ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.843 of 2015

Date	Order with signature of Judge

Present:
Mr. Justice Muhammad Ali Mazhar

Aroma Travel Services (Pvt.) Ltd. & others.....Plaintiffs

Vs.

Faisal Al Abdullah Al Faisal Al-Saud & others...Defendants

For hearing of CMA No.5424/2017.

Dates of hearing: 14.09.2017 and 15.1.2018.

Khawaja Shams-ul-Islam, Advocate for the Plaintiffs along with M/s. Shahzad Mehmood, Imran Taj, Khalid Iqbal and Muhammad Khoso, Advocates.

Mr. Mohammad Akram Sheikh, Advocate for the Defendant Nos.1 & 2 along with M/s. Saim Hashmi, Abid Naseem, Jam Asif Mehmood and Ms. Mariam, Advocates.

Mr. Masood Anwar Ausaf, Advocate for Defendant No.16.

Mr. Rehman Aziz Malik, Advocate for Defendant No.5.

Mr. Imtiaz Ahmed Mahar, Advocate for Defendant Nos.3 and 21.

Mr. Waqar Ahmed, Advocate for the Defendant No.19.

Muhammad Ali Mazhar, J. The defendant No.2 has brought this application under Sections 3 and 4 of the Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Awards) Act, 2011 to stay the proceedings in the instant suit and call upon the plaintiffs to seek remedy by means of arbitration as agreed to in the correspondence and Clauses of draft agreements annexed to the plaint.

2. The learned counsel for the defendant No.2 argued that perusal of draft agreements exchanged between the parties reveal that severable binding agreements exist between the parties to the extent of arbitration and foreign jurisdiction. All agreements exchanged between the parties contain arbitration clause (except for the Non-Disclosure Agreement) as well a mandatory foreign jurisdiction clause. The plaintiffs never raised any objection to the said clauses hence separable/severable binding agreement exists between the parties to the extent of arbitration and foreign jurisdiction which survives and enforceable even where the main contract is breached, disputed or remains unconcluded. It was further contended that an arbitration clause contained in the contracts are treated as separate and self-contained contracts. If there is no concluded agreement that is not necessarily an attack on arbitration agreement. The law of arbitration agreement usually followed the proper law of the main contract through which parties were presumed to have wanted their dispute resolved by arbitration. He further argued that the court must strove to give effect to the arbitration agreement and allow the arbitration tribunal to investigate whether the contract ever existed. An agreement to arbitration before a specified tribunal is in effect a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.

3. It was further contended by the learned counsel that in the case in hand, while the parties could not reach a conclusive and binding contract regarding the subject matter of the agreements before the negotiations were terminated, there was a conspicuous and consistent

agreement with regards to the dispute resolution mechanism being arbitration in a foreign jurisdiction. In view of the trite principle of severability and separability of the arbitration agreement from the main contract, it becomes clear that there was a solemn arbitration agreement between the parties and the Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Awards) Act, 2011 makes enforcement of an arbitration agreement mandatory upon the courts. The learned counsel referred to the dictums laid down in case of **Far Eastern Impex (Pvt.) Ltd. vs. Quest International Nederland BV 2009 CLD 153 Karachi, Cummins Sales and Service (Pakistan) Ltd. vs. Cummins Middle East FZE 2013 CLD 291 Karachi and Travel Automation (Pvt.) Ltd. vs. Abacus International (Pvt.) Ltd. 2006 CLD 497.** Have a confidence in the dictum laid down in the aforesaid judicial precedent, the learned counsel avowed that after the commencement of the Act of 2011, the discretion available to the court under Section 34 of the Arbitration Act, 1940 to stay the suit in view of an arbitration agreement is no longer available, since Sections 3 and 4 of the 2011 Act are mandatory in nature. The application under the 2011 Act is free from the limitations and trappings applicable to an application under Section 34 of the Arbitration Act, 1940, such as the requirement on part of the defendant to file such an application before taking a step in the proceedings therefore in view of the precedent set and law established by this court supra it is mandatory to stay the suit and direct the plaintiffs to uphold their arbitration agreement. It was further averred that an arbitration agreement is validly constituted and is enforceable even where it is unsigned. As a reference, learned counsel quoted Article II (2) of

