It is estimated that there are several thousand BITs in force all over the world. Pakistan is also a party to several BITs and has had long familiarity with this type of international agreement. Indeed, it appears that the very first BIT ever signed was that between Pakistan and Germany in 1959. Although each BIT is, in the end, a treaty between two States and must be interpreted and applied as such, BITs tend to follow a certain common format and share many features. For present purposes, two may be noted. Firstly, a BIT invariably contains a definition of "investment", and this tends to be stated quite broadly. Secondly, a BIT provides for a mechanism for resolving disputes between an investor from one State and the other State, in which the investment has been made. Although the dispute resolution clauses vary greatly, they do tend to provide (usually as part of a menu of options) for arbitration under the ICSID Convention.

10. On the basis of the foregoing two features, the settled international practice appears to be that if a State is a member of the ICSID Convention and is party to a BIT that provides for arbitration in terms thereof, that constitutes an open or standing "offer" by the State, and consent to ICSID arbitration. In such circumstances, an investor from the other State (which State must also, of course, be party to the Convention) can "accept" such "offer" and take any dispute relating to investment under the BIT to arbitration under the ICSID Convention by making an appropriate request in terms of Article 36. This fulfils the requirement of "consent in writing" by the investor in terms of Article 25, and sets the ICSID

arbitration in motion. The question of whether the dispute relates to "investment" is to be determined by considering the ICSID Convention along with the definition contained in the BIT. It is to be emphasized that the foregoing is only a general description and much depends on a number of factors, including (but certainly not limited to) the exact terms of the BIT as well as any objections by way of maintainability or jurisdiction as may be available to the respondent State. However, for present purposes it suffices to state matters in broad outline. The international practice just described has been reiterated by tribunals in ICSID arbitration proceedings. Thus, in *El Paso v. Argentina*, the tribunal observed as follows:

> "It is now established beyond doubt that a general reference to ICSID arbitration in a BIT can be considered as being the written consent of the State, required by Article 25 to give jurisdiction to the Centre, and that the filing of a request by the investor is considered to be the latter's consent." (ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27.04.2006, para 35. Quoted in Christoph H. Schreuer, et. al., *The ICSID Convention: A Commentary*, 2nd ed., 2009, pp. 212-3 (herein after "*Schreuer*"). The decision is available at www.italaw.com (accessed 14.12.2013).)

11. It appears that Pakistan and Turkey have entered into at least two BITs, the first of which was signed on 16.03.1995 (and took effect sometime in 1997), and the second of which was signed on 22.05.2012. For present purposes, I will refer to the earlier treaty. This contained, in Article VII, a dispute resolution mechanism, which as presently relevant provided as follows:

> "1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith.
>
> 2. If these disputes cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:
>
> (a) the International Center for Settlement of investment Disputes (ICSID) set up by the "Convention on Settlement of investment Disputes Between States and Nationals of other States", (in case both Parties become signatories of this Convention.) …
>
> 3. The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law."

The BIT contained a (broadly stated) definition of "investment" in Article I. Turkey has been a member State of the ICSID Convention since 1989. (Hereinafter, unless clear from the context or otherwise specified, "BIT" means the Pakistan-Turkey BIT of 1995.)

12. To revert to the narration of facts, it appears that after the judgment in the *Rental Power* case, the NAB authorities started proceedings in terms as thereby directed. The Supreme Court from time to time made orders, some of which were in relation to Karkey. Eventually, by order dated 26.11.2012, the Supreme Court directed the NAB authorities to recover USD 120 million (approximately) from Karkey,

"subject to all just and legal exceptions". It was observed in the said order that if at any later stage any further amount was found due, "it shall be responsibility of Chairman NAB to effect its recovery, if the Ship has left the territorial waters of Pakistan". A notice dated 03.12.2012 was thereafter served by NAB on Karkey, in which reference was made to the various orders of the Supreme Court, and a sum of USD 128,135,897/- was demanded, either by way of payment or the furnishing of an "equivalent bank guarantee … whereafter the NAB will allow the Power Plants/Vessels which are currently secured against the outstanding amount to move out of Pakistan territory". No payment having been made and no bank guarantee having been furnished, ultimately the present Suit was filed by the plaintiff under the admiralty jurisdiction of this Court on 24.05.2013, making a claim of USD 128,135,897. As noted above, an application (CMA 46/2013) was made for the arrest of the defendant-vessels (the defendant Nos. 1 to 4) and on 28.05.2013, such an order was made, arresting the vessels subject to the condition that the vessels be allowed to sail if a bank guarantee for the aforesaid sum was provided.

13. In the meanwhile Karkey had not been sitting idle and had proceeded to take various steps. It appears to have started setting the stage for ICSID arbitration almost immediately after the decision in the *Rental Power* case by serving notice of its claims against Pakistan, and eventually made a request to the Centre on 16.01.2013 for arbitration under Article 36 (read, of course, with the BIT) in respect of those claims. At the same time, it also filed a request for provisional measures under Article 47 of the ICSID Convention. (This provision will be considered in some detail later.) A three-member tribunal ("Tribunal") was empanelled and this position was confirmed on 25.07.2013.

14. In the present Suit, on 16.09.2013, Karkey filed two applications, being the aforementioned CMA Nos. 68 and 69 of 2013. The first is under section 4 of the 2011 NYC Act. By this application, Karkey seeks to have the present Suit stayed and the plaintiff's claim (which of course, Karkey strongly contests) referred to arbitration before the London Court of International Arbitration (LCIA) in terms as provided in section 28 of the Contract. This stated in material part as follows:

> "28. Arbitration
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> In case a Dispute is not resolved among the PARTIES in conformity with Section 27 then it will be exclusively and finally resolved by arbitration in the following manner:
>
> i) The Contract, as well as the rights and obligations of the PARTIES shall remain in full effect and force while said arbitration procedure is pending, and the arbitration award shall be final and binding on the PARTIES;
>
> ii) all arbitration shall follow the rules of arbitration of the London Court of International Arbitration ("LCIA"), in force as of the date of the Contract, and as further amended, except to the extent that such rules conflict with the provisions of this Section 28, in which case the provisions of this Section 28 shall control;
>
> iii) all arbitration shall be conducted in London, United Kingdom, and the PARTIES agree to exclude, to the extent that it is permitted by applicable law, any right of application or appeal to

any court of competent jurisdiction with regard to any issue of fact or issue of law arising from the course of any arbitration. The laws of Pakistan shall govern the procedure, effectiveness, interpretation, construction, performance and application of the arbitration established herein;

…

viii) the PARTIES hereby expressly waive any right to resolve any Dispute relating to the Contract except in accordance with an arbitration conducted in accordance with this Section 28;

ix) the PARTIES reserve the right to refer to a court of competent jurisdiction all preliminary injunction suits, if necessary to obtain legal measures intended to protect their rights prior to or during the arbitration, and such measures shall not be considered a waiver or violation of the arbitration; provided that such judicial relief (i) is limited to that which is required to prevent imminent damage to a PARTY and (ii) does not resolve the merits or substance of such Dispute; ….”

I may note that section 27 required the parties to attempt to resolve disputes amicably, failing which it could be referred to a “mutually agreeable third party as an expert”. This provision was not however, invoked or relied upon before me.

15. The other application, CMA 69/2013, seeks rejection of the plaint under Order 7, Rule 11 CPC, on two grounds. Firstly, it is contended that the admiralty jurisdiction has been wrongly invoked and no action is maintainable under the 1980 Ordinance in the facts and circumstances of the case. Secondly, it is contended that the Suit is not maintainable on account of both section 28 of the Contract (i.e., the arbitration agreement) as well as the ICSID arbitration proceedings (which had already been invoked by Karkey by the time the Suit was instituted).

16. Karkey's request for provisional measures under Article 47 was opposed by Pakistan. Both parties made written and oral representations, and the Tribunal gave its decision on 16.10.2013 (“PM Decision” or “Decision”). By para 187 thereof, the Tribunal decided that the defendant-vessel No. 1 (i.e., mv *Karadeniz Powership Kaya Bey*) be allowed to depart for the dry dock at Dubai “for inspection and repairs as determined by Bureau Veritas (or other equivalent agency) to maintain the vessel’s flag-registry and class certification”. In the Decision, a deadline of 01.11.2013 was given for this purpose (which was later extended). In order to meet this deadline, Pakistan was asked, “in particular”, to cause the plaintiff to “obtain the temporary suspension of the order of the High Court of Sindh at Karachi dated [28] of May 2013 in the Admiralty Suit No. 07 of 2013, which arrested the vessel, as long as the Arbitral Tribunal shall not have informed the State of Pakistan that the suspension is no longer necessary for the purposes of enabling the vessel to obtain the vessel’s flag-registry and class certification”. I will examine the PM Decision later herein below. However, I may note that in para 34 of the Decision, the defendant-vessel No. 3 is identified as a barge and the defendant-vessel No. 4 as a fuel tanker on the basis of what was stated by Karkey before the Tribunal in its claim.

