Neutral Citation Number: [2024] EWHC 70 (Comm)

Case No: CL-2022-000471

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/01/2024

**Before** :

**DAME CLARE MOULDER DBE**
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

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|---|---|
| **Quaid-e-Azam Thermal Power (Private) Ltd** | **Claimant** |
| **- and -** | |
| **Sui Northern Gas Pipelines Limited** | **Defendant** |

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**Toby Landau KC and Peter Webster** (instructed by **Shearman & Sterling (London) LLP**) for the **Claimant**
**Lucas Bastin KC and Jackie McArthur** (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Defendant**

Hearing dates: 13 and 14 December 2023

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# Approved Judgment

This judgment was handed down remotely at 10.00am on 22 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Dame Clare Moulder DBE :**

## Introduction

1. This is a challenge brought by Quaid-e-Azam Thermal Power (Private) Limited ("QATPL") under Section 68 of the Arbitration Act 1996 (the "Act") to a final award dated 2 August 2022 (the "Award").

2. The underlying arbitration related to unpaid invoices under a Gas Supply Agreement (the "GSA") entered into by the parties on 22 July 2016.

3. Sui Northern Gas Pipelines Limited ("SNGPL") is a public limited company incorporated in Pakistan engaged in the business of gas transmission, distribution and sale.

4. QATPL is a private limited company incorporated under the laws of Pakistan. It owns and operates a power plant at Bhikki, near Sheikhupura, Pakistan (the "Complex"). The Complex operates on Re-Gasified Liquefied Natural Gas ("RLNG") as its primary fuel.

5. The grounds of challenge are in summary that:

    a. the Tribunal acted in breach of Section 33 of the Act by determining the claim on a basis that SNGPL had not pleaded and/or by determining it in a way that meant that QATPL did not have a reasonable opportunity to respond to SNGPL's case in the way in which that case was finally sought to be advanced; and

    b. in breach of Section 68(2)(d) of the Act, the Tribunal failed to rule on a determinative issue that the parties had put before it, namely whether SNGPL's failure to issue invoices within the contractual deadline under the GSA deprived it of the entitlement to claim for sums in the May 2018 Invoice (as defined below).

6. QATPL seeks an order setting aside, or remitting, parts of the Award.

## Relevant legal principles on Section 68 of the Act

7. Section 68 of the Act states (so far as material):

> "*(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—*
>
> *(a) failure by the tribunal to comply with section 33 (general duty of tribunal);*
>
> *(b) …*

> *(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;*
>
> *(d) failure by the tribunal to deal with all the issues that were put to it;*
>
> *…*
>
> *(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—*
>
> *(a) remit the award to the tribunal, in whole or in part, for reconsideration,*
>
> *(b) set the award aside in whole or in part, or*
>
> *(c) declare the award to be of no effect, in whole or in part.*
>
> *The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration*."

8. Section 33 of the Act provides:

> "*(1) The tribunal shall—*
>
> *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
>
> *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*
>
> *(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.*"

9. The relevant legal principles for Section 68 challenges are set out in *RAV Bahamas Ltd and another v Therapy Beach Club Inc* [2021] UKPC 8 at [30]-[37]. I note in particular from that judgment that:

> "*the test of serious irregularity was intended to limit intervention to "extreme" cases where it could be said that "the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*"

and that the test of serious irregularity has been recognised as imposing a "*high threshold*".

10. QATPL submitted that a substantial departure from the parties' pleaded case is a paradigm example of a breach of s. 33: *The Vimeira* [1984] 2 Lloyd's Rep 66 at 76: "*the essential function of an arbitrator … is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues remain live issues*".

11. QATPL also relied on *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 at pp 284F-285A (cited with approval in *RAV Bahamas* at [35]):

> "*the whole process of arbitration is intended as a way of determining points at issue, it is more likely to be a matter of serious irregularity if on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting*".

12. SNGPL referred to the judgment of Popplewell J (as he then was) in *Terna Bahrain Holding Company WLL v Al Shamsi* [2013] 1 All E.R. (Comm) 580 at [85].

13. I note in this context the following from that judgment at [85]:

> "*(3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the court's intervention. Relief under s 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls out for it to be corrected.*
>
> *(4) There will generally be a breach of s 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.*
>
> *(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s 33 or a serious irregularity*." [Emphasis added]

14. As to the second ground of challenge which is brought under Section 68(2)(d), failure to deal with an issue that was put to it, the Court stated in *RAV Bahamas* that there are three questions: What is an issue? Has the issue been put to the arbitrators? Have the arbitrators failed to deal with it?

15. As regards all three questions, in *RAV Bahamas* Lord Hamblen and Lord Burrows JJSC, handing down the judgment of the Board, stated that the authorities on Section 68(2)(d) were drawn together and summarised by Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC), at para 33(g). I note in particular the following paragraphs of the judgment of the Board:

> "*40. In relation to the first question of what is an issue, Akenhead J said the following in para 33(g):*
>
> *"(ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning' or 'steps' in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this*

*question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity (Petrochemical Industries v Dow [2012] 2 Lloyd's Rep 691, para 15; Primera v Jiangsu [2014] 1 Lloyd's Rep 255, para 7).*

*(iii) While there is no expressed statutory requirement that the section 68(2)(d) issue must be 'essential', 'key' or 'crucial', a matter will constitute an 'issue' where the whole of the applicant's claim could have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with (Petrochemical Industries , at para 21).*

*(iv) However, there will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award (World Trade Corpn v C Czarnikow Sugar Ltd [2005] 1 Lloyd's Rep 422 at para 16). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (Weldon Plan Ltd v The Commission for the New Towns [2000] BLR 496 at para 21).”*

*42. Turning to whether the issue has been “put to” the arbitrators, Akenhead J continued in para 33(g) of the Raytheon case as follows:*

*“(v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the section 68(2) application (Primera at paras 12 and 17).”*

*There is a degree of overlap between the considerations relevant to whether there is an “issue” and whether it has been “put to” to the tribunal. It is clear that this does not require the issue to have been pleaded or included in a list of issues. It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general, what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue, as one which it is required to determine, that it would reasonably be expected to deal with it.*

*43. Finally, as regards whether the arbitrators have failed to deal with the issue, Akenhead J continued in the following way:*

*“(vi) If the tribunal has dealt with the issue in any way, section 68(2)(d) is inapplicable and that is the end of the enquiry (Primera, at paras 40—41); it does not matter for the purposes of section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.*

*“(vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length (Latvian Shipping v Russian People’s Insurance Co [2012] 2 Lloyd’s Rep 181, para 30).*

*“(viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue (Fidelity Management v Myriad International [2005] 2 Lloyd’s Rep 508, para 10, World Trade Corpn, para 19).*

*A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it (Hussman v Al Ameen [2000] 2 Lloyd's Rep 83).*

*"(ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences (World Trade Corpn, at para 45). The fact that the reasoning is wrong does not as such ground a complaint under section 68(2)(d) (Petro Ranger [2001] 2 Lloyd's Rep 348, Atkins v Secretary of State for Transport [2013] EWHC 139 (TCC) at [24]).*

*"(x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise (Petrochemical Industries, at para 27). If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues (Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd [2010] EWHC 442 (Comm) at [30]).*

*"(xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, section 68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the tribunal has followed for the purposes of arriving at its conclusion, section 68(2)(d) will be engaged.*

*"(xii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) (Ascot Commodities v Olam [2002] CLC 277 and Atkins, para 36). The court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard."*
[emphasis added]

## Section 3.6 of the GSA

16. The first ground of challenge relates to Section 3.6 of the GSA:

"*Section 3.6 Diversion of Gas and Take or Pay*

*(a) From and after the Commercial Operations Date GT1 and during a Month in the Delivery Period, the Buyer shall take and if not taken pay for the portion of the Firm Gas Allocation pertaining to that Month (the 'Monthly Take-or-Pay Quantity') divided by the number of days in that Month multiplied by the difference between the number of days in that Month and (i) the number of days (or fractions thereof) of Force Majeure Events declared by the Seller or the Buyer, (ii) the number of days (or fractions thereof) of non-delivery of Gas by the*

*Seller in that Month for any reason, including a breach or default by the Seller or maintenance undertaken by the Seller pursuant to Section 12.1, and (iii) the number of days of Scheduled Outages in that Month notified to the Seller pursuant to Section 12.2 (in relation to the maintenance and scheduled outages, each to the extent not already catered for under the Firm Gas Order).*

*(b) In case Monthly Take-or-Pay Quantity is not fully utilized by the Buyer in the Complex, the Buyer may request the Seller to divert any unutilized Monthly Take-or-Pay Quantity to any other power plants (after seeking their consent) and the Seller shall arrange for such diversion at the cost and risk of Buyer subject to available capacity in its pipelines. Any amounts received by the Seller from the other power plants in consideration of supply of the diverted Gas shall, after making deduction of any additional charges incurred by the Seller in arranging the sale, be paid by the Seller to the Buyer within 3 Business Days of receipt of such amounts (along with a copy of the invoice evidencing the selling price of the unutilized Monthly Take-or-Pay Quantity). If other power plants refuse or the Seller due to technical constraints or any other reasons is unable to supply the diverted Gas to the other power plants, the Seller shall have the right to supply such Gas to any of its consumers and the amounts recovered from those consumers shall, after making deduction of any additional charges incurred by the seller in arranging the sale, be paid by the Seller to the Buyer within 3 Business Days of receipt of such amounts (along with a copy of the invoice or any other document evidencing the selling price of the unutilized Monthly Take-or-Pay Quantity).*"

## Chronology

17. So far as relevant the chronology is as follows.

18. On 24 May 2018 SNGPL sent an invoice to QATPL for the months of May 2017, November 2017, December 2017, January 2018, February 2018 and March 2018 (the "May 2018 Invoice").

19. On 28 May 2018 QATPL disputed liability for the amounts claimed.

20. On 13 June 2018 SNGPL drew down the gas supply deposit (the "Gas Supply Deposit") furnished by QATPL under the terms of the GSA in partial satisfaction of the amounts claimed under the May 2018 Invoice.

21. In June 2018 proceedings were commenced by QATPL in the Lahore High Court to restrain SNGPL from drawing down on the Gas Supply Deposit. By consent the claim was submitted to a process of expert determination in accordance with the GSA.

22. In September 2019 recommendations were issued by the Expert.

23. On 11 October 2019, SNGPL and QATPL each submitted a request for arbitration, commencing two arbitrations with LCIA numbers 194490 and 194491.

24. By the Arbitration, QATPL sought to recover sums of which SNGPL had obtained payment through the encashment of the Gas Supply Deposit. SNGPL sought by way of counterclaim to recover outstanding sums over and above the value of the Gas Supply

Deposit which it argued were owed and reflected in a number of disputed invoices as well as an order regarding the maintenance of the deposit. Both sides also claimed certain heads of declaratory relief.

25. The two arbitrations were consolidated into Arbitration No. 194490.

26. As originally there were two separate arbitrations there were two requests for arbitration and two replies.

27. Once the arbitrations were consolidated the order of pleadings was as follows:

    a. QATPL issued a Statement of Case.

    b. SNGPL then issued a Statement of Defence and Counterclaim.

    c. QATPL issued a Reply to the Statement of Defence and Defence to Counter Claim.

    d. SNGPL issued a Statement of Reply to Defence to Counterclaim.

28. On 16-17 June 2021**,** the parties exchanged written opening submissions.

29. On 19 June 2021 QATPL's Pakistani lawyers emailed the Sole Arbitrator, alleging that SNGPL was "*seeking to run an entirely different case than the one pleaded*" and inviting the Sole Arbitrator to strike out relevant parts of SNGPL's Opening Submissions.

30. On 20 June 2021 the Arbitrator responded that:

> "*If the Respondent wishes to pursue this application it will need to do so tomorrow at the hearing, but I can assure the parties that the case will be decided on the pleadings as presented. If either party wishes to run a new case, not encompassed by the current pleadings, then they will have to make an appropriate application to amend their pleadings.*"

31. The hearing took place on 21-25 June 2021.

32. On the first day of the hearing QATPL made an application to strike out the relevant sections of SNGPL's submissions.