the New York Convention 1958, which provides that "Agreement in Writing" includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The learned counsel further contended that 2011 Act was promulgated by the Legislature to comply with International Obligation incurred. As per Section 18 of the Act of 2011, the Convention supersedes the provisions of the 2011 Act to the extent of any conflict. Similar provision is found in Sections 5 and 6 of the Arbitration Act in England and Section 7 of the Arbitration Act in India. Moreover, the afore-stated principle has been upheld by the superior courts at various occasions, inter alia **Hashmi Can Company vs. Hysong Corporation of Karachi PLD 1999 Karachi 25, Ralli Brothers vs. Muhammad Amin Muhammad Bashir Ltd. 1987 CLC 83 Karachi, Hub Power Co. vs. Wapda PLD 2000 SC 841, Lahore Stock Exchange Ltd. vs. Fredrick J. Whyte Group PLD 1990 SC 48, M.A. Khan & Co. vs. Pakistan Railways Employees' Housing Society Ltd. 1996 CLC 45 Karachi.**

4. He further argued that a foreign jurisdiction clause/forum selection clause, being in the nature of an arbitration clause, can and should be similarly enforced by the courts. He placed reliance on **M.A. Chowdhury vs. Mitsui Lines Ltd. PLD 1970 SC 373, Scherk vs. Alberto-Culver Co. 417 US 506 Supreme Court (1974), Bremen vs. Zapata Off-Shore Co. 407 US 1 Supreme Court (1972), Masood Asif & others vs. UBL 2001 CLC 479 Karachi.** It was further argued that this court in various cases recognized the sanctity of the forum selection clause in an agreement and has sought to enforce the same. In this regard, he referred to the

case of **Raziq International Ltd. vs. Panalpina Ltd. PLD 2014 Sindh 175** ***(authored by me)*****, Global Quality Foods Pvt. Ltd. vs. Hardee's Food Systems PLD 2016 Karachi 169** ***(authored by me),*** **Redtone Telecommunications Pakistan (Pvt.) Ltd. vs. FOP PLD 2014 Sindh 601, Light Industries (Pvt) Ltd. vs. ZSK Stickmaschinen GMBH, 2007 CLD 1324 Karachi, Light Industries (Pvt) Ltd. vs. ZSK Stickmaschinen GMBH 2009 CLD 1340 Kar, CGM vs. Hussain Akbar 2002 CLD 1528 Karachi.**

5. The learned counsel also referred to an order passed by me in the same suit on 30.01.2017. He made much emphasis that in the order passed on an application moved under Order 7 Rule 11 CPC, the question of existence or legality or enforceability of the arbitration agreement between the parties was not decided. The stance of the defendants have been consistent throughout the entire proceedings, whereby they denied to have any binding and conclusive agreement with the plaintiffs regarding the subject matter of the suit, however, a separable and severable arbitration agreement came into existence as the intent and consent of both the parties can be irrefutably seen from their communication. He further added that in the previous application, the defendants had prayed rejection of plaint on various accounts, including being barred by law in view of the mandatory foreign arbitration and foreign jurisdiction clause but through instant application the defendants seek the indulgence of this court to uphold the mandate laid down in Sections 3 and 4 of the 2011 Act i.e. to stay the suit and enforce the arbitration agreement between the parties.

6. Quite the reverse, the learned counsel for the plaintiffs argued that the instant application under Sections 3 and 4 of the Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Awards) Act 2011 is not maintainable and suffers from legal defect. The defendant Nos.1 and 2 participated in the proceedings and earlier filed an application under Order VII Rule 11 CPC which was dismissed. This court in the order dated 30.01.2017 had already discussed the choice of jurisdiction and foreign arbitration clause hence the application filed by the defendants is liable to be dismissed as the same is hit by constructive res judicata. The defendant on dismissal of earlier application filed H.C.A. No.120/2017 which is still pending. The contract is an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter of a legal consideration, mutuality of agreement and mutuality of obligations. Contract has been defined as an agreement between two or more persons intended to create a legal obligation between them and to be legally enforceable. He further argued that the defendants denied to have any concluded contract between the concerned parties and in these circumstances how the plaintiffs can be called upon to first invoke arbitration clause or to apply in the courts of elected jurisdiction accentuated in the drafts agreements. The plaintiffs have sought declaration that the exchange of emails, contract, MOU and Joint Venture Agreement between the plaintiff Nos.1 to 3 with the defendant Nos.1 to 9 demonstrate a binding contract with all the basic ingredients for which the plaintiff Nos.1 to 3 made investments of more than Rs.12 crores for setting up, establishing and starting the business