17. It appears that after the PM Decision, the Federal Government (through the Attorney General's office) prodded the plaintiff to take action in conformity with the same. This led to the filing of CMA 98/2013 on 26.10.2013. In this application, the plaintiff has prayed for a "modification" of the order of 28.05.2013 in terms substantially along the lines of the PM Decision as noted above. This application came up before me on 29.10.2013. On that date, an order of the Supreme Court dated 25.10.2013, and a no-objection certificate (NOC) from the Chairman, NAB dated 28.10.2013 was also produced. The Supreme Court order was in continuation of the judgment in the *Rental Power* case. The Court reproduced the relevant portion of its order dated 26.11.2012 (referred to in para 12 herein above) and ordered, with reference to the Chairman NAB, as follows:

> "… he can take measure on his own to allow temporary sailing of the ship outside the territorial jurisdiction of Pakistan. He shall himself under Section 23 of the NAO [the National Accountability Ordinance, 1999, as amended, under which NAB is created] or any other provisions shall ensure that the outstanding amount found due against the Ship Kaya Bey will be recovered.
>
> 2. As there is no restraint by this Court, and in light of the paragraph reproduced herein above, we allow this CMA as well with the observation that let the Chairman NAB himself take the necessary steps with regard to this issue keeping in view of the national interest…."

In view of the foregoing position, I considered it appropriate to give notice of the application (i.e., CMA 98/2013) to Chairman, NAB. On the next date, which was 05.11.2013, the learned Deputy Prosecutor General NAB appeared and, as recorded in the order made on that date, stated that his instructions from the Chairman were that "the Court may impose such condition as may be deemed appropriate by way of security or otherwise as would ensure the return of the vessel which is sought to be temporarily released from arrest". I was not fully satisfied with this statement, and directed that on the next date an appropriate statement in writing, signed by the Chairman personally, be placed before the Court. On the next date, which was fixed as 12.11.2013, I was assisted by learned counsel for the respective parties (as also the law officers from NAB) and I decided that the best way forward would be to hear counsel on the four applications referred to herein above. The next date was fixed as 20.11.2013, when a request for adjournment was made by learned counsel for the plaintiff, which however was strongly opposed by learned counsel for Karkey. On the submissions made, I directed that the hearing of the applications be adjourned to 26.11.2013, on which date (as well as 28.11.2013) the applications were heard and thereupon reserved.

18. Learned counsel for the plaintiff submitted, in support of his application for arrest of the defendant-vessels and in opposition to Karkey's two applications, that the admiralty jurisdiction of the Court had been rightly invoked. He submitted that the matter came within the scope of section 3(2)(h) read with section 4(4) of the 1980 Ordinance. In particular, his case was that the Contract was an agreement relating to the use or hire of the defendant-vessels and the plaintiff's claim in the Suit was one arising out of the said agreement. In support of this submission, learned counsel referred to various

clauses of the Contract. Reliance was placed on the definition of "equipment" given in the second recital to the Contract, the description of the nature of the agreement (section 9), and section 12, which referred to the equipment having been "rented". Further reliance was placed on section 17. Learned counsel also referred to the *Rental Power* case to submit that the plaintiff had a clear claim against Karkey and for the arrest of the defendant-vessels. It was submitted that since the jurisdiction invoked was the admiralty jurisdiction no question arose of the Suit being stayed under section 4 of the 2011 NYC Act. Learned counsel further contended that since this Court clearly had jurisdiction under the 1980 Ordinance that necessarily meant that the application seeking rejection of plaint had to be dismissed. He prayed accordingly.

19. Learned counsel for Karkey strongly opposed the arrest of the defendant-vessels and prayed that his applications be allowed. Learned counsel submitted that section 3(2)(h) had no application in the present case. He referred to the first recital to the Contract, which stated that the plaintiff, as buyer of the rental services, wished to "rent 231.8 MW net … of power for a period of 60 months", to contend that this particularized and specified that what was being rented. Learned counsel drew a distinction between the defendant-vessels as ships on the one hand, and the power plants installed on them (i.e., the first two defendants) on the other. His case was that what had been rented was the electric power as specified. For this purpose it was the plant (i.e., the "Reciprocating Generating Sets and Balance of Plant" described in the second recital) that was relevant and not the ships as such. The latter had nothing whatsoever to do with the Contract. At best and at most, the ships served as floating platforms for the power plants and nothing more, and that was the only sense in which the reference to "on barge mounted powerships" in the second recital had to be understood. Section 3(2)(h) was however concerned with ships as such. Until and unless the agreement was for the use or hire of a ship as such, this provision had no application. Since that was patently not the situation at hand, it did not apply and the admiralty jurisdiction could not be invoked. Learned counsel also referred to the definition of "ship" in section 2(k) of the 1980 Ordinance. Without prejudice to the foregoing submissions, learned counsel contended that the Supreme Court in the *Rental Power* case had in any event declared the Contract to be void *ab initio*. This meant that, in law, the Contract had never existed at all. Thus, there had, in law, never been any agreement of any sort to which section 3(2)(h) could at all apply.

20. Learned counsel, again without prejudice to the submissions already made, placed reliance on the arbitration agreement contained in section 28 of the Contract. He submitted that an arbitration agreement, even if embedded in the main (or matrix) contract as a clause thereof, had an independent existence of its own. Even if the main agreement had ceased to exist (or, in law, had never existed at all) that did not of itself affect the arbitration agreement. The latter was regarded as severable from the main contract. The declaration that the Contract was void *ab initio* did not therefore affect the arbitration agreement. Learned counsel submitted that section 28 of the Contract was clear in its terms. The plaintiff's claim had to be referred to arbitration and the suit stayed. As regards the Suit having been brought under the admiralty jurisdiction learned counsel submitted that for a claim under section 3(2)(h) to be exercisable in rem

against a ship, it had necessarily to be supported by a claim in personam, by reason of section 4(4). In other words, for the defendant-vessels to be arrested there had to be a claim in personam against Karkey. But that was precisely the claim that had to be referred to arbitration under section 28 of the Contract. Merely because the present Suit had been brought under the 1980 Ordinance was not a reason why section 4 of the 2011 NYC Act could not, and did not, apply. Indeed, learned counsel also submitted that because the claim had to be arbitrated, the in rem jurisdiction could not be exercised against the defendant-vessels.

21. Learned counsel submitted further that after the judgment in the *Rental Power* case, a tripartite agreement had been entered into among Karkey, the plaintiff and NAB. This agreement, dated 07.09.2012, related to all outstanding claims that were being, or could be, made against Karkey by reason of the *Rental Power* case. It provided that a net sum of USD 17.2 million only was payable by Karkey to NAB in respect of such claims. Learned counsel referred in particular to clause 3, which stated as follows: "NAB confirms that having completed its enquiry, it is satisfied that KARKEY has settled the Account [i.e., the claim of USD 17.2 million]. Resultantly, KARKEY has no liability, and there remains no basis or evidence for proceeding(s) by NAB or any of the other Parties or GoP [Government of Pakistan] against KARKEY and/or its project/investment and that NAB has completed and closed its enquiry in respect of KARKEY". Clause 4 provided, *inter alia*, that the parties would not initiate or pursue any claim against each other in any court or arbitration "under or in connection with or in relation to the [Contract]" (subject to a saving in favor of Karkey). Learned counsel submitted that this agreement had never been repudiated or challenged in any manner by either NAB or the plaintiff. Thus, there was no basis whatsoever for any claim as now being advanced or the filing of the present Suit. Learned counsel further submitted that in any case, the present claim was entirely of NAB's making and the plaintiff was simply acting as the former's instrument. It was pointed out that the basis of the claim was the notice dated 03.12.2012, but that had been issued by NAB and not the plaintiff. Without prejudice to these submissions, learned counsel also drew attention to the statement annexed to the plaint in which the claim of USD 128,135,897 had been itemized under various heads, and submitted that even on a bare perusal thereof, many of the heads had nothing whatsoever to do with the Contract. Learned counsel prayed that the plaintiff's application for arrest of the defendant-vessels be dismissed and Karkey's applications be allowed.