33. On 10 August 2021, SNGPL and QATPL submitted their respective written closing submissions.

34. The Award in the Arbitration was published on 2 August 2022.

## The Award

35. The Sole Arbitrator in paragraphs 203-206 of the Award dealt with QATPL's email of 19 June 2021 and rejected its application to strike out sections of SNGPL's written Opening:

> "*203. The claim advanced by the Claimant on the pleadings was for sums invoiced by the Claimant for the Take or Pay amount, with a credit being given for amounts realised by the diversion of the gas (and recovered by encashment of the security deposit). The claim is not advanced as a claim for damages suffered as a result of a breach of contract by the Respondent. This is evident from the relief claimed by the Claimant in the SOD set out above and repeated in the REP, albeit with the figures claimed having been adjusted. The Respondent, by its Statement of Case (e.g. [125]) and Reply to Defence and Defence to Counterclaim (e.g. [151(a)]) argued, inter alia, that the Claimant had to establish actual loss or damage suffered by it before it could claim amount amounts from the Respondent (and that the Claimant had failed to do so).*
>
> *204. Although the Claimant's pleadings do refer to loss, in my view, the essence of the claim being advanced by the Claimant was clearly set out in the relief referred to above and also at paragraph 4 of the REP which provided as follows:*
>
> *"The issues in dispute are simple and straight forward. The Claimant arranged for the gas. The Respondent failed to take that gas. The Respondent also failed to take consent of the other power plants for the diversion of unutilized gas to them. Therefore, the unutilized gas was diverted to other consumers of the Claimant. The Claimant has a right under the GSA to divert the gas to any other consumer in such circumstances. The Claimant is now asking for the tariff differential and the additional charges it has incurred in arranging for the sale as mentioned in the GSA. .. "*
>
> *205. The Respondent had ample opportunity to, and did, set out its defences to the claim advanced by the Claimant. Further, in this case the Parties agreed that the Respondent should set out its case first and accordingly it (although the Respondent) served the SOC in which it, inter alia, asserted that the amounts claimed by the Claimant under Section 3.6(a) of the GSA amounted to a penalty which could not be recovered under Section 74 of the Contract Act 1872 (e.g. [127]). It is not surprising that in response the Claimant characterised the sums it was seeking under Section 3.6(a) as actual loss.*
>
> *206. Accordingly, I reject the Respondent's application to strike out sections of the Claimant's written Opening. The Claimant's claim is for recovery pursuant to the GSA of the differential between the Take or Pay amount and any recovery made it from the diversion of the Gas to others (together with a credit for recovery against the security and a late payment surcharge).*" [emphasis added]

36. In the Award, the Tribunal dismissed QATPL's claim to recover the value of the Gas Supply Deposit and instead awarded SNGPL the sums claimed (other than in respect of two months) and ordered QATPL to replenish the Gas Supply Deposit.

## Alleged breach of Section 33

37. QATPL's case in relation to Section 33 is that the Tribunal decided the Arbitration on the basis of a case advanced by SNGPL five days before the final hearing, which had not been pleaded and was radically different to, and inconsistent with, the case that SNGPL had previously pleaded in its Statement of Defence (the "Defence") and Statement of Reply to Defence to Counterclaim.

## Actual Loss Case vs Price of Gas Case

38. In the Arbitration Claim Form the distinction which QATPL draws is between an "*Actual Loss Case*" and a "*Price of Gas Case*". This is a nomenclature which risks blurring the issue as to whether, as alleged by QATPL, the case advanced by SNGPL immediately before and at the final hearing, had not been pleaded and was radically different to, and inconsistent with, the case that SNGPL had previously pleaded in its Defence and Statement of Reply to Defence to Counterclaim.

39. In the Arbitration Claim Form QATPL defined the "*Actual Loss Case*" as follows:

> "*SNGPL previously claimed that QATPL owed it certain sums relating to alleged failures by QATPL to comply with Section 3.6 of the GSA, a provision titled "Diversion of Gas and Take or Pay". SNGPL contended that those sums were due because, according to SNGPL, they represented the actual loss it suffered as a result of QATPL's failure to take the gas allegedly made available to it (the "Actual Loss Case"). SNGPL contended that these sums were recoverable (notwithstanding Section 74 of the Pakistan Contract Act 1872 ("Section 74"), which applies to penalty provisions) because the sums claimed were the loss actually suffered by SNGPL as a result of QATPL's failure to take the "Take or Pay" quantity of gas under the GSA. SNGPL provided evidence of its actual loss, which it calculated as the loss arising from the supply of gas to domestic consumers in Pakistan for a lower tariff than the tariff paid by power producers, such as QATPL, as well as industrial and commercial consumers. SNGPL advanced this argument and evidence with its [Defence] and SORD*." [emphasis added]

40. It seems to me that there are two elements to the "*Actual Loss Case*" which QATPL alleges was the pleaded case originally advanced by SNGPL:

    a. a claim that QATPL owed SNGPL "*certain sums relating to alleged failures by QATPL to comply with Section 3.6 of the GSA*"; and

    b. that those sums were due because, according to SNGPL, they represented "*the actual loss it suffered as a result of QATPL's failure to take the gas allegedly made available to it*".

41. In my view the use of the term "*Actual Loss Case*" is imprecise since it does not set out the basis for the claim or the "*alleged failure*". However in its definition of the "*Price of Gas Case*" in the Arbitration Claim Form it appears that the distinction that is being drawn by QATPL is between a failure to pay for the gas amounting to a breach of the GSA and a claim that the sums were due and payable under Section 3.6:

> "*SNGPL no longer contended that it was entitled to the amounts it was counterclaiming on the basis they represented its actual loss. Instead, SNGPL argued that it was entitled to the price of gas under Section 3.6 GSA regardless of whether it had suffered any loss. In particular, SNGPL now argued that the sums claimed were due and payable because QATPL's failure to take the gas did not amount to a breach of the GSA and Section 74 was therefore wholly inapplicable (the "Price of Gas Case"). SNGPL further contended that the burden was on QATPL to establish that it was entitled to a credit arising from the*

*diversion of its gas under Section 3.6(b) GSA and that if QATPL contended that insufficient credit had been given by SNGPL, QATPL would need to bring a claim against SNGPL for the shortfall*." [emphasis added]

42. QATPL submitted that there was a "*fundamental disconnect*" between what QATPL termed the "*Price of Gas Claim*" and the "*Actual Loss Claim*". It was submitted that:

    a. The case that QATPL believed it was facing, was that Section 3.6 of the GSA allowed SNGPL to recover the loss it had suffered; the loss being by reason of QATPL not taking "take or pay" volumes of gas, and that constituting a breach of contract.

    b. The claim was that SNGPL had been forced to sell the untaken gas to lower tariff consumers and thereby suffered a loss and that QATPL was obliged to pay the sum to SNGPL because that reflected their loss.

    c. This was therefore a claim which was governed by Section 73 of the Pakistan Contract Act which set down the circumstances in which damages for breach of contract were recoverable under the laws of Pakistan dealing with notions of causation and remoteness.

    d. Further Section 74 of the Pakistan Contract Act would apply which provided that where you have a stipulation in a contract with respect to damages, recovery must reflect actual loss.

43. By contrast QATPL submitted that a Price of Gas claim would not have been a claim for breach of contract but would be a claim to recover sums as a debt, regardless of whether they reflected SNGPL's actual loss. QATPL submitted that:

    a. The sums would be due because SNGPL had issued "take or pay" invoices.

    b. The invoices would state the untaken quantity of gas by QATPL, how much QATPL had not taken, multiplied by the price and giving credit under Section 3.6(b) for gas used elsewhere.

## "Obligation to Pay Case"

44. SNGPL submitted (paragraph 23 of its skeleton) that it consistently advanced as a primary case that it was entitled to "take or pay" amounts, payment of which was a primary contractual obligation owed by QATPL and QATPL had ample opportunity to respond to this primary case.

45. In its submissions to this Court (paragraph 31 of its skeleton) SNGPL submitted that the basis of its claim was not an allegation that QATPL had breached the GSA by failing to take sufficient gas causing loss to SNGPL for which SNGPL was claiming compensation. Rather from the beginning the claim was founded on a primary contractual obligation on QATPL to pay the amounts being claimed as "due" (the "Obligation to Pay Case") without needing to show that QATPL's failure to take gas had been a breach of the contract that caused SNGPL to suffer loss.

46. SNGPL further submitted (paragraph 35 of its skeleton) that the relief sought in its Counterclaim was a take or pay amount adjusted for amounts realised from other

consumers and that although the GSA contemplated two separate payments, SNGPL had taken the "*more efficient*" route of adjusting the take or pay invoices to account for what it would otherwise have had to reimburse to QATPL. The relief claimed was therefore premised on the Obligation to Pay Case.

## Discussion

### The pleadings

47. Against those submissions as to the nature of the pleaded case, I turn to consider the pleadings. It is for the Court to form a view on the overall effect of the pleadings and it is difficult to reflect the overall effect in picking out certain paragraphs of the pleadings and then tracing through how the particular paragraphs are developed/responded to. Whilst in light of the submissions which relied on particular paragraphs in the pleadings, it seems to me that I should deal with individual paragraphs of the pleadings, the conclusion as to what was the pleaded case (and what QATPL reasonably understood from the pleadings) can only be reached by considering the pleadings as a whole and the references below are necessarily an incomplete description of what is contained in the pleadings and which the Court has read as a whole.

#### *QATPL's Statement of Case*

48. QATPL's Statement of Case is some 46 pages.

49. The "*outline*" of QATPL's case in Section 2 commences as follows (paragraphs 8 and 9):

> "*The Disputes between the Claimant and the Respondent arise out of the GSA. They relate to certain claims of the Claimant made under Section 3.6 of the GSA. This provision is titled 'Diversion of Gas and Take or Pay'.*
>
> *The Respondent disputes and denies the claims in their entirety.*"

50. I note at the outset that this outline by QATPL refers to "*certain claims of the Claimant made under Section 3.6 of the GSA".* [emphasis added] It does not refer to any alleged breach of Section 3.6 of the GSA.

51. QATPL then raises 3 issues as follows (paragraph 11):

    a. "*for the disputed period, there was no firm gas arrangement in place since no firm gas orders were ever placed. Hence, Section 3.6 of the GSA was not attracted.*"

    b. "*the 'Diversion of Gas' arrangement is a part and parcel of the 'Take or Pay' obligation…If that gas was utilized by [other gas-based power plants], there would ultimately be no amounts to claim under the take or pay arrangement … during the disputed period, the Gas utilized by such other gas-based power plants was more than the Gas not utilized by the Respondent. This is not denied by the Claimant. In the circumstances, there is no basis for the claim as pursuant to the 'diversion of gas' arrangement, all unutilized Gas stood utilized.*"

c. "*whether or not, in cases where the Respondent has disputed any particular claim, the Claimant can make a drawdown on the security deposit put in place to secure the Respondent's payment obligations*." [emphasis added]

52. Whilst the Outline concludes (paragraph 12) with reference to "*various other legal and factual grounds on the basis of which the claims of the Claimant fail*" as discussed below, it seems to me that the Outline identified the main issues from QATPL's perspective.