activities of defendant No.2 all over Pakistan, and in turn the defendant Nos.1 to 9 had agreed and are still under a legal and moral obligation to transfer 25% of defendant No.2 in favour of plaintiff No.2 as per agreed terms of the transaction. The learned counsel concluded that the application in hand is liable to be dismissed with exemplary cost.

7. Heard the arguments. In order to articulate the chronicle of this lawsuit, it is de rigueur to draw attention that earlier the same defendant filed CMA No.9436/2015 under Rule 3 of the Order II, Rule 11 of Order VII CPC for rejection of plaint. The application was heard by me and vide order dated 30.1.2017, the application was dismissed. Now the same defendant moved the present application (CMA No.5424/2017) under Section 3 and 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 by dint of which they have entreated to stay the proceedings and refer to the plaintiff to seek remedy through foreign arbitration as agreed in the various correspondence and clauses of draft agreements annexed with the plaint. In paragraph 2 of the application, the counsel for the defendant No.2 also referred to some draft i.e. Memorandum of Understanding, Shareholders Agreements and Share Purchase Agreements on which the plaintiffs have placed reliance to declare it binding contract but the defendant in their earlier application moved for rejection of plaint took a straightforward and unqualified plea that all such agreements exchanged between the parties were scarcely draft agreements and not a single contract was signed between the parties. It was further pleaded by the same defendant that the whole case of the

plaintiffs is structured on miniature correspondence which never matured into a binding contract.

8. It would be most expedient and utilitarian to allude to the arguments progressed by Mr.Akram Sheikh at the time of hearing of earlier application in this very suit which I had jot down in the order, reported in **2017 YLR 1579.** The gist of arguments mentioned in paragraphs 2, 3 and 4 of the order dated 30.1.2017 passed on C.M.A No.9436/2015 along with relevant findings to address specific line of argument fostered with regard to foreign arbitration clause in paragraph 17 of the aforesaid order are reproduced as under:-

> **"2. The learned counsel for the defendant Nos.1 and 2 moved an application (CMA No.9436/2015) under Rule 3 of Order II, Rule 11 of Order VII and Section 151 of CPC for rejection of the plaint on the ground that the correspondence if any exchanged between the plaintiff Nos.1 to 3 with defendant Nos.1, 10, 21 cannot be treated as binding contract for transfer of 25% shareholding of defendant No.2 to the plaintiffs....." [emphasis applied]**
>
> **"3..... The plaintiffs are relying on mere negotiations with vague and generalized allegations without referring to a single binding contract. Such a non-actionable plaint is liable to be removed from the docket of the court. The pre-contractual negotiations were taking place under NDA which contained a nonbinding clause. The exchanged draft agreements were manifestly incomplete and unsigned different from one another and involved different parties. The suit is barred in law due to the mandatory foreign arbitration clauses and the exclusive jurisdiction clauses contained in all the draft agreements which oust the jurisdiction of this court." [emphasis applied]**
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> **"4. ..... He further argued that there was no concluded contract or any kind of communication between the parties disclosing a *consensus ad idem* and the material terms remained undecided at all times. It is settled law that *consensus ad idem* must be shown to exist and any ambiguity in the same will adversely reflect on the existence of a contract. At best the forwarding of these drafts constituted mere invitation to treat which did not materialize into an agreement between the parties. The tone and tenor of the email attached with the plaint speaks volumes of the kind of engagement which the plaintiff's No.2 and 3 had with Etimad. It is reiterated that they were merely facilitating the launch of Etimad, with no say in the management and the local facilitation by the Plaintiffs began after the meeting in Dubai on 02.10.2012 and all services provided to the Applicants were as a result of and in consideration of this".**
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> **17. The learned counsel for the defendant No.1 and 2 exuberantly argued that in some draft agreements, choice of jurisdiction to sue and foreign arbitration clause was also integrated. This plea is disproportionate as admittedly the fundamental defence is that no agreement was signed between the parties whereas plaintiffs assert sustenance of an oral agreement and promises against which they made funding. When the learned counsel for the defendant No.1 and 2 vigorously denied having any concluded contract between the concerned parties then how the plaintiffs can be called upon to first invoke arbitration clause or to apply in the courts of elected jurisdiction accentuated in the drafts agreements. [emphasis applied]"**