22. Exercising his right of reply, learned counsel for the plaintiff submitted that all the various heads under which the claim had been made arose out of the Contract, but that even if some did not, they would simply stand excluded when the Suit was finally decided. However, that was a matter for the trial and could not mean that the defendant-vessels ought not to be arrested. Furthermore, even though the Contract had been declared void *ab initio*, the claim nonetheless arose out of the same within the meaning of section 3(2)(h). Learned counsel submitted that it was only if the plaintiff had sought to enforce any right under the Contract (which was patently not the case) that the declaration by the Supreme Court could stand in the way; otherwise, the claim was justiciable under the admiralty jurisdiction. The learned law officers for NAB also made submissions and in particular placed reliance on the written submissions filed by them on 19.11.2013. Learned counsel for Karkey however strongly opposed any right of hearing being

given to NAB, submitting that it was not party to the Suit and could not be allowed to intervene in this manner. Finally, I may note that learned counsel for both the plaintiff and Karkey also relied on certain case law in support of their submissions.

23. I have heard learned counsel as above and considered the case law and material relied upon. I have also examined the record with their assistance. I may note that given the importance and complexity of the issues involved, I also consulted certain other material, including various commentaries on the ICSID Convention and the NY Convention. I mention the principal resources so utilized because they were not as such referred to or relied upon by learned counsel but they do, in many important ways, inform the discussion and analysis that follows. *Schreuer (op. cit.)* is regarded as the leading commentary on the ICSID Convention and appears to be frequently cited by ICSID tribunals. I have also benefited from the material available on the excellent website on investment treaty arbitration maintained by Professor Andrew Newcombe, www.italaw.com. As regards the NY Convention, I have principally consulted three treatises: *New York Convention: Commentary* by Dr. Reinmar Wolff (ed.), 2012 (herein after "*Wolff*"); *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* by Herbert Kronke, et. al. (2010); and *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* by Emmanuel Gaillard and Domenico Di Pietro (ed.), 2008. I have also benefited from the material available on www.newyorkconvention1958.org, a website on the NY Convention maintained by UNCITRAL.

24. I start the discussion by noting that section 25 of the Contract expressly provided as follows: "This Contract and the rights and obligations of the PARTIES hereunder shall be governed by the laws of Pakistan". Section 28 of the Contract, which contained the arbitration agreement, expressly provided in its clause (iii) as follows: "The laws of Pakistan shall govern the procedure, effectiveness, interpretation, construction, performance and application of the arbitration established herein". Thus, the law of Pakistan was not merely the proper law of the Contract; it was also the substantive law of the arbitration agreement as well as, it would seem, being the curial law and conceivably also the *lex arbitri*.

25. I begin with CMA 46/2013, and the question whether the admiralty jurisdiction of this Court under the 1980 Ordinance has been properly invoked. Section 3(2)(h) provides as follows:

> "**3. Admiralty Jurisdiction of the High Court**.- …
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> (2) The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following causes, questions or claims-
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> …
>
> (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship; …."

It is now well established that section 3(2)(h) is to be construed and applied broadly. The 1980 Ordinance is based on equivalent English legislation, and our law has tended to develop along the same lines as English law. It is well settled that what is now section 20(2)(h) of the (UK) Senior Courts Act, 1981 (previously titled the Supreme Court Act), which is similarly worded, is to be broadly construed: see *Halsbury's Laws of England,* 4th Ed. (Reissue), 2001, Vol 1(1), para. 321. It is, *inter alia*, stated there that the words "'agreement relating to use or hire of a ship' are not to be given a restricted meaning". The approach to be taken to section 20(2)(h) can be gauged, for example, from *The Antonis P Lemos* [1985] 1 All ER 695, where the House of Lords held that the clause was broad enough to include a claim in tort in appropriate circumstances. There, the action in rem was based exclusively in tort (on alleged negligence) and was not "founded on any breach of any contract made directly between the two parties to the action" (pg. 698). A learned Division Bench of this Court, in *Compagnie Continentale (France) SA v. Pakistan National Shipping Corporation and others* 1994 MLD 2178, has noted this decision with approval, and I myself have had occasion to rely upon it in a recent case (see *Metal Construction of Greece SA v. Owners of the vessel mv Lady Rea* 2013 CLD 1829).

26. With the foregoing in mind, I turn to whether the Contract was one for the use or hire of the defendant-vessels. It appears to me, with respect, that it is incorrect to characterize the Contract as one for the "rent" of "231.8 MW net … of power for a period of 60 months", as submitted by learned counsel for Karkey. Electric power is not rented: it is consumed. At the end of the rental period, the power as such cannot be returned by the lessor or taken away by the lessee. Thus, the Contract could not have been for the rental of electric power *per se*. In my view, the point is conclusively established by section 8(h) of the Contract, which provided in material part as follows: "… if the SELLER Equipment is available and qualifies for dispatch and BUYER is unable to receive Net Electrical Output from the SELLER Equipment for any fault in the grid system or for any other condition solely caused by BUYER then the energy will be deemed to have been delivered for the period". Furthermore, section 4.2(h) provided in material part as follows: "For the avoidance of doubt, the Monthly Rental Services Fee shall be payable irrespective of dispatch by the BUYER". Thus, the Contract contemplated that as long as Karkey was ready and able to deliver electric power to the plaintiff it had to be paid, irrespective of whether delivery was actually taken or even sought. It is therefore clear that what was rented under the Contract was not the power as such, but rather the capacity to produce or generate the power at the contracted level and under the specified conditions. Now normally, it could be said that the capacity to generate electric power is a matter different from the thing (equipment, plant, etc.) that produces or generates that power. The question is whether this would be true also in the rather peculiar case of a power ship? In my view, the answer ought to be in the negative. A power ship is, quite literally, a special purpose vehicle (SPV). It has only one purpose and serves one function alone: to deliver electric power at its port of call. During the hearing, I specifically asked learned counsel for Karkey whether the electric plants installed on the defendant-vessel Nos. 1 and 2 could be removed or separated from them and installed elsewhere in order to generate electric power. The answer was in the negative. This is in keeping with the description of power ships noted in para 2 herein above. It is also consistent with the express manner in which "equipment" is defined in the Contract, as pointed out by learned counsel for the plaintiff. On the alternate reading of this definition, as suggested by learned counsel for Karkey, the reference to the power ships would become

otiose and redundant. However, that is not how the second recital is worded nor how the Contract was intended to operate. In my view, to use or hire the capacity of the plant installed on a power ship is to use or hire the power ship itself. And, there can hardly be any doubt that the use or hire of a power ship can only be for the purpose of utilizing the plant installed thereon for the generation of electric power. In the somewhat peculiar position of a power ship, these statements are but two sides of the same coin. Thus, for example, the hired capacity to produce the electric power at the specified level had to be available throughout the entire 60 month period (subject to permitted "outages" such as scheduled maintenance, etc.). But this necessarily meant that the power ships had to remain available for and throughout the entirety of the said period. And while delivering power under the Contract, the power ships could not be put to any other use or hire. This was quite intentional and clearly within the contemplation of the parties. Thus, were the power ships to sail away during the contractual period that would have meant an immediate and irremediable breach of the Contract by Karkey.

27. The foregoing conclusions also accord with the business sense of the Contract. It is well established that this is a permissible aid to the interpretation of contracts. A leading treatise on the subject states as follows:

> "In addition to the words of the instrument, and the particular facts proved by evidence admitted in aid of interpretation, the court may also be assisted by a consideration of the commercial purpose of the contract, and in considering that purpose may rely upon its own experience of contracts of a similar character to that under examination. However a court must be cautious before concluding that a particular interpretation does not accord with commercial common sense." (*The Interpretation of Contracts* by Kim Lewison, 5th ed., 2011, pg. 42).

In my view, when the Contract is read as a whole, and the (admitted) circumstances in which it came to be executed are kept in mind, there can be hardly any doubt that the commercial purpose was for Karkey to make the power ships available for the generation of electric power, for said power to be supplied to the grid through the plaintiff. The specific words and language used in the various sections of the Contract must be understood, construed and applied accordingly.

28. I therefore conclude that the Contract was for the "use" or "hire" of the power ships, and that this was so within the meaning of section 3(2)(h) of the 1980 Ordinance.