53. Section III is the "*Framework governing the Complex*" and included a description of Section 3.6 of the GSA (paragraphs 33-35) drawing the distinction between the obligation in subsection (a) of Section 3.6 on QATPL to take, and if not taken, pay for the gas and the provision for gas to be diverted in subsection (b):

> "*Where a firm gas arrangement has come in place for any period, in the manner described above, Section 3.6 of the GSA provides for a 'Diversion of Gas and Take or Pay' arrangement. Section 3.6(a) describes the 'Monthly Take or Pay Quantity' in respect of which the take or pay obligation is to apply subject to Section 3.6(b) which describes the 'diversion of Gas' arrangement.*
>
> *34. Section 3.6(a) provides a take-or-pay clause whereby during a Month, the Respondent has to take and if not taken pay for the portion of the Firm Gas Allocation pertaining to that Month…*
>
> *35. Generally, firm gas supply arrangements provide that in case the buyer is unable to 'take' its firm commitment and consequently, the buyer nonetheless pays for such firm quantities pursuant to its take-or-pay obligation then the buyer has the option and right to 'make-up' gas within the next year or other specified period without having to pay for the same again. This mechanism of 'make-up gas' is not available in the GSA. Section 3.6(b) of the GSA, however, provides for 'diversion' of the unutilized firm gas…*". [emphasis added]

54. Section IV was the "*Background Facts up to the Disputes*" and Section V was "*Disputes under the GSA*". The first paragraph under Section V read (paragraph 59):

> "*On 24.05.2018, the Claimant completely volte-faced and out of nowhere, raised an invoice for the month of May 2017 and the period from November 2017 to March 2018, claiming certain amounts purportedly on account of self-assumed shortfall in utilization of the Monthly Take-or-Pay Quantity pursuant to Section 3.6(a) of the GSA (the "First Claim")…*"

55. The essence of the complaint (paragraph 64) was that SNGPL raised invoices in circumstances where QATPL contended that the unutilized gas had been utilized by other power plants and that SNGPL had failed to corroborate its claims:

> "*In the meanwhile, the Claimant continued to raise monthly claims for the period following COD. These claims were made for the months May and July to October in 2019, and March to June in 2020. This was done despite the fact that the unutilized Gas was utilized by other power plants for which payment mechanism had specifically been brought in line with that of the Billing Cycle under the GSA. In recognition of that, the Claimant has regularly made adjustments in*

> *subsequent claims thereby revising downwards its earlier claims on account of utilization by its consumers. However, surprisingly, and in utter violation of the terms of the GSA, it arbitrarily maintains that certain amounts still remain payable. The Claimant continues to hold this unreasonable position and withholds all information / documents / invoices necessary to corroborate any such claims. Accordingly, the Respondent has duly disputed all such illegal, unlawful, baseless and arbitrary claims*." [emphasis added]

56. Section VI was headed "*Respondent's submissions*" and opened with a general statement that the claims of the Claimant were "*illegal unlawful and invalid*". The submissions were then advanced in subsections which were in summary:

    a. The take or pay only applied to a firm gas arrangement.

    b. Certain periods were excluded from Section 3.6(a).

    c. All unutilized gas was diverted to and utilized by other power plants.

    d. SNGPL was estopped from raising any claims.

    e. Section 3.6(a) "*as applied*" was unconscionable, oppressive and penal.

57. It is notable that the explanation in relation to the submission that all unutilised gas was diverted (paragraph 100) was as follows:

> "*Without prejudice to the foregoing, Section 3.6(b) of the GSA provides that in case the Monthly Take or Pay Quantity is not fully utilized by the Respondent in the Complex, the unutilized portion is to be diverted, firstly, to other power plants. In case the entire unutilized quantity is utilized by the other power plants, then the Claimant cannot effectively recover any amounts from the Respondent. This is because the other power plants are charged at the same rates as the Respondent. Resultantly, there would be no difference in price received from the other power plants and the price that the Respondent would have paid. In the event the other power plants refuse, or the Claimant due to technical constraints is unable to supply the unutilized gas to other power plants, then that Gas can be diverted to other consumers (including domestic consumers) by the Claimant.*" [emphasis added]

58. This led to the following conclusion at paragraph 112:

> "*Even otherwise, it is only in the event that the power plants refuse to accept delivery of unutilized Gas or the Claimant due to technical constraints or due to any other such reason is unable to deliver unutilized Gas to other power plants, that the right to supply such Gas to any of its consumers has been conferred on the Claimant. Hence, claim of take or pay invoices raised by the Claimant is contrary to record and the contractual framework, as (a) the unutilized Gas has been utilized by other power plants; (b) none of the other power plants refused to accept delivery of such unutilized Gas; and (c) the Claimant has not claimed any technical constraints etc. for its inability to supply such unutilized Gas. It is thus evident that the right to deliver any such unutilized Gas to any of its consumers had not crystallized and this position of the Claimant is in breach of Section*

> *3.6(b) of the GSA. Furthermore, any and all claims raised by it with respect to take or pay invoices are liable to be declared illegal and unlawful*." [emphasis added]

59. The focus of this section and the way that QATPL's case is expressed at this point is that claims are being made by SNGPL under Section 3.6(a) but in stating that the invoices were contrary to the "*contractual framework*" the focus is on the unutilized gas and the allegation of a breach of Section 3.6(b). In other words QATPL was asserting that the amount due under Section 3.6(a) was entirely covered under Section 3.6(b) since the gas was utilized by other power plants and the right to deliver to consumers (which would have triggered a payment by QATPL) had not crystallized. It is notable in my view that QATPL asserts that SNGPL cannot "*effectively recover*" from which I infer that it was recognising the commercial netting rather than a legal entitlement.

60. Turning then to subsection (E) in Section VI, this set out QATPL's case on penalties and was relied on in particular by QATPL in its submissions to this Court. The pleadings started with "*take or pay*" clauses in general asserting that a buyer paying for gas that it never received or utilized is "*harsh and oppressive*". QATPL referred (paragraph 121-122) to one reported Pakistani judgment (*Orient Power v SNGPL*) where the validity of take or pay clauses was examined and noted that whilst the challenge was not accepted by the Court the "*make up gas provision*" was an "*essential feature*" and that feature did not exist in the GSA. QATPL pleaded that:

> "*…The Claimant by applying the take or pay provision in the manner described above is also depriving the Respondent of the benefit of the mechanism provided in Section 3.6(b) of the GSA, and in that sense, of the essential feature of the take or pay arrangement. This would take away any optional aspect out of the equation and make the take or pay provision clearly unconscionable, oppressive and penal. In that event, under the laws of Pakistan, this would attract Section 74 of the Contract Act, 1872. It provides that:*
>
> *"74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."*" [emphasis added]

61. QATPL in its submissions to this Court also relied on paragraphs 123 and 124 of the Statement of Case which (so far as material) read as follows:

> "*123. As per Section 74 of the Contract Act, and the principles settled by the superior courts of Pakistan, the Claimant is only entitled to recover reasonable compensation after proving its loss through reliable, cogent and trustworthy evidence…*
>
> *124. It is settled law that clauses in a contract imposing a penalty would be disregarded by the courts as being unconscionable and would not be enforceable for being confiscatory in nature. The amounts claimed by the Claimant under*

> *Section 3.6(a) of the GSA are without any consideration, and purportedly as compensation for the loss allegedly suffered by it. It is settled law that a fixed amount, even if stipulated in a contract, cannot be recovered under Section 74 of the Contract Act, 1872, if the quantum of actual damage or loss suffered is not proved through sufficient evidence…*". [emphasis added]

62. It was submitted for QATPL to this Court that this showed that QATPL understood the claim as one where there was a need to prove loss.

63. The argument that the claim was a penalty and therefore unfair, unconscionable and illegal was clearly advanced in QATPL's Statement of Case. However that subsection read in the context of the whole pleading does not show that QATPL understood SNGPL to be alleging a breach of contract or that SNGPL was advancing a case based on actual loss. Rather QATPL was asserting that the claim was a penalty because Section 3.6(b) had not been applied correctly, its case being that the other power plants had not refused to take delivery and the right to deliver to consumers had not crystallised.

### *SNGPL's Defence*

64. SNGPL's Defence started with an outline of SNGPL's case. It referred to 3 elements as follows (paragraphs 11-13):

    a. The take or pay obligation.

    b. The invoice for the monthly take or pay quantity (after deducting the weekly quantities consumed by QATPL).

    c. A "*mitigation mechanism*" whereby if the gas was not taken by QATPL, QATPL could arrange for any other consumer in the power sector to take the unutilized gas at the same tariff provided that if the other power plants refused or SNGPL was unable to supply the diverted gas to other power plants, SNGPL had the right to divert the gas to any of its consumers and pass on amounts recovered from sale of such diverted gas to QATPL after deduction of any additional charges incurred by SNGPL in arranging the sale.

65. SNGPL then referred (paragraph 14) to the fact that:

> "*The parties in practice are implementing the above commercial agreement by the following mechanism: The Respondent does not make the payment of the take or pay invoice generated after close of the relevant month – instead, the Claimant generates a netting off invoice in due course whereby it adjusts the take or pay invoice for amounts invoiced by it to other consumers to whom the unutilized gas has been diverted. This mechanism is being implemented by the Claimant solely for the benefit of the Respondent at the request of the Respondent to facilitate cash flow of the Respondent*".

66. In the *"Background"* section (paragraphs 19 and 21) SNGPL set out that a take or pay clause obliged the buyer to take or pay for a minimum contracted amount of gas and that weekly invoices were submitted for the gas supplied and invoices were submitted on a monthly basis for the take or pay quantity. SNGPL pleaded that QATPL was

obliged to pay the invoices or the netting off invoices which SNGPL explained at paragraph 14 (and referred to above):

> "*19. In oil and gas contracts, a take or pay clause is a standard contract term worldwide. A take or pay clause binds the buyer to either take or pay for a minimum contracted amount of gas as agreed in the contractual framework. If the buyer fails to take that gas, it is required to pay for the minimum amount of contracted quantity not taken.*
>
> *...*
>
> *21. ... QATPL is invoiced on a weekly basis for supply of gas consumed, whereas the invoices for monthly take or pay quantity are generated for a particular billing month (the "take or pay invoice") at the end of such month. SNGPL submits that take or pay invoices/netting off invoices (as explained in paragraph 14 above) are payable by the Respondent given the terms agreed in the GSA…*" [emphasis added]

67. The section continued with further explanation of "*take or pay*" (paragraph 26):

> "*From COD of GT1, QATPL has an obligation to either take certain amount of gas or if not taken it must pay for that gas. Monthly take or pay obligation is contained in Section 3.6 of the GSA…*"

68. The Defence then addressed a number of arguments raised by QATPL (paragraphs 65-72). SNGPL pleaded that:

- the position of QATPL was unjust and uncommercial because SNGPL was liable to reimburse for capacity payments made to QATPL even though QATPL was refusing to pay for the gas;

- even if invoices were not generated in a timely manner the GSA contained a no waiver clause;

- the take or pay clause was not penal; and

- the billing mechanism in the GSA required QATPL to pay for the entire invoice and SNGPL was required to reimburse QATPL to the extent any amount was recovered from the diversion to another power plant nominated by QATPL.

69. Before this Court, in its submissions QATPL relied on Paragraph 67 of SNGPL's Defence which stated:

> "*In light of these submissions it is submitted that take or pay clauses are legally valid and contractually binding. Further, QATPL is required to pay the same in compliance with the terms of the GSA. The Take or Pay clause contained in the GSA is not penal. It provides for a mechanism, whereby SNGPL can recover the actual loss it may suffer as a result of the diversion of the gas. Therefore, it is incorrect to say that the clause is penal. There is no element of penalty involved and the clause is just, fair and reasonable. It is based upon the basic principles of contract law that if any party suffers any loss because of the breach or fault of*

> *the other, the suffering party should be able to recover the actual loss suffered by it from the breaching party*." [emphasis added]

70. It is clear that paragraph 67 in the Defence was responding to the pleading on this particular issue in QATPL's Statement of Case and was one of a number of points to which SNGPL was responding and was putting forward a defence. It is wrong therefore to take paragraph 67 in isolation in considering the language and the reference to "*loss*" and "*breach*".

71. Further it is clear that SNGPL was pleading a case that QATPL is obliged to pay the entire invoice and then there is separate provision for reimbursement of diverted gas. However SNGPL, acting in compliance with the "*commercial understanding*", was seeking not the absolute amount due under subsection (a) but only the differential i.e. after netting off against the amounts due under subsection (a) the amounts due to QATPL under subsection (b).