29. The next question that requires consideration is the effect of the declaration by the Supreme Court that the rental power contracts were void *ab initio*. It will be recalled that learned counsel for Karkey submitted that this meant, in any event, that the Contract had never existed in law and hence there had never been any agreement at all. Since section 3(2)(h) postulates an agreement, it could not therefore have any application to the facts and circumstances of the present case. The operative part of the Supreme Court judgment has been set out in para 5 above. In my view, it is important to keep in mind that the Supreme Court not merely declared the contracts to be void *ab initio*, but also ordered, in consequence

thereof, that they be rescinded. These two aspects must be applied together. In my respectful view, the true question therefore is: what is the status and effect of a contract that is rescinded by reason of being void *ab initio*? The answer to this lies in section 65 of the Contract Act, 1872, which, without its illustrations, provides as follows:

> "65. **Obligation of person who has received advantage under void agreement or contract that becomes void**. When an agreement is discovered to be void, or when a contact becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

The Privy Council, in *Thakurain Harnath Kuar v. Thakur Indar Bahadur Singh* AIR 1922 PC 403, held that this section applies also to an agreement that was void from inception. It was observed as follows (emphasis supplied):

> "The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from Section 2. By Clause (e) every promise and every set of promises forming the consideration for each other is an agreement, and by Clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By Clause (g) an agreement not enforceable by law is said to be void.
>
> *An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception* as distinct from a contract that becomes void." (pg. 405)

This Court also has held in a number of cases that section 65 applies to a situation where the agreement is void at inception. Reference may be made to a Division Bench judgment reported as *Khan Muhammad v. Abdul Wakeel Khan and others* 2012 CLC 324, and single Bench decisions reported as *Muhammad Sabir v. Muhammad Khalid Naeem Cheema and others* 2010 CLC 1879 (where reference was specifically made, at pg. 1885, to the section applying to a contract void *ab initio*), *Hyderabad Municipal Committee v. Jaweed Murtaza Khan* 1986 MLD 1410 and *Ali Murtaza v. Karachi Metropolitan Corporation* 1985 CLC 1730. The last two judgments specifically referred to and applied the Privy Council decision.

30. In my respectful view, the declaration that the Contract was void *ab initio* and in consequence was to be rescinded was tantamount to it being "discovered to be void" within the meaning of section 65. The plaintiff's claim (of course, if at all ultimately successful) must therefore be regarded as being in terms of section 65. The claim would be for restoration by Karkey of the advantage received by it "under such agreement", i.e., an agreement discovered to be void, or to make compensation for having received such advantage. As already noted, section 3(2)(h) of the 1980 Ordinance is to be construed broadly. If its language can sustain a claim in tort, as held in *The Antonis P Lemos (supra)*, it is certainly broad enough to support a claim arising in circumstances to which section 65 of the Contract Act is applicable. Put differently, in my view, the "agreement" to which section 3(2)(h) can apply is not limited to one enforceable by law; as used therein, this term refers to both "agreements" and "contracts" as explained by

the Privy Council in the cited case. It follows that the term can also mean an agreement discovered to be void. But such an agreement can be one that was void *ab initio*. A claim in terms of section 3(2)(h) can thus be in relation to such an agreement. It follows that the plaintiff's claim under section 65 for restoration by Karkey of the advantage it obtained under the Contract, which was void *ab initio* (but which I have found to be one for the use or hire of the power ships), or to make compensation for having received such advantage, would be a claim within the scope of section 3(2)(h). In other words, notwithstanding that the Contract was void *ab initio*, the matter would nonetheless fall within the admiralty jurisdiction of this Court.

31. The next two points that require consideration are (a) the effect of the tripartite agreement dated 07.09.2012, and (b) the various heads under which the plaintiff has bracketed its claim of USD 128,135,897 (see para 21 herein above). As to the first point, it is to be noted that the amount specified in agreement of 07.09.2012 (USD 17.2 million) was brought to the attention of the Supreme Court on 26.11.2012. However, the Supreme Court did not accept this amount, and directed the NAB authorities to recover the amount of USD 120 million (approximately), subject to all just and legal exceptions (see para 12 herein above). In view of this position, at this stage, which is that of interim relief and interlocutory orders, it is somewhat difficult to assess the effect of the agreement of 07.09.2012 given that the Supreme Court has expressly not accepted the amount stated therein. Therefore, without prejudice to the right of Karkey to take recourse to this agreement or raise it in defence at the appropriate stage, it ought not to affect the outcome of the issues presently before me. The second point is somewhat different. It will be recalled that learned counsel for Karkey submitted that some of the heads under which the plaintiff's claim has been stated do not relate to the Contract even on a bare perusal. It is also to be noted that the Supreme Court expressly qualified its order to recover USD 120 million, making it subject to all just and legal exceptions. The expression "subject to all just exceptions" has a well understood meaning. In *Ghulam Muhammad v. Irshad Ahmad* PLD 1982 SC 282, the Supreme Court observed as follows: "one of the well−known meanings of the phrase 'subject to all just exceptions' is that the order which contains this expression, would be effective unless and until the other party who would be effected by such an order takes exception to it and raises objections which are ultimately upheld to be just and valid" (pg. 285). I have already expressed the view that the plaintiff's claim (if at all valid) would appear to fall under section 65 of the Contract Act, i.e., Karkey would be liable to restore the advantage it obtained under the Contract or to make compensation for it. When the various heads of claim specified by the plaintiff are examined, two prima facie seem to fall in the category of advantages obtained under the Contract, as being directly connected with the latter. These are the advance payment of USD 80 million and the capacity charges paid, amounting to USD 43,203,639. The amount of USD 37,283,903/-, which the plaintiff admits was payable to Karkey under the Contract for electric power actually dispatched and fuel cost, has to be set off against these amounts. (The plaintiff has, in fact, claimed only a net amount.) The object of section 65 is to restore the advantages obtained by both parties to each other. Reference may be made to *State of Rajasthan v. Associated Stone Industries (Kotah) Ltd.* AIR 1985 SC 466 where the Supreme Court of India, relying on *Govindram Seksaria v. Edward Radbone* AIR 1948 PC 56, observed as follows (pg. 469):

> "It is not as if Section 65 of the Contract Act works in one direction only. If one party to the contract is asked to disgorge the advantage received by him under a void contract so too the other party to the void contract may ask him to restore the advantage received by him. The restoration of advantage and the payment of compensation has necessarily to be mutual."

In my respectful view, prima facie (and without prejudice to either the claim of the plaintiff or any defence set up by Karkey) and for purposes only of the present application for arrest of the defendant-vessels, only a net amount of USD 85,919,736/- should be taken into consideration.

32. In view of the foregoing discussion, I conclude that the plaintiff has been able to make out a prima facie case for the exercise of the admiralty jurisdiction of this Court in terms of section 3(2)(h) of the 1980 Ordinance. The equities lie in favor of the plaintiff and against the defendants. All the ingredients for interim relief are in place. I would therefore dispose off CMA 46/2013 by confirming the order of arrest made on 28.05.2013 against the defendant-vessels, subject to the modification that the amount of the bank guarantee that may be provided in terms thereof is reduced to USD 85,919,736/-.

33. I turn to Karkey's application under section 4 of the 2011 NYC Act, CMA 68/2013. This section essentially gives effect to Article II of the NY Convention and is in the following terms:

> "**4**. **Enforcement of arbitration agreements.—** (1) 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.
>
> (2) On an application under subsection (1), the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

It will be seen that subsection (2), in particular, corresponds to Article II(3) of the NY Convention.

34. The first question that needs to be addressed is, once again, the effect of the declaration in the *Rental Power* case that the Contract was void *ab initio*. If the Contract, in law, never existed, what of the arbitration agreement contained in section 28 thereof? Did it not meet the same fate and hence was it not the case that, in law, there never had been any arbitration agreement between the parties? It will be recalled that learned counsel for Karkey submitted that it was well settled that an arbitration agreement even if embedded in the main contract was a separate agreement in its own right and essentially remained operative and unaffected by any factor that vitiated the main contract. This position is of course well settled in Pakistani law and of long standing. Reference may be made to *Hitachi Ltd. and another v. Rupali Polyester and others* 1998 SCMR 1618 where, at pg. 1658, the Supreme Court noted the separability of the two contracts. Reference may also be made to two judgments of this Court, *Karachi*

Shipyard and Engineering Works Ltd. v. General Iron and Steel Works Ltd. PLD 1971 Kar 501 and *Muhammad Sarwar Khan v. Federation of Pakistan* PLD 1958 Kar 224 in which it was held that frustration or repudiation, respectively, of the main contract did not affect the arbitration agreement embedded therein, which was severable from the former. The three cited judgments (and of course others) amply demonstrate that Pakistani law in this area of the law has, in the main, tended to develop along the same lines as other common law jurisdictions, and this ought to be all the more so since the enactment of the 2011 NYC Act. I turn therefore to look at how English law has developed with regard to the extent and manner in which an arbitration agreement embedded in the matrix contract survives any failure (howsoever fundamental) of the latter.