72. Thus paragraph 69 read:

> "*The billing mechanism as provided in the GSA requires that QATPL in the first place pay for the entire take or pay invoice. In case QATPL fails to take the relevant amount of gas and nominates any other power plant (after seeking consent of such power plant) for diversion of the quantity not taken, SNGPL will divert the relevant quantity of gas to such other power plant at the risk and cost of QATPL. SNGPL is required to reimburse QATPL to the extent any amount is recovered from such diversion (after making deduction of any additional charges incurred by SNGPL in arranging the sale) to any other power plant…*". [emphasis added]

73. SNGPL explained further in that section how it had calculated the amount of any reimbursement and concluded at paragraph 72 by referring to the fact that it was only seeking the differential because it was acting in compliance with the "*commercial understanding*" rather than (I infer) insisting on the contractual mechanism:

> "*…SNGPL has acted in compliance with the commercial understanding reflected in Section 3.6 of the GSA. In fact, SNGPL is only seeking recovery of the differential amounts and not of the full take or pay amounts which QATPL was required to pay under the GSA. It is quite clear that SNGPL is entitled to such recovery.*"

74. There is then a section in the Defence entitled "*Rebuttal to QATPL submissions*" which responds to particular numbered paragraphs in QATPL's Statement of Case. This section is entirely consistent with what has gone before and does not advance a case based on breach of contract. For example at paragraph 107 SNGPL pleaded:

> "*…The Claimant raised invoices for the monthly Take or Pay quantity and demanded the net amount payable to it by QATPL after adjusting the amounts billed to other consumers in respect of sale of diverted gas (plus any additional charges incurred by SNGPL)…*"

75. To the extent that QATPL relied in its submissions to this Court on the invoices as not reflecting a "*Price of Gas*" case it seems to me that the Defence and the explanation put

forward in paragraphs such as paragraph 107, makes clear that SNGPL was demanding the net amount after adjusting for the diversion of gas and further explains why in relation to the Section 3.6(b) calculation it has used an average:

> "*...it is mentioned in the letter dated 31 May 2018 of the Claimant that it is not practicable to identify the exact rate pertaining to supply of diverted gas to domestic consumers and the Claimant has taken average rate that is reasonable in the given circumstances…*".

76. Nothing in these sections suggest that the claim was other than a claim for the "take or pay" amounts due under Section 3.6(a) albeit that the amount claimed is netted against the amount due under Section 3.6(b). Under a subheading "*Diversion of Gas*" SNGPL repeated its assertion that it had acted in accordance with the commercial understanding which is why it was only claiming the net amount:

> "*The Claimant has acted in compliance with the commercial understanding reflected in Section 3.6 of the GSA. In fact, the Claimant is only seeking recovery of the differential amounts and not of the full take or pay amounts which the Respondent was required to pay under the GSA. It is quite clear that the Claimant is entitled to such recovery…*". (Paragraph 118 (e))

77. QATPL in its submissions to this Court relied on paragraph 121(e) and the reference by SNGPL to "*tariff differential*" as inconsistent with a take or pay clause:

> "*The Respondent further equates the operation of a Take or Pay clause to the imposition of a penalty. It is submitted that the Take or Pay clause solely aims to reimburse the Claimant for the tariff differential in case of diversion to lower tariff sectors. It is also worth mentioning that the tariff differential has not been claimed for a number of months when unutilized RLNG was diverted on the same tariff*." [emphasis added]

78. Paragraph 121 makes it clear in the opening sentence that it is a response to the case advanced by QATPL at paragraphs 119-126 of its Statement of Case. It is therefore a response to QATPL's assertion that the amounts claimed could only be recovered if they represented a loss. The fact that SNGPL was only seeking recovery of the differential amounts does not alter the contractual basis of the claim. Further the fact that the net amount claimed represented its loss does not change the legal basis of the claim under Section 3.6(a).

79. QATPL submitted to this Court that paragraph 121(f) is inconsistent with a Price of Gas Case because it made reference to the mitigation mechanism:

> "*Generally, the Take or Pay Clauses are upheld in different jurisdictions. The Claimant submits that the Take or Pay Clause is valid and binding. Further, the mitigation mechanism provided in the Take or Pay clause is also in tandem with the principles of contract law. Therefore, the clause must be upheld and enforced*."

80. In my view this paragraph is wholly consistent with SNGPL advancing a case that QATPL was obliged to pay the take or pay amount but SNGPL were only seeking to recover the net amount after giving credit for the payment due under Section 3.6(b).

This is consistent with the case that SNGPL advanced in the Defence, for example paragraphs 69 and 72 referred above.

81. Thus in my view SNGPL was not advancing a case which was dependent on showing actual loss and consistent with that, SNGPL asserted (paragraph 121(g)) that Section 74 of the Contract Act (which as set out above, applied to a breach of contract where a sum is stated in the contract as the amount to be paid in case of such breach) was not applicable:

> "*The Case law relied upon by the Respondent is not relevant and provisions of Section 74 of the Contract Act are not attracted. In Take or Pay Clause, the Respondent has agreed to either take or pay for the gas ordered.*"

*QATPL's Reply to the Statement of Defence and Defence to Counter Claim ("QATPL's Reply")*

82. In QATPL's Reply one can see from the subheadings in that document the issues between the parties which have already been raised in the pleadings:

a. Whether there was a firm gas arrangement;

b. Whether certain periods were excluded;

c. Whether all unutilized gas was diverted to and utilized by other power plants;

d. Estoppel;

e. Whether Section 3.6(a) as applied was unconscionable, oppressive and penal;

f. Whether the invoices were erroneous.

83. It is difficult to provide a summary of QATPL's Reply without rehearsing the full arguments on the various issues. Further this pleading has to be read in light of the previous pleadings.

84. I note the following passages where QATPL described SNGPL's case under Section 3.6(a) which in my view demonstrate that it understood SNGPL's position to be that QATPL was obliged to pay for the monthly take or pay quantity and was not a claim for a failure to take gas:

> "*29. In its SOC, the Respondent demonstrated that from a bare reading of Section 3.6(a) of the GSA, it becomes clear that: (a) the Respondent's obligation to 'take' or if not taken 'pay' would have to be with respect to a specified quantity of Gas; (b) this obligation to 'take' or if not taken 'pay' a specified quantity of Gas is for a particular Month; and (c) the obligation to 'pay' could arise only if such specified quantity for a specified Month is made available by the Claimant and not taken by the Respondent. It follows that in case there is no such specified quantity for a specified Month, then take or pay regime as stipulated in Section 3.6(a) of the GSA cannot apply.*
>
> *30. The Claimant expressly accepts this premise in its SOD and, therefore, the Parties are in agreement in that respect. The only point in dispute between the*

> *Parties is whether, on a proper construction of the GSA, the Respondent's obligation to pay for the Monthly Take or Pay Quantity can be deemed substituted with an annual quantity of the Minimum Gas Order in the event no Firm Gas Order is in place. The Claimant's position is that in the event the Respondent has not placed the Firm Gas Order, it cannot take benefit of its own failure and in such event, the Respondent is obligated to take and if not taken pay for the Minimum Gas Order. While making such assertion, the Claimant fails to point out a single provision of the GSA that permits such construction. Further, it does not even attempt to explain as to how such annual quantity would crystalize into an obligation to take and if not taken pay for the monthly quantity*." [emphasis added]

85. A further example of QATPL showing that it understood that SNGPL's case was that it was obliged to pay for the take or pay quantity can be seen in paragraph 52:

> "*The Claimant accepts that delivery of Gas to the Respondent proceeded under interim arrangements till COD. The Claimant is therefore not entitled to the claims under Section 3.6(a) of the GSA for the Monthly Take-or-Pay Quantity. The Claimant seeks to resist this conclusion by alleging that regardless of such interim arrangement being adopted by the Parties, the Respondent was obligated to either take the Gas equivalent to the Monthly Take or Pay Quantity or pay for it in the event it was unutilized in the same tariff sector and the Claimant is not under any obligation / requirement to change ADP under the GSA*." [emphasis added]

86. In its submissions to this Court QATPL relied on paragraph 91 of QATPL's Reply:

> "*In the sub-sections that follow, the Respondent demonstrates (without prejudice to the foregoing) that the Claimant is not entitled to claim and recover any amounts for the unutilized Monthly Take-or-Pay Quantity for the following independent reasons: (a) First, admittedly all Gas not utilized by the Respondent was diverted to and utilized by other power plants, per the contract binding the Parties, more particularly Section 3.6(b) of the GSA. Therefore, the Claimant cannot claim and recover for the Monthly Take-or-Pay Quantity under Section 3.6(a) of the GSA...*".

87. This paragraph must be read in context and in light of the original pleading in QATPL's Statement of Case. As discussed above in relation to paragraph 112 of the Statement of Case, QATPL's case that unutilized gas was utilized by other power plants was concerned with QATPL's allegation of a breach of Section 3.6(b). This is also evident in QATPL's Reply itself as this paragraph 91 forms the opening paragraph of a section headed "*Even otherwise all unutilized gas was diverted to and utilized by other power plants*" and paragraph 91 refers to "*the sub-sections that follow"*. The next subsection is headed "*Section 3.6(b) of GSA*".

88. Before this Court QATPL also relied on paragraph 132. Under a sub-heading "*No substantiation or corroboration of claims*" QATPL pleaded:

> "*From a plain reading of Section 3.6 of the GSA, it is evident that any claim on account of Diversion of Gas and Take or Pay has to be raised, established and corroborated with evidence as per the requirements of law. The Respondent has*

> *repeatedly requested for such record. The Claimant to date has failed to produce any document to evidence daily transmission to domestic consumers and its invoices of the unutilized Monthly Take or Pay Quantity. Therefore, in the absence of any clear evidence (as also detailed in Section VI and IX below), the Claimant is not entitled to claim any amounts whatsoever under Section 3.6 of the GSA*."

89. Two points can be made. Firstly this is a subsection in the section dealing with diversion to other power plants and thus as referred to above is concerned with Section 3.6(b). Secondly the issue of the record or evidence does not negate in my view the inference that QATPL understood that SNGPL claimed a contractual entitlement under Section 3.6(a) to be paid the take or pay invoices. SNGPL can be required to prove the amount of its claim for the amount of "take or pay" without changing the basis of the claim from one to an entitlement to "take or pay" to a claim for loss for breach of contract for failing to take the gas.

90. QATPL also relied in its submissions to this Court on paragraphs 151 and 153 of QATPL's Reply and in particular the following:

> "*151. In the sub-sections that follow, the Respondent demonstrates that the Claimant is not entitled to claim and recover any amounts pursuant to Section 3.6 of the GSA, i.e., 'Diversion of Gas and Take or Pay' for the following independent reasons:*
>
> *(a) First, in terms of the laws of Pakistan as well as the GSA, the Claimant had to establish actual loss or damage suffered by it before it could claim any amounts from the Respondent. For this, not only did the Claimant have to establish actual loss, but also that such actual loss was directly caused by the Respondent. The Claimant has miserably failed to do so…*
>
> *153. For the reasons set out below, the Claimant's claim, based on Exhibit C-31 attributing all supplies to the domestic sector on account of unutilization of the Monthly Take or Pay Quantity by the Respondent and based on such excel sheet, its claim for actual loss suffered by it to be recovered from the Respondent merits rejection. The position of the Claimant goes against the plain terms of that provision, the terms of GSA, as a whole, as well as commercial sense and the modalities placed for diversion and utilization of the Gas by the Parties. It also renders Section 3.6 of the GSA unconscionable, oppressive and penal. The Claimant has not suffered any loss on account of breach or fault of the Respondent. Similarly, the Claimant has neither claimed nor established the actual loss suffered by it on account of the Respondent*." [emphasis added]

91. These paragraphs appear at the start of the section headed "*Section 3.6(a) of the GSA as applied makes it unconscionable, oppressive and penal*". This section is therefore a further pleading in relation to the issue raised by QATPL in its Statement of Case where it was one basis on which it resisted SNGPL's claim. As set out above, the way in which QATPL's submissions were framed in this regard was that QATPL was alleging that it was the "application" of the take or pay mechanism which was depriving QATPL of the benefit of Section 3.6(b) which made the take or pay provision unconscionable and penal. It was pleaded by QATPL that SNGPL had not complied

with its diversion obligations and had not provided invoices and evidence to support its claim.

92. Read in context it is QATPL who sought to resist the claim under Section 3.6(a) by pleading that SNGPL had to establish loss and it is clear in light of the earlier pleading that the focus of QATPL's complaint is that SNGPL has not shown that the unutilized gas was not used by other power plants. That is a complaint which relates to Section 3.6(b). It is clear that QATPL sought to challenge the issue of whether the unutilized gas had been diverted and whether it went to the domestic sector. It does not follow that QATPL understood that the claim by SNGPL under Section 3.6(a) was a claim for breach of contract in failing to take gas or that SNGPL needed to show actual loss to bring a claim under Section 3.6(a).

93. QATPL in its submissions before this Court also relied on paragraphs 154-156 (setting out the principles of establishing actual loss/damage) and paragraph 164 (referring to Section 73 of the Contract Act which deals with compensation for loss or damage caused due to any breach of contract). These paragraphs of QATPL's Reply have to be read in context and when read in context do not provide support for QATPL's case that it did not understand SNGPL to advance a case that it was entitled to claim payment under Section 3.6(a). These submissions are directed at the issue of whether the gas was diverted and whether the gas was diverted to domestic consumers such that SNGPL was entitled to claim that loss from QATPL.

*SNGPL's Statement of Reply to Defence to Counterclaim ("SNGPL's Reply")*

94. In its submissions to this Court QATPL pointed to paragraph 4 of SNGPL's Reply as support for its case that SNGPL was advancing an "*Actual Loss Case*":

> "*The issues in dispute are simple and straight forward. The Claimant arranged for the gas. The Respondent failed to take that gas. The Respondent also failed to take consent of the other power plants for the diversion of unutilized gas to them. Therefore, the unutilized gas was diverted to other consumers of the Claimant. The Claimant has a right under the GSA to divert the gas to any other consumer in such circumstances. The Claimant is now asking for the tariff differential and the additional charges it has incurred in arranging for the sale as mentioned in the GSA. The Claimant is clearly following the provisions of the GSA and in doing the same, it has adopted a reasonable approach. There are clear instances where the gas was not taken by the Respondent and the Claimant was able to divert it to same tariff sector and resultantly no charges for diversion were payable by the Respondent. The submissions made hereunder would show that the Respondent has received a benefit of approximately Rs. 27.5 Billion. However, then there were instances where tariff differential along with additional charges were incurred for the diversion of gas as the gas was diverted in the lower tariff sector and the Claimant is claiming such amounts from the Respondent. The amount being claimed by the Claimant is approximately Rs. 6.9 Billion*." [emphasis added]

95. In my view QATPL's submission ignores the context: this opening section of SNGPL's Reply is headed "*The Case of the Claimant*" and the immediately preceding paragraphs of SNGPL's Reply refer firstly to the contractual obligation on QATPL of "*take or*

*pay*" and then the separate mechanism (in Section 3.6(b)) for the benefit of QATPL for diversion of gas to other consumers to avoid loss:

> "*1. The case of the Claimant is that the main and material document is the GSA and that needs to be enforced between the parties. The submissions made by the Respondent are an attempt to wriggle out of the contractual provisions agreed between the parties in the GSA. It was agreed in the GSA that Respondent will take and if not taken will pay for the gas that is being arranged on the request of the Respondent. The Claimant failed to take the gas and also failed to pay for it. The dispute arises from the failure of the Respondent to abide by the contractual terms of the GSA.*
>
> *2. A mechanism was also provided in the GSA whereby if the gas was not taken by the Respondent, the Respondent could arrange for any other consumer in the power sector (after taking consent of such power sector consumer) to off take the unutilized gas at the same tariff so no loss is suffered by any party. The Respondent even failed to arrange for such consent. Had the Respondent performed its part of the deal, the dispute would not have arisen…*" [emphasis added]

96. As referred to elsewhere, the approach of SNGPL was only to seek the tariff differential but that does not detract from its pleaded case as to its rights to be paid under Section 3.6(a). Paragraph 4 is consistent with that case:

> "*…The Claimant is now asking for the tariff differential and the additional charges it has incurred in arranging for the sale as mentioned in the GSA. The Claimant is clearly following the provisions of the GSA and in doing the same, it has adopted a reasonable approach…*"

97. QATPL also pointed to paragraph 59 and 62 of SNGPL's Reply as showing that SNGPL was advancing an "*Actual Loss Case*":

> "*59. Take or pay clauses are legally valid and contractually binding. The Take or Pay clause contained in the GSA is not penal. It provides for a mechanism, whereby SNGPL can recover the difference or loss it may suffer as a result of the diversion of the gas. Therefore, it is incorrect to say that the clause is unconscionable, oppressive and penal. There is no element of penalty involved in the clause and the clause is just, fair and reasonable.*"
>
> "*62. It is submitted that the Claimant has shown herein below that the Respondent has to pay the Claimant. The Claimant arranged for the gas for Respondent. The gas was allocated to the Respondent. The Respondent failed to take such gas. The gas was sold to other consumers. In the months in which the gas was sold to lower tariff sector, the Claimant has raised Take or Pay invoices and charged the differential amount from the Respondent. The Claimant submits any such loss is the direct result of the actions of the Respondent. It is clear that the failure of the Respondent led to the entire situation. The failure of the Respondent to take gas and the failure of the Respondent to arrange consent of the other power plants for the diversion of the gas are the effective and dominant reasons for such loss*." [emphasis added]

98. QATPL submitted to this Court that if SNGPL had been running a "Price of Gas Case" it would have said that QATPL was proceeding on the wrong basis and that it did not need to show loss in order to claim payment. QATPL further submitted that SNGPL did not plead that its case on actual loss was an alternative case.

99. Paragraphs 59 and 62 appear in the section of SNGPL's Reply headed "*Section 3.6 is not unconscionable, oppressive and penal*". Paragraph 59 follows on from the previous pleadings which (as discussed above) commenced with QATPL's pleading in its Statement of Case that Section 3.6(a) as applied was unconscionable, oppressive and penal. Given the way that the pleadings developed and given the fact that this is part of a section dealing with a particular argument raised by QATPL, I do not accept that SNGPL's pleaded case was, or that QATPL reasonably believed, by reason of the language in these paragraphs, that SNGPL was bringing a case for breach of contract or that SNGPL needed to prove actual loss to establish that amounts were due under Section 3.6(a). There is no statement that SNGPL was bringing a case for breach of contract and it refers to a "*mechanism to recover the difference or loss*". Throughout the pleadings SNGPL explained why it was only claiming the differential amount and how it had calculated that amount. These paragraphs cannot be read in isolation without regard to the totality of the pleadings. The fact that SNGPL did not say that it was replying to the case advanced by QATPL was in my view unnecessary given the fact that it was clearly identified as responding to the issue originally raised by QATPL. Further when the pleadings are read in their totality SNGPL's response on this issue does not displace the positive statements that had been made by SNGPL throughout.

100. QATPL's reliance on the reference to "loss" in paragraph 73 in support of its case is also without any substance. It appears in the context of a lengthy section of SNGPL's Reply dealing with the issue of the Diversion of Gas which commenced as follows:

> "*64. The Claimant has attached with the Statement of Defence and Counterclaim, a diversion table showing the diversion of the unutilized gas of the Respondent. The Diversion Table is attached as Exhibit C-31. For the better understanding of the Diversion Table, the Detailed Diversion Table with the extended columns is being provided and is attached. The Diversion Table and Detailed Diversion Table is explained below and the supporting documents being relied upon by the Claimant are also being explained and referred below*."

101. Read in context therefore, paragraph 73 provides no support for QATPL's case:

> "*73. The Gas Reserve Bank mechanism did not work smoothly as the system gas in summer was insufficient to meet the shortfall occurred in winter due to diversion of RLNG, therefore, such loss has been claimed by the Claimant from the Federal Government and the Federal Cabinet has approved the same for recovery through price adjustment. However, the loss claimed from Government Power Projects, including the Respondent is separate from the loss claimed from the Government as this loss was suffered solely due to breach of the contractual obligation by the Respondent and not due to any directive issued by the Government*."

102. QATPL then relied on paragraphs 76 and 79 of SNGPL's Reply in the Section headed "*G. Quantification of Loss suffered by the Claimant*":

> "*76. The amount mentioned in the Statement of Case and Counterclaim included gross Take or Pay amount for the month of June and August, 2020. These amounts have been reversed and consequently, no amount is being charged as Take or Pay for the month of June and August 2020. As a result, the table provided as Exhibit C-32 has accordingly been updated and the same is attached. The updated table reflects the amount recoverable by the Claimant from the Respondent as at 1st September 2020."*
>
> *"79. In light of the above-mentioned submissions, it is clear that the Claimant has clearly shown the diversion and provided supporting documents in this regard. Therefore, the arguments regarding Section 73 of the Contract Act have no force and are not relevant.*"

103. In oral submissions to this Court it was submitted for SNGPL that SNGPL was setting out an alternative case in the event that the Tribunal were to accept QATPL's argument that Section 3.6 was a penalty and the fact that SNGPL dealt with this case in the alternative is not a basis on which to say that SNGPL did not also advance a contractual entitlement case.

104. Before this Court it was submitted for QATPL that Section G was not put in the alternative and SNGPL was not saying that the issue of Loss was not relevant.

105. I accept the submission for SNGPL (footnote 10 of its skeleton) that the paragraphs in this section explained the documents on which SNGPL relied to support the adequacy of its adjustment of the take or pay invoices to account for the diversion under Section 3.6(b).

106. Support for this conclusion can be seen when the pleadings are taken as a whole. In its Defence (paragraphs 126-130) SNGPL advanced its Counterclaim. Paragraphs 127 and 128 read:

> "*127. As at 1st September 2020, Respondent owes an amount of Rs. 8,532,321,095/-50 to the Claimant. <u>This amount comprises a take or pay amount of Rs. 7,022,321,074/- (adjusted for amounts realized from other consumers and from encashment of security)</u> plus late payment surcharge on outstanding amounts at the Delayed Payment Rate of Rs. 1,510,000,021/-. Further, Respondent is liable to provide the Gas Supply Deposit in accordance with terms of the GSA.*
>
> *128. The first page of Table reflects the amounts payable to the Claimant as mentioned above. The second page of the Table provides for the breakdown of the amounts mentioned in the First Table. Supporting invoices are also provided.*" [emphasis added]

107. The tables referred to in paragraph 128 of SNGPL's Defence are footnoted as Exhibit C-32. It is therefore clear that in SNGPL's Reply, Section G (including paragraph 76 of the Reply) relates to the earlier pleading and is providing updated figures. The Counterclaim is expressed as a claim for the take or pay amount (subject to adjustment). Read in context paragraph 76 does not establish that SNGPL was not pleading that it was contractually entitled to the take or pay amount under Section

3.6(a) or that its (primary) case was that SNGPL was claiming for its actual loss for QATPL's failure to take the gas.

108. As to the reference to Section 73 of the Contract Act, this is part of the response to the penalty case raised by QATPL and whilst in this section SNGPL pleaded that it did not apply because it was claiming actual loss, it does not change SNGPL's (primary) pleaded claim of contractual entitlement which is evident in the rest of the pleadings.

## The nature of the pleaded case

109. Having reviewed the detailed pleadings and set out above what can only be a summary of the detail, the Court is able to form a view as to whether, as alleged by QATPL, the case advanced before the Tribunal was radically different from, and inconsistent with, the case which QATPL says was the pleaded case in SNGPL's Defence and Reply.

110. As set out above, there are two issues as to the nature of the pleaded case of SNGPL:

    a. Was the pleaded case a failure to pay for the gas amounting to a breach of the GSA or a claim that the sums were due and payable under Section 3.6?

    b. Did SNGPL plead a case that sums were due because they represented the actual loss it suffered as a result of QATPL's failure to take the gas allegedly made available to it?

## Was the pleaded case a failure to pay for the gas amounting to a breach of the GSA or a claim that the sums were due and payable under Section 3.6?

111. QATPL submitted that the claim previously advanced by SNGPL was that SNGPL had been forced to sell the untaken gas to lower tariff consumers and thereby suffered a loss.