35. The first point to note regarding the position in English law is that there has been legislative intervention in the shape of section 7 of the Arbitration Act, 1996. This provides that an arbitration agreement embedded in another contract "shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement". However, it is well settled that this is simply reflective of the position at common law. That the arbitration agreement is distinct and separable from the main contract has been described as "part of the very alphabet of arbitration law" in the House of Lords in *Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and others* [2005] 3 All ER 789 (see at para [21]). Lord Steyn there referred to the leading judgment of Hoffmann, LJ (as he then was) in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 3 All ER 897, where it was held that the doctrine of separability could apply to save the arbitration agreement even where the main contract was void *ab initio* and not merely voidable. There are a number of English decisions that support and confirm this position. It is not however, necessary to cite further authority. In my view, the position developed under the English case law ought also to be regarded as the position in the law of Pakistan. When the *Rental Power* case is looked at from this perspective, in my respectful view, it is clear that the Supreme Court was there concerned with the main contracts and not with any arbitration clause embedded therein as part of the dispute resolution mechanism. Thus, what was declared void *ab initio* and ordered to be rescinded were the main contracts—including of course, the Contract—and not any arbitration agreements therein. This conclusion is bolstered by the additional direction given by the Supreme Court for the relevant amounts to be recovered through "civil action" and not only by recourse to criminal law. Arbitration proceedings are of course in the nature of "civil action". I therefore conclude that section 28 of the Contract, being the arbitration agreement between the plaintiff and Karkey, was distinct and separable from the main contract, and survived the latter being declared void *ab initio*. Thus, the question of whether section 4 of the 2011 NYC Act is to apply or not is not moot but very much alive and I now turn to consider this issue.

36. The position with regard to section 4 is clear. If subsection (1) applies then by reason of subsection (2) the proceedings must be stayed and the parties referred to arbitration, unless the arbitration agreement itself is either (a) null and void, or (b) inoperative or (c) incapable of being performed. (There

may be a further narrow and strictly limited "public policy" ground, but this point does not arise here and I leave it open.) Learned counsel for Karkey of course submitted that none of these obstacles stood in the way, and hence Karkey's application ought to be allowed and the present Suit stayed. I have carefully considered the matter and, with respect, must disagree. In my view, for the reasons herein after stated, the facts and circumstances of the case at hand are such that the arbitration agreement ought to be regarded as incapable of being performed.

37. According to *Wolff (op. cit.)*, "the expression 'incapable of being performed' refers to **practical aspects of the prospective arbitration proceedings**" (pg. 188; emphasis in original). Similar views have been expressed in the other treatises (see para 23 above) consulted by me. Now, the admitted position is that Karkey has already initiated arbitration proceedings under the ICSID Convention. Of course, those proceedings are against the State of Pakistan and not, as such, against the plaintiff. However, there can be little doubt that there would be a substantial overlap between the issues raised in the ICSID proceedings and any arbitration proceedings to be initiated in terms of section 28 of the Contract (herein after referred to as the "prospective arbitration proceedings"). This would be all the more so if Pakistan were to file a counter claim in the ICSID proceedings or Karkey were to file a counter claim in the prospective arbitration proceedings. It may even be that if the plaintiff is directed to initiate the prospective arbitration proceedings, it may do so as a matter of form but then ask the arbitrators for a stay pending the outcome of the ICSID proceedings. These are, in my view, possibilities that have a more than reasonable probability of actually occurring.

38. In addition to the foregoing, it must be kept in mind that Article 26 of the ICSID Convention provides that ICSID arbitration is "to the exclusion of any other remedy" (see para 7 herein above). There appears to be a certain hierarchy if a situation arises where there is ICSID arbitration on the one hand and arbitration proceedings (or the possibility of such proceedings) before some other forum such as ICC, LCIA, etc., on the other. *Schreuer* states the matter as follows:

> "One of the functions of Art. 26 is to create a rule of priority vis-à-vis other systems of adjudication in order to avoid contradictory decisions and to preserve the principle of *ne bis in idem* …. Therefore, a non-ICSID tribunal should decline jurisdiction in the face of a valid submission to ICSID arbitration unless a contrary intention of the parties can be established …." (pg. 381)

Reference must, in this context, be made to two ICSID arbitrations, in which Pakistan was involved: *SGS v. Pakistan* ICSID Case No. ARB/01/13 and *Bayinder v. Pakistan* ICSID Case No. ARB/03/29 (noted in *Schreuer* at pp. 381-2). In the first case, Pakistan had entered into an agreement with SGS, a Swiss company, for it to provide pre-shipment inspection services. The agreement provided for arbitration in Pakistan, to which of course the Arbitration Act, 1940 applied. Disputes arose and ultimately SGS initiated ICSID proceedings on the basis of a BIT between Pakistan and Switzerland. At the same time, Pakistan brought suit in the civil courts seeking to restrain SGS from initiating or continuing ICSID proceedings and a declaration that arbitration proceedings as envisaged under the

agreement be started. The civil court gave the injunction sought, and an appeal filed by SGS before the Lahore High Court failed (*SGS Societe Generale v. Pakistan* 2002 CLD 790). SGS appealed to the Supreme Court and Pakistan cross-appealed. The decision of the Supreme Court is reported as *Societe Generale De Surveillance S.A. v. Pakistan* 2002 SCMR 1694 (reproduced at 8 ICSID Reports 356). SGS was restrained from "taking any taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID Arbitration". The arbitration proceedings in terms of the agreement were allowed to proceed, but the scope thereof was limited in the manner and for the reasons as indicated by the Supreme Court. When the matter came before the ICSID tribunal, it held as follows (as stated in *Schreuer*, pg. 382):

> "The Tribunal referred to previous decisions recognizing that contractual claims and treaty claims could co-exist and upheld its jurisdiction with respect to alleged violations of the treaty, since that jurisdiction would not be shared by the PSI Agreement arbitrator. As to the claims arising from alleged breaches of contract, the Tribunal held that it was not competent to decide contractual claims unless they also constituted or amounted to treaty violations." (Decision on Objections to Jurisdiction, 06.08.2003, available at www.italaw.com)

39. I am of course bound by the decision of the Supreme Court, regardless of what the ICSID tribunal may have said or decided. I have carefully considered the judgment. It is to be noted that Pakistan (which was a directly a party to the agreement) wished to proceed to arbitration under the contract whereas SGS wanted to continue with the ICSID arbitration proceedings. There was no litigation pending in the courts of Pakistan where the substantive dispute was raised or involved. In my respectful view, the decision of the Supreme Court in *SGS v. Pakistan* does not appear to have a bearing on the issue I am now considering.

40. In the second case, *Bayinder v. Pakistan*, the contract was between Bayinder, a Turkish company and the National Highway Authority (NHA), a statutory authority. The contract provided for a dispute resolution mechanism that would culminate in arbitration in Pakistan. The contract having been terminated, Bayinder started ICSID proceedings on the basis of the BIT. At the same time, arbitration proceedings started in this country between NHA (as claimant) and Bayinder. Pakistan objected to the ICSID proceedings, contending that Bayinder's claims fell outside the jurisdiction of the ICSID tribunal and that arbitration proceedings under the contract had already been initiated. (The tribunal's decision on jurisdiction, dated 14.11.2005, is available at www.italaw.com). Again, it will be noted that there was no litigation pending in Pakistan where the substantial dispute was involved. This case also therefore does not have a bearing on the issue that I am now considering.

41. Before proceeding further, there is one point that may be highlighted. In the present case, Karkey's claim in the ICSID proceedings, namely that its rights under the BIT have been violated appears to emanate directly from the judgment of the Supreme Court in the *Rental Power* case. At the same time, the plaintiff's claim in the present Suit is also based on the *Rental Power* case. This is therefore not a

situation, which appears to have arisen not infrequently in ICSID proceedings, of there being two sets of claims, one based on an international treaty (invariably the relevant BIT) and the other on purely contractual terms. Here, there is identity between the substantive bases of both claims. In my view therefore, the present situation is one to which what is stated in *Schreuer* at pg. 381 (see para 38 herein above) would be applicable.

42. Accordingly, I conclude that in view of the ICSID proceedings initiated by Karkey, it has itself created a situation, now subsisting, where recourse to arbitration under section 28 of the Contract would not be possible or feasible, i.e., the arbitration agreement is incapable of being performed. By reason of subsection (2) of section 4, the present Suit cannot and ought not to be stayed under the 2011 NYC Act. Only one final point needs to be made. There appears to be nothing in the NY Convention to suggest that the reason why the arbitration agreement is incapable of being performed must be of a permanent or irremediable nature. It may well be temporary or remediable. In my view, if the reason or situation rendering the arbitration agreement incapable of being performed exists when the application for stay of proceedings under section 4 comes up for hearing before the court, then such application is to be dismissed. But if subsequently the situation changes and the reason ceases to exist (e.g., the impediment is removed), I can see no reason why the defendant cannot renew the application if the proceedings are still pending. Thus, in the present case, if the ICSID proceedings fail or are abandoned, then it may be that Karkey is able to renew its application under section 4 of the 2011 NYC Act. However, any such application, if filed, will be dealt with on its own merits and subject to the rights of the plaintiff and in light of the circumstances then prevailing.

43. For the foregoing reasons, I hold that the arbitration agreement contained in section 28 of the Contract is currently incapable of being performed by reason of the ICSID arbitration proceedings initiated by Karkey itself, and therefore the present Suit cannot be stayed in terms of section 4 of the 2011 NYC Act. CMA 68/2013 is therefore dismissed, without prejudice to Karkey's right to file a fresh application at a later stage, if so deemed appropriate, in terms as noted in the last preceding para.

44. Before proceeding further, one remaining aspect must also be considered. Learned counsel for Karkey had submitted that the in rem jurisdiction under the 1980 Ordinance could not or ought not to be exercised because of the arbitration agreement between the parties. This is an important question, and raises a general point, which can stated as follows: if there is an arbitration agreement between the plaintiff and the person liable in personam (whether or not a defendant), can the in rem jurisdiction be exercised to arrest a ship in respect of which such an action would otherwise lie in admiralty jurisdiction? This question has been considered in different jurisdictions. It suffices to refer to only one such decision, that of a Full Bench of the Bombay High Court reported as *J.S. Ocean Liner LLC v. mv Golden Progress* (decided on 25.01.2007 and noted at AIR 2007 NOC 1376 (Bom.); full text available at: www.indiankanoon.org (accessed 15.12.2013)). Two questions were considered by the Full Bench, one of

which was: "… whether a suit only for arresting a ship by way of obtaining the security in the pending arbitration can be maintained or proceeded with?" After considering a number of authorities, both English and Indian, and referring to the Indian legislation as also an international convention, the learned Full Bench answered the question in the affirmative, in the following terms:

> "68. We shall, accordingly, articulate our conclusions thus:
>
> …
>
> (ii) An action in rem (in admiralty jurisdiction) for recovery of the claim and arrest of the vessel where the parties have agreed to submit the dispute to arbitration can be maintained and in such case if by way of an interim measure, the vessel is arrested or the security provided to obtain the release of the vessel, matter shall proceed in accord with Article VII of the International Convention on Arrest of Ships, 1999.
>
> (iii) If the proceedings are brought within the time so ordered by the Court before the arbitral tribunal, any final decision resulting therefrom shall be recognised and given effect with respect to the arrested ship or to the security provided in order to obtain its release provided that the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for defence and in accord with the provisions contained in [the Indian Arbitration Act].
>
> (iv) With regard to clauses (ii) and (iii), it is, however, clarified that retention of security shall remain a matter of discretion and it shall be for the court to pass appropriate order in that regard after taking into consideration all relevant circumstances."

I am in respectful agreement with the reasoning that led the learned Full Bench to the foregoing conclusions and the conclusions as well, subject only to the comment, which need not be elaborated here, that the conclusions may need some adaptation (without affecting the substance thereof) to suit our procedural requirements. It follows that if I had decided that Karkey's application under section 4 of the 2011 NYC Act ought to have been allowed and had stayed the present Suit, I would still have had the discretionary jurisdiction to order the arrest of the defendant-vessels or the providing of security for their conditional release. For the record, I would note that in the facts and circumstances of the present case, I would have exercised this discretion in favor of ordering the arrest of the defendant-vessels subject to Karkey providing a bank guarantee in terms as stated in para 32 herein above, and subject to the further condition that if the plaintiff did not initiate arbitration proceedings within a stipulated period and pursue the same diligently, or abandoned the same, then the order of arrest and/or providing of security (as applicable at the relevant time) would stand recalled and vacated.

45. I turn to consider the second application moved by Karkey, CMA 69/2013, seeking rejection of the plaint. Since I have allowed the plaintiff's application for arrest of the defendant-vessels in terms as stated above, and dismissed Karkey's application under section 4 of the 2011 NYC Act, it necessarily follows that in my view, the plaint cannot be rejected. There is no need for any separate consideration of CMA 69/2013, which fails and is hereby dismissed.

46. This brings me to the last of the four applications that require consideration, CMA 98/2013. It will be recalled that this application has been filed by the plaintiff, seeking a temporary suspension of the order of arrest in relation to the defendant-vessel No. 1 (herein after the "*Kaya Bey*"). The context of this application is the PM Decision of the Tribunal, made on Karkey's request for provisional measures under Article 47 of the ICSID Convention. The operative part of the PM Decision has been set out in para 16 herein above. The question of whether, how and if so, to what extent provisional measures recommended by ICSID tribunals can affect judicial proceedings pending in the host State is an issue that has been considered in relation to jurisdictions all over the world, and continues to be an alive issue. Here, a distinction must be made. In some cases, ICSID tribunals have recommended a complete cessation or suspension (or even withdrawal) of the judicial proceedings. That is not the case here. Accordingly, this issue is not before me, and I expressly leave it open (insofar as the courts of Pakistan are concerned) for consideration in a suitable case. (I would however, in passing, draw attention to an interesting article on this important issue by Rodrigo Gil: "ICSID Provisional Measures to Enjoin Parallel Domestic Litigation", *World Arbitration & Mediation Review*, 535-602, Vol. 3: Nos. 4-5 (2009).) The issue before me is whether, and if so, to what extent, an ICSID tribunal can recommend provisional measures that, in effect, interfere with pending judicial proceedings in the host State and affect the integrity of the judicial process. (I use the term "integrity" broadly to include, as appropriate, both procedural and substantive matters.) This necessarily requires a consideration of Article 47 of the ICSID Convention.

47. Article 47 provides as follows:

> "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

Reference should also be made to Rule 39 of the Arbitration Rules, which in relevant part is as follows:

> "(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> …
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
>
> (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present

observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests."

48. It seems that at least initially, ICSID tribunals considered recommendations under Article 47 to be non-binding requests. *Schreuer* states the matter thus:

> "The Convention's legislative history suggests that a conscious decision was made not to grant the tribunal the power to order binding provisional measures. However, this lack of binding force would not deprive them of all legal relevance. The general obligation not to frustrate the object of the proceedings will in many cases amount to an obligation to abide by provisional measures that are necessary to complete the arbitration successfully. Moreover, the tribunal has the power to take the parties' conduct into account when making the award …, the binding force of which is beyond doubt." (pg. 764)

The crucial shift came in 1999, when the tribunal in *Maffezini v. Spain* asserted "the word 'recommend' to be of equivalent value to the word 'order'" (ICSID Case No. ARB/97/7; Decision on Provisional Measures (Procedural Order No. 2), 28.10.1999, para 9; available at www.italaw.com). Interestingly, the tribunal based its conclusion primarily on the Spanish text of Rule 39. Be that as it may, ICSID tribunals quickly adopted this position. The passage most often cited appears to be from the tribunal's decision in *Tokio Tokelés v. Ukraine*, where it was stated as follows (emphasis supplied):

> "It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures "recommended" by an ICSID tribunal are legally compulsory; they are in effect "ordered" by the tribunal, and the parties are under a *legal obligation* to comply with them."
> (ICSID Case No. ARB/02/18, Procedural Order No. 1, 01.07.2003, para 4, available at www.italaw.com).

Reference is also made to the tribunal's decision in *Occidental v. Ecuador*, where it was stated as follows (emphasis in original):

> "The Tribunal wishes to make clear for the avoidance of doubt that, although Article 47 of the ICSID Convention uses the word "recommend", the Tribunal is, in fact, empowered to order provisional measures. This has been recognized by numerous international tribunals, among them the ICSID tribunal in the *Tokios Tokelés* case." (ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17.08.2007, para 58, available at www.italaw.com).

Thus, the nature of the provisional measures has changed from non-binding recommendations having "legal relevance" to their becoming a "legal obligation".

49. In *ETI Euro Telecom International NV v. Republic of Bolivia and another* [2008] EWCA Civ 880, [2008] 2 Lloyd's Rep 421, in the (English) Court of Appeal, Lawrence Collins, LJ (as he then was) cited para 4 from the tribunal's decision in *Tokio Tokelés v. Ukraine* (reproduced above) and stated that there was "no doubt" with regard to the principle stated therein (see at para [102], pg. 435). Reference was also made to *Occidental v. Ecuador (supra)*. Thus, it seems that the position adopted by ICSID tribunals has received high judicial sanction. Nonetheless, and with respect, it may not be out of place to note that the decisions of ICSID tribunals do not constitute binding precedent. Interestingly, in the present case although the Tribunal made copious reference to earlier decisions, it made clear that it was referring to "previous decisions on provisional measures where appropriate to present or illustrate its finding or determination, but not as mandatory precedents" (see para 132 of the PM Decision).