112. In my view it is clear on the pleadings (as discussed above) that SNGPL was not advancing a claim for breach of contract by QATPL in failing to take the gas but was pleading a claim for the failure by QATPL to pay the amount owing under Section 3.6(a). In making its claim for that amount under Section 3.6(a) SNGPL chose to net off the amount of the payment which would otherwise have been due under Section 3.6(b) relating to unutilized gas. Insofar as QATPL characterise it as a claim relating to "*failures to comply with Section 3.6*" it is clear that there were other alleged failures relating to Section 3.6(b) (e.g. failure to obtain consent) but these do not affect the primary claim brought by SNGPL under Section 3.6(a) which was a failure by QATPL to pay the take or pay amount.

113. As referred to above, in my view the pleadings made the basis of the claim clear: for example SNGPL pleaded at paragraphs 26 and 27 of the Defence:

> "*26. From COD of GT1, QATPL has an obligation to either take certain amount of gas or if not taken it must pay for that gas. Monthly take or pay obligation is contained in Section 3.6 of the GSA, which is reproduced for reference:*
>
> *"Section 3.6 Diversion of Gas and Take or Pay*

> *(a) From and after the Commercial Operations Date GT1 and during a Month in the Delivery Period, the Buyer shall take and if not taken pay for the portion of the Firm Gas Allocation pertaining to that Month (the "Monthly Take-or-Pay Quantity") divided by the number of days in that Month multiplied by the difference between the number of days in that Month and (i) the number of days (or fractions thereof) of Force Majeure Events declared by the Seller or the Buyer, (ii) the number of days (or fractions thereof) of non-delivery of Gas by the Seller for that Month for any reason, including a breach or default by the Seller or maintenance undertaken by the Seller pursuant to Section 12.1, and (iii) the number of days of Scheduled Outages in that Month notified to the Seller pursuant to Section 12.2 (in relation to the maintenance and scheduled outages, each to the extent not already catered for under the Firm Gas Order.*
>
> *(b) … (emphasis added)*
>
> *27. It is absolutely clear from the underlined extract of Section 3.6 (a) that the obligation to pay a take or pay invoice starts from Commercial Operations Date GT1 i.e. 08.05.2017. COD of one of the GTs was achieved on 08.05.2017 and therefore, the Take or Pay Clause triggered from 08.05.2017*."

114. The obligation to pay the "take or pay" payment is reflected elsewhere, for example in paragraph 101 of the Defence:

> "*In response to contents of Paragraph No. 51, it is submitted that the QATPL admits and accepts that Commercial Operation Date GT1 was achieved on 08.05.2017. It is the position of the Claimant that the take or pay payments triggered from the same date. The Respondent was not only obliged to make payment for the Gas delivered and consumed but was also liable to make the take or pay payment under Section 3.6 of the GSA*." [emphasis added]

115. The basis of the obligation to pay is addressed in paragraph 107. Paragraph 107 is a response by SNGPL to paragraph 59 of QATPL's Statement of Case:

> "*59. On 24.05.2018, the Claimant completely volte-faced and out of nowhere, raised an invoice for the month of May 2017 and the period from November 2017 to March 2018, claiming certain amounts purportedly on account of self-assumed shortfall in utilization of the Monthly Take-or-Pay Quantity pursuant to Section 3.6(a) of the GSA (the "First Claim")*." [emphasis added]

116. In response to this allegation that it was claiming for a shortfall in utilization, SNGPL was clear that it was claiming the amount due being the take or pay amounts (adjusted for the diverted gas):

> "*107. In response to contents of Paragraph No. 59 and 60, it is submitted that SNGPL raised an invoice for the amounts that were due to it. This invoice included the take or pay payments for the month of May 2017, November 2017, December 2017, January 2018, February 2018 and March 2018. The Claimant raised invoices for the monthly Take or Pay quantity and demanded the net amount payable to it by QATPL after adjusting the amounts billed to other consumers in respect of sale of diverted gas (plus any additional charges incurred by SNGPL)...*". [emphasis added]

117. The basis of the claim is further set out in paragraph 110 responding to paragraph 64 of QATPL's Statement of Claim. In paragraph 64 QATPL had asserted that:

> "*In the meanwhile, the Claimant continued to raise monthly claims for the period following COD. These claims were made for the months May and July to October in 2019, and March to June in 2020. This was done despite the fact that the unutilized Gas was utilized by other power plants for which payment mechanism had specifically been brought in line with that of the Billing Cycle under the GSA. In recognition of that, the Claimant has regularly made adjustments in subsequent claims thereby revising downwards its earlier claims on account of utilization by its consumers. However, surprisingly, and in utter violation of the terms of the GSA, it arbitrarily maintains that certain amounts still remain payable…*". [emphasis added]

118. SNGPL responded that it had raised the invoices in accordance with the terms of the GSA:

> "*110. In response to contents of Paragraph No. 64, it is submitted that the Claimant has raised the Take or Pay invoices in accordance with the terms of GSA. Where any unutilized gas was diverted to any low tariff sector and any extra costs or expenses were incurred by the Claimant during any month, the Claimant issued a netting off invoice to QATPL…*". [emphasis added]

Did SNGPL plead a case that sums were due because they represented the actual loss it suffered as a result of QATPL's failure to take the gas allegedly made available to it?

119. QATPL submitted that the claim previously advanced by SNGPL was that SNGPL had been forced to sell the untaken gas to lower tariff consumers and thereby suffered a loss and that QATPL was obliged to pay the sum to SNGPL because that reflected their loss.

120. This submission in my view conflates the reason why the sums were due and the amount claimed. In my view SNGPL's pleaded case was that QATPL had an obligation to "take or pay" for gas. That is why sums were due. The amount claimed by SNGPL under Section 3.6(a) was netted against the amount which SNGPL calculated under Section 3.6(b) but as was clear from SNGPL's pleadings the netting off was not a contractual requirement. In calculating the net amount SNGPL did claim the difference in tariff on the utilisation of the gas by the domestic sector but this was not a sum claimed as a result of QATPL's "failure" to take the gas but the amount which was calculated by taking the amount due under Section 3.6(a) and adjusting it for the diversion provisions in Section 3.6(b).

121. It was submitted before this Court for QATPL that it understood from the pleadings that SNGPL's case of "take or pay" or an "Obligation to Pay" was only if there was an actual loss. It was submitted that the word "*loss*" appears everywhere in the pleadings and paragraph 67 of SNGPL's Defence was "*critical*" because it was an analysis of the obligation by SNGPL.

122. In my view paragraph 67 made it clear that SNGPL was not advancing a claim for breach of contract:

"*QATPL is required to pay the same in compliance with the terms of the GSA*".

123. As to the submission for QATPL that the obligation was only to pay the actual loss, paragraph 67 has to be read in context. From the context (as set out above) it is clear that this section is a response to the issue raised by QATPL as to whether the clause was penal. In my view the fact that SNGPL in response to QATPL's pleading, asserted that it was not penal because the clause provided a mechanism which enabled SNGPL to recover its actual loss does not alter the basis of the pleaded claim. Further when the Defence is considered as a whole, it is evident that SNGPL had rejected QATPL's assertion that its claim was for a shortfall in utilization in circumstances where QATPL asserted the gas had been used by other power plants (see for example paragraphs 107 and 110 of the Defence discussed above).

124. In its description of the "Actual Loss Case" QATPL also relied on the assertion that:

> "*SNGPL contended that these sums were recoverable (notwithstanding Section 74 of the Pakistan Contract Act 1872 ("Section 74"), which applies to penalty provisions) because the sums claimed were the loss actually suffered by SNGPL as a result of QATPL's failure to take the "Take or Pay" quantity of gas under the GSA.*"

125. In my view SNGPL only made this contention (that the sums claimed were the loss actually suffered) in response to an argument advanced by QATPL in its Statement of Case that the claim was a penalty under Section 74 of the Pakistan Contract Act. The fact that SNGPL responded to this submission cannot affect the basis of the claim made by SNGPL which was relying on the take or pay obligation in Section 3.6(a) and thus was not alleging a breach of contract. At its highest this was (as submitted by SNGPL at paragraph 30 of its skeleton) an alternative case if the Tribunal was to find that SNGPL needed to prove actual loss.

126. QATPL relied in support of its challenge that "*SNGPL provided evidence of its actual loss, which it calculated as the loss arising from the supply of gas to domestic consumers in Pakistan for a lower tariff than the tariff paid by power producers, such as QATPL, as well as industrial and commercial consumers."* Again in response to a challenge made by QATPL in its pleadings, SNGPL provided evidence of its loss underpinning its calculation in relation to the unutilized gas. The focus of the challenge can be seen from the discussion of the pleadings above to be in relation to Section 3.6(b).

127. Before this Court QATPL also relied on the "diversion tables". It was submitted that this was "*more grist for the mill to say this looks like an actual loss case. It is a way in which SNGPL was estimating what it actually had lost, allocating between different entities, and it's a million miles away from a take or pay debt claim, identifying gas going to specifically QATPL and specifically onwards to specific users."*

128. To the extent that QATPL relied on the tables submitted by SNGPL as supporting its case that SNGPL's pleaded case was based on actual losses, these have to be considered in light of the pleadings. As referred to above, Exhibit C-32 was referred to at paragraph 128 of the Defence and SNGPL's Reply, Section G (including paragraph 76 of SNGPL's Reply) related to the earlier pleading and was providing updated figures. The Counterclaim is expressed as a claim for the take or pay amount (subject to

adjustment) and the tables in my view were to support the net amount claimed without changing the basis of the contractual claim.

129. C-31 was introduced by paragraph 119 of SNGPL's Defence:

> "*It thus follows that QATPL's assertions from Paragraph 100 to 112 that all unutilized RLNG has been consumed by the power sector is baseless. Without prejudice to the foregoing, the table of consumption provided by the Respondent is unverified data and cannot be relied on. Moreover, the fact that power sector has its own demand and cannot just rely upon the unutilized gas of the GPPs mentioned hereinabove must also be taken into account. Details / Table [C-31] has been provided to show the diversion of the gas for relevant months.*"

130. Paragraph 119 was in a section headed "*Diversion of Gas*" and was responding to QATPL's Statement of Case in paragraphs 100-112. This in turn was QATPL's argument that all unutilized gas was diverted to other power plants. Paragraphs 100 and 106 of QATPL's Statement of Case show that QATPL was addressing the adjustment that it claimed to be entitled to under Section 3.6(b):

> "*100. Without prejudice to the foregoing, Section 3.6(b) of the GSA provides that in case the Monthly Take or Pay Quantity is not fully utilized by the Respondent in the Complex, the unutilized portion is to be diverted, firstly, to other power plants. In case the entire unutilized quantity is utilized by the other power plants, then the Claimant cannot effectively recover any amounts from the Respondent. This is because the other power plants are charged at the same rates as the Respondent. Resultantly, there would be no difference in price received from the other power plants and the price that the Respondent would have paid. In the event the other power plants refuse, or the Claimant due to technical constraints is unable to supply the unutilized gas to other power plants, then that Gas can be diverted to other consumers (including domestic consumers) by the Claimant…*
>
> *106. Therefore, it is evident that any Gas not utilized by the Respondent was utilized by other power plants, pursuant to its delivery by the Claimant to such power plants against which the Claimant would already have received the payment at the Gas Price, within the time frame of the Billing Cycle. Consequently, the Claims raised by the Claimant against the Respondent is in complete violation of the provision of Section 3.6(a) and (b). Further, it is also an act of unjustified enrichment so as to deprive the Respondent of the benefit under Section 3.6(b) and insulate itself with respect to its obligation to deliver Gas in the Province of Punjab to its consumers…*". [emphasis added]

131. C-42 was a more detailed version of C-31 introduced by paragraph 64 of SNGPL's Reply:

> "*64. The Claimant has attached with the Statement of Defence and Counterclaim, a diversion table showing the diversion of the unutilized gas of the Respondent. The Diversion Table is attached as Exhibit C-31. For the better understanding of the Diversion Table, the Detailed Diversion Table with the extended columns is being provided and is attached…*"

132. C-57 was introduced by paragraph 77 of SNGPL's Reply showing an apportionment for each month:

> "*In order to clearly explain how the volume of the unutilized gas diverted to the domestic sector (along with their apportionment) as mentioned in the Diversion Table / Detailed Diversion Table translates into the Pakistan Rupees and connects with the Exhibit C-32 having record of the relevant invoices, the table showing apportionment of RLNG for each relevant month is being provided…*".