50. I turn to consider the nature of the "legal obligation" imposed on a host State when an ICSID tribunal makes a recommendation (i.e., "order") under Article 47. In order to do so, it will be necessary to consider the awards that are made in ICSID arbitration proceedings. The first point to note is that provisional measures under Article 47 are *not* awards in any sense whatsoever, whether interim or partial. This is absolutely clear. Now, Article 53 of the ICSID Convention provides that awards shall be "binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention". This is a crucial aspect of the ICSID Convention: awards made are not open to challenge in any proceedings in or before the member States. The only recourse open to an aggrieved party is in terms of the Convention itself. This is limited to seeking an interpretation of the award (Article 50), its revision (Article 51) or its annulment (Article 52). It is to be emphasized that these remedies are not in the nature of appeals; the scope is strictly limited and narrowly defined. Secondly, Article 54 draws a distinction between the recognition of an award, and its enforcement. All member States are bound to recognize an award rendered under the Convention and the award constitutes *res judicata*. However, its enforcement is limited only to the "pecuniary obligations" (if any) as may be imposed by the award. *Schreuer* states the matter thus:

> "The obligation to enforce extends only to the pecuniary obligations imposed by the award. It does not extend to any other obligation under the award such as restitution or other forms of specific performance or an injunction to desist from a certain course of action. By contrast, the obligation to recognize extends to the entire award." (pg. 1136)

Sections 3 and 4 of the 2011 ICSID Act give due recognition to this position inasmuch as they refer to the pecuniary obligations imposed by the award in relation to the execution thereof.

51. When the provisional measures recommended under Article 47 are compared with awards, two points emerge. Firstly, provisional measures are not subject to any interpretation, revision or annulment as

is applicable to awards. Thus, even the limited checks available under the Convention in relation to awards are wholly lacking in the case of provisional measures. The parties are entirely in the hands of the tribunal. I note the stringent and high standards that the Convention imposes as qualifications for arbitrators: see Article 14, which speaks of "high moral standards" and "recognized competence" and requires arbitrators to be able to exercise "independent judgment". The eminence of the persons nominated to the Panel of Arbitrators (see Articles 12 and 13) is not in doubt. However, one is here concerned with a matter of principle, and the fact of the matter is that insofar as provisional measures are concerned, the tribunal's recommendations are not subject to any external review or consideration whatsoever.

52. Secondly, it seems clear that if a party does not comply with the recommended provisional measures, the tribunal cannot impose any sanctions or penalties as such or force the party to take any steps or even to refuse to proceed further with the arbitration. What it can do is to factor this failure or refusal in the award when it is finally made. If that party is the one against whom, ultimately, the award is made, this can effectively happen (in the sense of being enforceable) only if the matter of the non-compliance is factored in the pecuniary obligations that are imposed. To put it differently, the tribunal can, in effect, award damages for non-compliance or disregard of the provisional measures. This much appears to be non-contentious. If however, the tribunal attempts to factor in the disregard of its recommendations in other ways by, e.g., drawing adverse inferences against the defaulting party in respect of the substantive dispute or issues or in the making of the award, that, it seems, would be highly contentious. Certainly, any such act by a tribunal cannot be regarded as part of the jurisprudence of ICSID arbitration, or to be settled by the practice of ICSID tribunals.

53. With the foregoing comparison between provisional measures and awards in mind, I return to the central point, which is crucial for determining how CMA 98/2013 is to be dealt with: what is the nature of the "legal obligation" imposed when provisional measures are recommended? The issue here is this: is the "legal obligation" an "international obligation" (sometimes also referred to as an "international legal obligation")? This is not a matter of mere semantics but is of crucial importance, since it goes to one of the most important aspects of international law, namely State responsibility. An award issued under the ICSID Convention is certainly an international obligation. To the extent that disregard of the provisional measures is factored into an award in the manner described in the last preceding para, such disregard also *ipso facto* becomes an international obligation. However, the question is whether the recommended provisional measures, in and of themselves (on, as it were, an independent, standalone basis), can be regarded as an "international obligation" and therefore come within the scope of the principle of State responsibility?

54. The importance of this point is that a State is bound to comply with an international obligation and a failure to do so constitutes an "internationally wrongful act", for which the State is responsible. The

principles of international law relating to state responsibility were formulated by the International Law Commission (ILC) in the form of Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA") in 2001. According to a well-known treatise on international law, the ARSIWA "have been much cited and have acquired increasing authority as an expression of the customary law of state responsibility" (*Brownlie's Principles of Public International Law*, 8th ed., 2012, pg. 540). The relevant articles of ARSIWA state as follows (emphasis supplied):

> "**l. Responsibility of a State for its internationally wrongful acts**.-- Every *internationally wrongful act* of a State entails the international responsibility of that State.
>
> **2. Elements of an internationally wrongful act of a State**.-- There is an *internationally wrongful act* of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a *breach of an international obligation* of the State.
>
> **3. Characterization of an act of a State as internationally wrongful**.-- The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.
>
> **4. Conduct of organs of a State**.-- 1. The conduct of any State organ shall be considered an act of that State under international law, *whether the organ exercises legislative, executive, judicial or any other functions*, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

Articles 29 to 31 of the ARSIWA set out the legal consequences for an internationally wrongful act and Articles 34 to 37 expand upon the remedies that may be claimed from the defaulting State. Article 34 provides, in particular, that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination". Article 33 provides as follows:

> "**33. Scope of international obligations set out in this part**.-- 1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
>
> 2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."

55. When the foregoing articles of the ARSIWA are kept in mind, the fundamental importance of the distinction between a "legal obligation" and an "international obligation" is manifest at once. If the provisional measures recommended under Article 47 are an "international obligation", then any breach of

the same by Pakistan, as an entity to which Article 4 of the ARSIWA applies, may constitute an internationally wrongful act. This would, in principle, expose the State to the full panoply of consequences at international law (including those as noted above). On the other hand, if the provisional measures are a "legal obligation", then a breach of the same would not, it appears, come within the scope of the ARSIWA.

56. At first sight, it may perhaps seem that provisional measures should be regarded as an "international obligation". After all, Article 47 is a provision in a multilateral treaty, and as noted in *Schreuer* (see para 48 herein above) there is a "general obligation not to frustrate the object of [ICSID] proceedings". Indeed, when considering who the "addressees" of the provisional measures are, *Schreuer* specifically refers to Article 4 of the ARSIWA (see at pg. 797). However, after having considered the matter, I am of the view that the provisional measures are not, and ought not to be regarded as, an "international obligation". This is so for the following reasons. Firstly, provisional measures are concerned with "preserving" the respective rights of the parties. It is invariably the case that such "preservation" requires that the provisional measures be something other than a pecuniary obligation. However, as noted above, insofar as the enforcement of an award is concerned, that is limited only to pecuniary obligations, even though the award may well deal also with other, non-pecuniary rights and issues. Thus, to regard provisional measures as an "international obligation" could result in such measures being placed on a pedestal higher than the ultimate award itself; that which cannot be enforced through the award may yet become enforceable, even if temporarily, through provisional measures. Put differently, the interim relief would be granted a status higher than the final relief, which is inapposite. Secondly, provisional measures come to an end when the award is issued. Now, it may be that provisional measures are made on the request of a claimant, but ultimately, his case fails and the award is made against him. If in the meantime the provisional measures have been breached, this could, in principle, have the anomalous result that while on the substantive claim there is no international obligation of the host State, it may yet remain liable for an internationally wrongful act by reason of its breach of the provisional measures. Again, this is inappropriate. Thirdly, the tribunal is in any case empowered to take into consideration any breach of the provisional measures at the time of making the award (as noted above). Regarding the provisional measures as an international obligation could, in principle, result in double jeopardy for the host State: once, for and as soon as the breach of the provisional measures occurs, and the second time, if the breach is factored into the award (and, e.g., damages are awarded by the tribunal). It is to be emphasized here that if the provisional measures are an international obligation, then it is clear from the ARSIWA that a breach of the same is inevitably an internationally wrongful act, and this wrong occurs as soon as the breach takes place. Finally, as noted in *Schreuer* (see para 48 herein above), both the language of Article 47 and the *travaux préparatoires* of the ICSID Convention make clear that the provisional measures recommended were *not* intended to have binding effect. This was a much later development brought about by a process of interpretation undertaken by ICSID tribunals themselves. This constitutes the jurisprudence on which the binding effect of the provisional measures is based. But the precedents are not binding, as the Tribunal in the present case has taken some pains to make clear. In principle, the pendulum of interpretation may swing the other way. This, with respect, is hardly a firm

enough foundation to regard the rule as an "international obligation" (as opposed to it being a "legal obligation"), with attendant consequences for the host State.

57. For all of the foregoing reasons, I am of the view that provisional measures recommended by an ICSID tribunal, though undeniably a "legal obligation" of the State are not, and ought not to be regarded as, an "international obligation". The next question is as to how the domestic courts of the host State should deal with this "legal obligation" in the context presently under consideration, i.e., the case where the recommended provisional measures relate to pending judicial proceedings without requiring a complete cessation or suspension of the same. In my view, the domestic courts must take account of the consequences that can flow from the "legal obligation", namely, that any breach of the same may be taken into consideration by the tribunal while making its award. Since an award is undeniably an "international obligation", the breach of which would be an internationally wrongful act, the domestic courts should be cognizant that a breach or disregard of the "legal obligation" could, ultimately, result in severe consequences for their State on the international plane.

58. In my view, there are three possibilities that may confront the domestic courts in the present context. Firstly, it may be that giving effect to the provisional measures does not interfere with the pending judicial proceedings or affect the integrity of the judicial process. In this situation, the domestic courts should regard themselves as bound, subject only to exceptional circumstances, to give effect to the provisional measures in full. The second situation is where the provisional measures do, in effect, interfere with the judicial proceedings or affect the integrity of the judicial process, but it is possible to give effect to the recommendations, though perhaps in some manner different from that identified or specified by the tribunal. In this situation, it may be possible for the domestic courts to achieve the desired result without the judicial proceedings or the integrity of the judicial process being affected. For example, the substance of what the ICSID tribunal has recommended may be achievable, though by a route different from that specified by it. The domestic courts should take all steps possible to give effect to the recommended measures through such route as open to them, i.e., which does not affect the judicial proceedings or the integrity of the judicial process. Finally, there is the situation where it is not possible to give effect to the recommended measures in any manner (i.e., as specified by the tribunal or otherwise considered by the domestic courts) without affecting the judicial proceedings or the integrity of the judicial process. In my view, the domestic courts would nonetheless be under an obligation to take all steps (to the maximum extent possible) as minimize the inevitable inconsistency with the provisional measures. Thus, e.g., if it is possible to give effect to the provisional measures at least in part, to that extent the domestic courts should act accordingly.

59. It is important also to keep in mind that domestic courts are necessarily subject to the limitations and conditions imposed by their municipal law, both on the constitutional plane and otherwise. Such limitations and conditions may well result from the place of the court concerned in the judicial hierarchy

of the host State. Even with the best of intentions (and efforts), the court may simply be unable to give effect to the provisional measures, either in full or in part. In the context of an "international obligation", the breach of which is an internationally wrongful act, this may well be irrelevant on the international plane, as made clear by the ARSIWA. But in the context of a "legal obligation", these considerations are also of relevance and ought, as appropriate, to be taken into account. This, incidentally, is an additional reason why, in my view, the provisional measures recommended under Article 47 ought to be regarded only as a "legal obligation".

60. I now turn to consider CMA 98/2013 in light of the foregoing. The Tribunal has asked for a temporary suspension of the arrest orders in relation to the *Kaya Bey* for the reasons as identified in the PM Decision, and the plaintiff has prayed accordingly in its application. I again note that this application was filed at the instance of the Attorney General's office. I have no doubt that the provisional measures recommended by the Tribunal, which have resulted in the application, interfere with pending judicial proceedings (i.e., the present Suit) and affect the integrity of the judicial process. I may note that the arrest of a ship in the exercise of admiralty jurisdiction is at the discretion of the Court. If such an order has been made, it is not for the plaintiff to claim, as of right, for its modification by way of temporary suspension or otherwise. (Of course, a plaintiff may at any time withdraw entirely his application for the arrest of the ship, but that is another matter altogether.) In my view, it would be contrary to settled principles for a party to apply for, and be granted, discretionary relief and for that party then to come forward and seek "suspension" and "restoration" of such relief at its own will or to serve some collateral purpose, howsoever pressing. The present plaintiff is therefore not entitled as of right to the relief sought in CMA 98/2013. Indeed, such an application may well warrant dismissal. However, at the same time, the backdrop to this application cannot be ignored, and I must keep in mind the legal situation that has emerged on account of the PM Decision.

61. The concern expressed by Karkey, which found favor with the Tribunal as justifying the provisional measures, was "for inspection and repairs [of the *Kaya Bey*] as determined by Bureau Veritas (or other equivalent agency) to maintain the vessel's flag-registry and class certification". During the course of submissions, I asked learned counsel for Karkey how it would have achieved this result had the Contract run its course. The reason why this question came to mind was because the term of the Contract was 60 months (i.e., five years). For that entire period (which would still have been in effect today had the Contract remained in existence), the *Kaya Bey* would have remained moored at Karachi. It seemed to me that as a reasonable and prudent business entity and ship owner, Karkey would have taken this into account and have had in contemplation the measures that would have been appropriate to maintain the ship's flag-registry and class certification, given that it had to remain stationed throughout at Karachi. What were those contemplated measures? When I put this question to learned counsel, they understandably responded that it had certain technical aspects and they had not been instructed on the point, and quite properly expressed their inability to assist the Court.

62. Having considered the matter, I am of the view that the issue that CMA 98/2013 raises is the second of the three possibilities discussed in para 58 herein above. The Tribunal's provisional measures seeking suspension of the arrest of the *Kaya Bey* interfere with the present Suit and affect the integrity of the process of this Court. In a communication from the Tribunal subsequent to the PM Decision (dated 25.11.2013), and placed before me during the course of the hearing, the Tribunal expressed its "difficulty" in understanding why the departure of the *Kaya Bey* was being "delayed", given that the Decision in "clear terms" required that the vessel "be returned to Pakistan waters after these operations [at Dubai] have been carried out". With respect, I do have some difficulty in understanding how the Tribunal will enforce this aspect of the Decision should there be a change of heart at Karkey. I note in this context that the Tribunal itself noted Karkey's claim that during the period of their "detention" in Pakistan, the defendant-vessel Nos. 1 and 2 could "jointly … have produced revenue of over US$205 million" (para 58 of the PM Decision). However, it seems to me that the result sought to be achieved by the Tribunal may be substantively arrived at if Karkey is directed to take those measures which ought (as a reasonable and prudent manager of its affairs) to have been in its contemplation in this regard, in terms as noted in the last preceding para. If those measures can be adopted, then although the route by which Karkey is able to maintain the flag-registry and class certification of the *Kaya Bey* would be different from that recommended by the Tribunal, the substantive result would be the same. And, since the *Kaya Bey* would remain at Karachi, at the same time the integrity of this Court's judicial process would be maintained and any interference with this Suit would be minimized. If the foregoing is at all possible, then this Court would regard itself as bound to allow such measures to be taken. However, whether this is possible cannot be definitely concluded at this stage since, as noted, this will require further information from Karkey.

63. Accordingly, I conclude by holding that CMA 98/2013 cannot be disposed off at this stage and is to be regarded as pending. Karkey is hereby directed to inform this Court in detail of the measures that were in its contemplation for maintaining the flag-registry and class certification of the *Kaya Bey* (whether with or without any contemplated maintenance) had the Contract continued to run its course, and the vessel had remained stationed at Karachi. All the information provided in this regard must be supported by an affidavit sworn by a person holding an office or post in the defendant No. 5 at the senior most level, and to the extent that any technical information is being provided such information must be supported by an affidavit of a person duly qualified in this regard. The affidavit(s) and information must be filed within three weeks from today, with advance copy to learned counsel for the plaintiff. CMA 98/2013 to be listed after three weeks.

64. Before concluding, one final point needs to be addressed. On 09.12.2013, a statement was filed before me (in chambers) by the learned DPG, NAB enclosing a fresh NOC of even date signed by the Acting Chairman, NAB. This stated that since the Federal Government had given an "undertaking" on 08.12.2013 to "make up any shortfall in the moneys which NAB is obliged to recover from [the defendant No. 5] in the event that the vessel KAYA BEY does not return to Pakistani territorial waters the Chairman NAB hereby gives his NOC to the KARKEY vessel KAYA BEY leaving Pakistani territorial waters". This

"undertaking" given by the Federal Government is hardly consistent with the directions of the Supreme Court in the *Rental Power* case. Those directions were for recoveries to be made as therein described from the persons therein identified. Such recovery would obviously not be for the benefit of NAB but rather of the Federal Government itself. How the Federal Government can give an "undertaking" to make up any "shortfall" in such recovery is something that I have failed entirely to understand. Any so-called "undertaking" of this nature would be tantamount to nothing other than the Federal Government having written off the amount in question. Whether such a write off is even permissible under law (and if so, by whom) and especially in the face of a Supreme Court decision are questions that remain unanswered. The fresh NOC cannot be taken into account and is hereby rejected.

65. Accordingly, and in summary, the following position emerges:

(a) CMA 46/2013, filed by the plaintiff, for the arrest of the defendant-vessel Nos. 1 to 4 is allowed in terms of para 32 herein above.

(b) CMA 68/2013, filed by Karkey, under section 4 of the 2011 NYC Act is dismissed in terms of para 43 herein above.

(c) CMA 69/2013, filed by Karkey, seeking rejection of the plaint is dismissed.

(d) CMA 98/2013, filed by the plaintiff, seeking modification of the order of arrest in relation to the defendant No. 1, is deemed pending, and Karkey is directed to comply with the directions given in para 63 herein above.

JUDGE