133. C-58 was introduced by paragraph 78 of SNGPL's Reply:

> "*78. Lastly, a table [C-58] reflecting the month-wise position of the volumes and amounts charged and the benefit given to the Respondent for the amounts diverted to other consumers is also being provided.*"

134. Paragraph 78 appears in the Section G "Quantification of Loss suffered by the Claimant". I have already dealt with this Section above.

135. Considered in context in my view these tables were to support the "adjusted amount" claimed by SNGPL but the contractual claim was for the "take or pay" amount and not for loss caused by a failure of QATPL to take the gas.

## Conclusion on the pleaded case

136. I find that:

a. SNGPL's pleaded case as set out in the pleadings was not a failure by QATPL to take the gas but a failure to pay for the "take or pay" amounts under Clause 3.6(a) and it was not a claim for the loss it suffered "*as a result of QATPL's failure to take the gas*".

b. The fact that SNGPL claimed a net amount in respect of Section 3.6 being the amount of the take or pay obligation adjusted for the Section 3.6(b) diversion of gas and was calculated by reference to its loss arising from the supply of gas to domestic consumers for a lower tariff does not mean that the pleaded case was that the sums were due because they represented the loss suffered as a result of the failure to take the gas.

c. The pleaded case was that QATPL had an obligation under Section 3.6(a) to pay the take or pay amount. As a result Section 73 of the Pakistan Contract Act which set down the circumstances in which damages for breach of contract were recoverable under the laws of Pakistan dealing with notions of causation and remoteness did not apply.

137. My conclusions as to the pleaded case are wholly consistent with the conclusions of the Tribunal at paragraphs 203-204 of the Award (set out above). I therefore find that the Tribunal did not decide the Arbitration on the basis of a case which had not been pleaded nor was there any manifest error on the part of the Tribunal in its reasoning in this regard.

## Did the Tribunal adopt a fundamentally unfair procedure?

## QATPL's submissions

138. QATPL submitted (paragraph 65 of its skeleton) that the Tribunal adopted a fundamentally unfair procedure in its approach to the Strike out application and the parties' cases during the hearing, rejecting the Strike out application in the Award.

139. QATPL submitted that:

    a. the Price of Gas case had not been SNGPL's pleaded case; and

    b. "*at the very least (and adopting the approach in Ascot, approved in RAV Bahamas), on the basis of SNGPL's pleadings QATPL reasonably considered that it was facing a case by which SNGPL contended it could recover only if it showed that the sums claimed amounted to its actual loss*." [emphasis added]

140. QATPL submitted that if the Tribunal was going to proceed on the basis that SNGPL's pleaded case was the Price of Gas Case, the very least it needed to do was to give QATPL an opportunity to make any application it wished to make to adduce further material to address the Price of Gas Case. Otherwise, QATPL would be left having been ambushed a matter of only a few days before the hearing.

141. In its oral submissions before this Court QATPL referred to SNGPL's written opening submissions to the Tribunal at paragraph 12:

> "*The Respondent also asserts that, in part, unutilized Gas was in fact diverted to other power plants. If this is established, to the extent that the Claimant has failed to refund this amount, the Respondent would be entitled to bring a claim for refund based on amounts received from the other power plants. Again, this would not be a basis for the Respondent to fail to pay the relevant Take or Pay invoice. The Respondent would sue the Claimant for breach of the GSA in failing to give a refund of amounts received for unutilized Gas.*"

    It was submitted orally for QATPL that it was this statement, that if QATPL wanted to claim with respect to Section 3.6(b) QAPTL had to bring a claim, that was a "*complete change*" five days before the hearing and that was the "*absolute unfairness*".

## Discussion

142. As set out above, in my view on the pleadings it was clear that SNGPL was not advancing a claim for breach of contract by QATPL in failing to take the gas but was pleading a claim for the failure by QATPL to pay the amount owing under Section 3.6(a). In making its claim for that amount under Section 3.6(a) SNGPL chose to net off the amount of the payment which would otherwise have been due under Section 3.6(b) relating to unutilized gas. The fact that SNGPL claimed a net amount in respect of Section 3.6 being the amount of the take or pay obligation adjusted for the Section 3.6(b) diversion of gas and was calculated by reference to its loss arising from the supply of gas to domestic consumers for a lower tariff does not mean that the pleaded case was that the sums were due because they represented the loss suffered as a result of the failure to take the gas.

143. QATPL accepted that it is an objective test as to what QATPL "*reasonably considered*" the case it was facing to be. Accordingly I see no need to address the evidence as to the

subjective views of witnesses.

144. QATPL sought (*inter alia*) to rely on passages from the expert's determination which preceded the Arbitration but again this seems to me to be irrelevant to the pleadings and whether the pleaded case had changed or QATPL reasonably considered the case had changed from that pleaded.

145. In my view the detailed consideration above of the pleadings shows clearly that the nature of SNGPL's pleaded case was set out and viewed objectively there can be no basis for concluding that QATPL "reasonably" considered the pleaded case to be otherwise. In particular in light of the pleadings and as discussed above, I reject the submission that QATPL "*reasonably considered that it was facing a case by which SNGPL contended it could recover only if it showed that the sums claimed amounted to its actual loss*." [emphasis added]

146. Since there was no change in the pleaded case there was nothing "*fundamentally unfair*" in the Tribunal proceeding on the pleaded case (as it indicated it would do in response to the email of 19 June 2021) and no requirement to allow further material to be adduced. Contrary to QATPL's submissions there was no "*ambush*". Since the case advanced was pleaded, there can be no substance to the complaint by QATPL that "*the Tribunal did nothing*": the Tribunal had indicated it would deal with the case on the pleadings, the Tribunal did so and thus there was no need for the Tribunal to rule on the strike out application in advance of the Award and no unfairness within Section 33 of the Act in this regard.

147. QATPL submitted that it did not have a reasonable opportunity to respond to SNGPL's case "*in the way in which it was advanced"*. It was submitted for QATPL that this was not a case within the one contemplated by Popplewell J in the *Terna Bahrain* case, that it was not a case where QATPL was complaining about a "*strategic choice*" that it made.

148. To the extent that in its oral submissions to this Court, QATPL focussed its complaint of unfairness on the way the case was "*advanced*" by SNGPL in the opening submissions and subsequently before the Tribunal, this in my view did not amount to a change to SNGPL's pleaded case. In my view the case which was advanced at the hearing was pleaded and as such QAPTL had ample opportunity to meet that case. As stated by Popplewell J in *Terna Bahrain:*

> "*There is… an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s 33 or a serious irregularity*."

## Conclusion on whether the Tribunal adopted a fundamentally unfair procedure

149. For these reasons I find that the Tribunal did not adopt a fundamentally unfair procedure in its approach to the Strike out application.

## Conclusion on Section 68(2)(a)

150. For all these reasons, I find that there was no breach of Section 33 of the Act and no serious irregularity within Section 68(2)(a) of the Act.

151. In light of my findings I do not need to consider the issue of "*substantial injustice*" under Section 68 as this does not arise for determination.

## Section 68(2)(d)

### QATPL's case

152. QATPL asserts that the Tribunal failed to decide the following issue which had been put to it: whether SNGPL's claim in respect of May, November and December 2017 and January, February and March 2018 could be brought given SNGPL's failure to issue invoices relating to the Monthly Take-or-Pay Quantity in respect of those months, in compliance with the GSA.

153. QATPL asserted that this issue was advanced by QATPL in its pleadings, including at its Reply at paragraphs 134 – 146 and the Tribunal failed to determine this issue.

154. QAPTL submitted that this has caused or will cause substantial injustice to QATPL. The amount of those months is PKR 5,448,703,201 (i.e., approximately GBP 21 million), amounting to approximately 80% of the value of the amounts for which SNGPL counterclaimed in the Arbitration. If the Tribunal had determined that point, its decision on whether QATPL had to pay amounts to SNGPL for those months would or might well have been different.

### SNGPL's submissions

155. It was submitted for SNGPL (paragraphs 73-75 of its skeleton) that the Tribunal did deal with the question of whether the take or pay invoices were valid and could be relied upon by SNGPL: as part of the case on estoppel and in response to the question "are the Take or Pay invoices for the relevant months payable by [QATPL]".

### Discussion

156. QATPL relied on QATPL's Reply in support of its contention that the Tribunal failed to decide whether SNGPL's claim in respect of May, November and December 2017 and January, February and March 2018 could be brought given SNGPL's failure to issue invoices.

157. However in deciding what the issue was and whether it was dealt with by the Tribunal, the pleadings have to be considered in their entirety.

158. The issue of the timing of the invoices was raised by QATPL in its Statement of Case solely in the context of estoppel. Under the heading "*The Claimant is estopped and barred from raising any claims*" QATPL referred to the requirement under the GSA (specifically Sections 8.1 and 9.1) to issue monthly invoices. The relevant section read as follows:

> "*113. It is a matter of record that the Claimant did not issue any Monthly Take or Pay Invoices till May 2018. Then, in one go, the Claimant issued an invoice on 24.05.2018 for the period from May 2017 to May 2018. <u>This was done despite the</u>*

*requirement of 'monthly' take or pay invoices in cases where there was an entitlement under Section 3.6(a), read with Sections 8.1 and 9.1 of the GSA.*

*114. During this period, the arrangements, as elaborated in paragraphs 43-46 above, were fully in place and were being implemented in pursuance of the consultative process adopted by the parties described in paragraphs 47-50.*

*115. The Claimant, through its actions, conduct and representations clearly led the Respondent to believe that there was no take or pay arrangement in place for the year 2017 or even if it were, any unutilized Gas was successfully being diverted to and utilized by other gas-based power plants. The Claimant also led the Respondent to believe that no action was required on its part in this regard. The Respondent fully relied on this. Had it not been the case, the Respondent would have acted otherwise to ensure that no financial liability would fall on the Respondent, assuming that was the case under the GSA (which is denied).*

*116. Keeping this in view, the Claim raised on 24.05.2018 is contrary to the Claimant's earlier conduct and representations. The Claimant is therefore estopped and barred from raising this Claim.*

*117. Even otherwise, it was agreed in the GSA and expected that in case any amount was to be paid by the Respondent pursuant to Section 3.6(a) of the GSA, the same would be invoiced to the Respondent on a monthly basis. These arrangements, coupled with the extensive arrangements that were put in place for diversion of any unutilized Gas by NPCC and the Claimant, meant that in the absence of any claim or invoice after the month, the Respondent had the assurance that no amount was payable by it to the Claimant for the relevant month. This would also serve as confirmation that the mechanism set out in Section 3.6(b) of the GSA was being implemented to the benefit of all involved Parties.*

*118. Additionally, when no invoice for any unutilized Gas was raised by the Claimant for May, November and December of 2017 or for January, February or March 2018, it was confirmation that no take or pay liability had accrued to the Respondent for these months. Further, despite constant communication on various matters under the GSA from time to time during the year, the Claimant did not even once state or indicate in the slightest that any take-or-pay liability existed. In view of the above, the Claimant is estopped and barred from raising these Claims*." [emphasis added]

159. In its submissions QATPL highlighted the reference to the contractual terms in paragraph 113 (above). However this has to be read in the context of the entire section. It is clear in my view that the case being advanced is wholly directed to the issue of estoppel and the representations/assurances which QATPL asserted were made as a result of the invoices not having been issued on a monthly basis. In my view QATPL was not advancing a separate case that the claim should be refused for failure to comply with a contractual time requirement.

160. In response to those paragraphs of QATPL's Statement of Case, SNGPL replied at paragraph 120 in its Defence under the heading "*Whether the Claimant is estopped from raising any claims?*" as follows:

> "*In response to contents of Paragraph No. 113 to 118, it is submitted that the position taken by QATPL is incorrect. The Respondent has refused to pay the take or pay invoices on the ground that invoices have not been generated for amounts due for billing month i.e. May 2017 to March 2018 in a timely manner. It is submitted that the GSA contains a standard no waiver clause and where the Claimant did not generate the take or pay invoice in a timely manner, this does not constitute a waiver and does not excuse the Respondent from its contractual obligations. Section 21.1 (b) of the GSA provides as follows:*
>
> *"Neither the failure by a Party to insist on any occasion upon the performance of any term, condition or provision of this Agreement nor any delay or other indulgence granted by one Party to the other shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right hereunder."*
>
> *It is incorrect to argue that the Claimant is barred from raising these invoices or claiming the amounts because the rights of the Claimant cannot be waived nor any estoppel would operate against the Claimant.*"

161. It is therefore clear that this is a response by SNGPL to the argument on estoppel and the allegations made by QATPL that assurances or representations were made by virtue of the fact that monthly invoices were not submitted. Since there was no separate case advanced by QATPL based on the contractual obligations, SNGPL's Defence cannot be interpreted to be raising a separate claim on behalf of QATPL which QATPL had not itself advanced.

162. It is in light of the preceding pleadings that Section V of QATPL's Reply (and relied on by QATPL) has to be read. Firstly I note that it was headed: "*The Claimant is estopped and barred from raising any claims for monthly take or pay quantity*." This language directly reflects the earlier wording in QATPL's Statement of Case at paragraph 118 (set out above). As can be seen when paragraph 118 of the Statement of Case is read in context, QATPL was not there advancing a separate contractual claim by the words "*estopped and barred*" but a case based on estoppel and given that clear cross reference to the Statement of Case, this section of QATPL's Reply is clearly intended to relate to QATPL's case on estoppel originally advanced in its Statement of Case and does not suggest that QAPTL was now introducing a separate claim based on the contractual terms.

163. It is true that Section V is divided into two subsections headed under subsection A, "*the failure to issue the monthly invoices within the contractual deadline*" and under subsection B "*estoppel*". However bearing in mind the overall heading of the Section and the link back to the Statement of Case, in my view subsection A has to be read as part of the issue of estoppel raised by QATPL in the Statement of Case. Subsection A is merely developing the argument in response to SNGPL's Defence that there was no waiver which in turn has to be read in light of QATPL's case that the absence of monthly invoices had been a representation or assurance amounting to an estoppel. Thus in paragraphs 134 – 146 QATPL pleaded that Section 8.1(b) and 9.1 of the GSA imposed a contractual deadline and rejected as "*wrong*" SNGPL's assertion that no consequences followed if it failed to issue the invoice in the time provided in Section 8.1(b) and 9.1 of GSA.

164. SNGPL clearly understood the issue in relation to waiver to be part of the case on estoppel. In SNGPL's Reply it pleaded under section D headed "*Rebuttal to the estoppel argument*":

> "*57. The Estoppel has its basis in the concept of waiver…*"

165. If notwithstanding the structure of the pleadings, QATPL was seeking to plead in Subsection A, a separate case based on the contractual requirements, it is notable that this is not referred to in its written opening submissions. Not only does it not appear in the outline of *key points* in paragraph 8 of the opening submissions, it does not appear in the list of issues in paragraph 12. Paragraph 12 puts forward 4 main issues for determination of which estoppel appears under the first main issue "*whether there was any take or pay obligation for the years 2017 and 2018*".

166. That main issue was then divided into the following sub-issues:

> "*(i) Whether in the absence of Firm Gas Order, and consequently the Firm Gas Allocation and ADP, the Respondent is obligated to take or if not taken pay for the Minimum Gas Order from the Commercial Operations Date GT1 under Section 3.6(a) of the GSA?*
>
> *(ii) Whether the Firm Gas Order, Firm Gas Allocation and ADP were agreed and finalized for the year 2018 and if so, whether any change in RLNG supplies was possible for the Claimant?*
>
> *(iii) Whether the terms and conditions of the ITA are binding on the Parties?*
>
> *(iv) Whether the Claimant is estopped from raising any claims for the period up to the COD of the Complex*."

167. The issue of estoppel is then addressed in detail under the heading "*The Claimant is estopped from raising any claims for the period prior to the COD*". In that section it is notable that QATPL's position was that the issue in the proceedings was one of estoppel and not waiver as follows:

> "*34. In its SOC, the Respondent pleaded that the Claimant, through its actions, conduct and representations, clearly led the Respondent to believe that: (a) there was no take or pay arrangement in place for the year 2017; (b) even if it were, any unutilized Gas was successfully being diverted to and utilized by other gas-based power plants; and (c) and no action was required on its part in this regard. The Respondent fully relied on this. On this basis, the Respondent asserted that the Claimant is 'estopped' from raising any claims for the take or pay amounts for the period of 2017 and up till the COD. Interestingly, in its SOD, the Claimant, without addressing the basis of the Respondent's plea, only relied on a 'non-waiver' clause in the GSA (Section 21.1) and on the basis of such reliance, simply asserted that 'estoppel would not operate against it.'*
>
> *35. Apart for making such bald assertion that no estoppel operates against it, the Claimant failed to substantiate such assertion. Interestingly, the Claimant also failed to appreciate that issue in these proceedings is not whether actions and inactions of the Claimant amount to waiver. Rather, the issue is one of estoppel.*

> *This was also pointed out by the Respondent in its second set of pleadings i.e. SOR. However, even in its response to the SOR, the Claimant has reiterated its reliance on Section 21.1 of the GSA and yet again, failed to address the Respondent's contentions on estoppel. Therefore, as things stand, other than a bare denial against estoppel, the Claimant has not pleaded anything either on law or facts*." [emphasis added]

168. The clear thrust of QATPL's opening submissions is that QATPL alleged that SNGPL had by its actions including not raising monthly invoices led QATPL to believe that there was nothing due and thus was estopped from now raising the claim.

169. This was the approach followed by Counsel for QATPL in its oral submissions to the Tribunal where the failure to issue the monthly invoices was described as "*positive representations*" that there was no take or pay:

> "*We have also pleaded that for the period of 2017 and up until the May 2018, the first invoice that was issued was issued in one go and it covered seven months. Sorry, six months. So for that invoice we plead estoppel and I just identify why we talk about estoppel. Number 1, the contract envisages that a take or pay invoice has to be issued monthly. On May 2017, it should have been issued in June and so on and so forth. It didn't issue entire 2017, not in 2018. That is one, they didn't issue. Number 2, what they issued were weekly invoices and where it was shown to the honourable Tribunal this morning that in each invoice there was a column which said "take or pay" and it said "zero" . These are positive representations from the seller telling the Respondent that, look , there is no take or pay. No need to reserve about it. Why no need to worry? Either because there is no take or pay arrangement in 2018, let us say even if there is a take or pay arrangement, don't worry, 3.6(b) is in place that diversion is taking place , there is no loss. Because there is no loss, there is no need arisen for any monthly take or pay quantity. So the seller -- the Claimant led the Respondent to believe that there was no problem. There was no take or pay. By relying on that, the Respondent continued in those actions. The Respondent did not make any efforts to do something to address any of those concerns, if at all any genuine concerns had been raised. This, we submit, is sufficient to meet the requirements of estoppel and for that reason, estoppel applies at least up to the first invoice which was issued on 24 May 2018. Accordingly, if the Claimant is right on everything and the Respondent is wrong on everything, even then, for the reason of estoppel , those invoices -- that invoice cannot be claimed now*." [emphasis added]

170. The written closing submissions of QATPL are also consistent with this. At paragraph 59 in the section headed "*Whether the Claimant is estopped from raising any claims for the period up to the COD of the Complex*?", QATPL referred to the absence of monthly invoices as one of the "*key facts*" which showed representations made by SNGPL:

> "*The undisputed record in these proceedings reflects the following facts, which show that the Claimant intentionally, and in full knowledge, made several express and implied representations during the years 2017 and 2018:*
>
> *(a) The Claimant did not communicate at any time during the year 2017 that the Respondent was obligated to take or pay for any quantity of gas or the Minimum Gas Order in the absence of any Firm Gas Allocation.*

> *(b) The Claimant did not raise any invoice or claim for any loss by the Claimant for any month of 2017 during the year 2017 and for the months of January, February and March 2018 till May 2018.*
>
> *(c) Throughout 2017, the Claimant made supplies of gas to the Respondent on the basis of Day Ahead Notifications…*" [emphasis added]

171. QATPL stressed that the issue was one of estoppel and not waiver:

> "*61. The submissions made on the facts above reflect that the Claimant through its actions and omissions, intentionally caused the Respondent to believe that no take or pay obligation was applicable on the Respondent throughout the year 2017 and up till COD of the Complex; and even if it were, the ITA operated, the diversion mechanism put in place by the Parties after extensive deliberations operated and the Respondent was not required to do anything to avoid any claims being made against it. The Claimant fails to provide any explanation as to the reason why the claims were not timely raised and what triggered the Claimant in May 2018 to raise its claims for six months at once beyond the contractually stipulated deadlines. It simply refuses to engage in this discussion. Rather, it takes meritless technical objections on the issue of estoppel to somehow justify its barred claims.*
>
> *62. This is evident from the SOD, where the Claimant, without addressing the basis of the Respondent's plea, only relied on a 'non-waiver' clause in the GSA (Section 21.1) and on the basis of such reliance, simply asserted that 'estoppel would not operate against it.' Apart for making such bald assertion that no estoppel operates against it, the Claimant failed to substantiate such assertion. Interestingly, the Claimant also failed to appreciate that issue in these proceedings is not whether actions and inactions of the Claimant amount to waiver. Rather, the issue is one of estoppel. This was also pointed out by the Respondent in its second set of pleadings i.e. SOR. However, even in its response to the SOR, the Claimant has reiterated its reliance on Section 21.1 of the GSA and yet again, failed to address the Respondent's contentions on estoppel.*" [emphasis added]

172. In its submissions to this Court QATPL relied on the introductory language of the written closings that the written closings were only an "*overview*" of its position:

> "*The purpose of this Post-Hearing Brief is to provide an overview of the Respondent's position with respect to the issues raised in the titled Arbitration Proceedings, particularly in light of the arguments advanced by the Parties at the Final Hearing and the evidence presented by their respective witnesses. This is in addition to what has already been submitted and placed on record by the Respondent. These submissions may be read along with the earlier submissions of the Respondent, particularly the Respondent's Pre-Hearing Brief.*" [emphasis added]

173. However this does not advance QATPL's case in circumstances where the inference from both the pleadings and the prior written and oral submissions is that the issue was one of estoppel and no separate issue was advanced in relation to the contractual requirements.

174. The Award addressed the issue of the invoices under headings referring to both waiver and estoppel as follows:

> "*Claimant Question 3: By not sending an invoice till May 2018 has the Claimant waived its entitlement to claim amounts owed by the Respondent for any prior period? Respondent Section 1(iv): Whether the Claimant is estopped from raising any claims for the period up to the COD of the Complex?*"

175. The Tribunal in the Award recorded (paragraph 186) and accepted (paragraph 192) that QATPL had relied on the absence of invoices as a representation to found an estoppel but in the event found (paragraph 193) that there had been no reliance or detriment established by QATPL.

## Conclusion on Section 68(2)(d)

176. QATPL in its submissions repeatedly stressed that the point on the contractual requirements raised in QAPTL's Reply at paragraphs 134 – 146 had not been "*abandoned*" nor had there been an express disclaimer.

177. However I adopt the approach referred to by Akenhead J in *Raytheon* (cited with approval in *RAV Bahamas)*:

> "*Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) … The court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard*."

178. Further I note that (as set out above) Akenhead J said that:

> "*A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions…*"

179. In my view for the reasons discussed above, there was no failure by the Tribunal to deal with an essential issue. The Tribunal dealt with the issue of estoppel. In light of the pleadings (taken as a whole) and QAPTL's oral and written presentation of its case, in my view the Tribunal did not need to deal with the issue of the failure to issue monthly invoices other than in the context of estoppel. Given its finding on the lack of reliance or detriment no fuller discussion or detail on the absence of monthly invoices was necessary in the Award.

180. The challenge brought on the basis of Section 68(2)(d) of the Act is therefore dismissed.