9. On dismissal of application, the defendant No.2 has already filed High Court Appeal No.120/2017 which is pending in this court. It would be advantageous to replicate the basic facts alleged in the above High Court Appeal along with the grounds raised to challenge the aforesaid order.

Excerpt from Memo of H.C.A. No.120/2017
(Faisal Al-Saud vs. Aroma Travels and others)

Facts:

.....

"7. That it is an admitted fact by the respondents in their plaint and/or its accompanying attachments that *(i) the NDA was signed by them, that (ii) no other contract was signed, and that (iii) the foreign arbitration agreement was acceptable to them.* Based on this NDA as well as email communications between the parties when the NDA was shared, it is an admitted fact that (iv) negotiations on local partnership or shareholding began once the NDA was signed, and (v) were governed by the terms laid out in this NDA. In fact, the email accompanying the NDA sent to the respondents and attached by them (on page 437 of the plaint) clearly states that the NDA must be signed before any negotiations can begin. *Based on all the draft agreements and their relevant correspondences attached by the respondents, it is an admitted fact that (vi) all the drafts shared contained a foreign arbitration agreement and that (vii) the respondents agreed to the same and are therefore bound by it."* [emphasis applied]

"That against these admitted facts the petitioners *filed an application to dismiss the plaint under Rule 3 of Order II, Rule 11 of Order VII and Section 151 CPC for rejection of plaint on the grounds that it failed to disclose any cause of action, and was barred by the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, as well as the Specific Relief Act, 1877."* [emphasis applied]

Grounds:

.....

b) That the learned Judged failed *to appreciate that when a contract is reduced into writing, its non-signing means that it is in fact no contract and cannot be enforced:*

"Where a contract is reduced into writing, not only should it be founded upon the imperative elements of offer and acceptance, but its proof is also dependent upon the execution of the contract by both the contracting parties i.e. by signing or affixing their thumb impression. *...But in this case this is conspicuously lacking by virtue of non-execution (non-signing) of the agreement by the appellants, therefore in law and fact it is no contract (agreement)."* [emphasis applied] (PLD 2005 SC 187, paragraph 9). See also YLR 2015 Kar 2141 at 2146-7".

h) That all the draft agreements put on the record by the respondents contain an arbitration agreement which was accepted by the respondents as is admitted through the accompanying correspondence attached by them. *Therefore, the present dispute as to whether a contract exists between the parties or not must also be referred for arbitration. Therefore, the learned judge's conclusion is misconceived that: "When the learned counsel for the defendant No.1 and 2 vigorously denied having any concluded contract between the concerned parties then how the plaintiffs can be called upon to first invoke arbitration clause or to apply in the courts of elected jurisdiction accentuated in the drafts agreements."* [emphasis applied] (para 17 of the impugned order).
zz) That the impugned order and decision passed by the learned single Judge has not taken into consideration the facts of the case in as much

as the relationship between the parties are governed by the provisions of Non-Disclosure Agreement (NDA) dated 26.12.12 and the same expressly provides as follows: -

"The validity and interpretation of this Agreement and the legal relations of the Parties shall be governed by the laws of United Arab Emirates and shall be subject to the exclusive jurisdiction of the Courts in Dubai."

In view of the existence of the aforesaid clause in the NDA, it is obvious that the parties have chosen a forum for adjudication of any dispute between the parties, *therefore, the hon'ble learned single Judge of the hon'ble Court ought to have stayed the proceedings in terms of the law laid down by Supreme Court in the case reported at PLD 1970 SC 373* [emphasis applied] and the case reported at PLD 2014 Sindh 175 (M/s. Razik International (Pvt.) Ltd. vs. Panalpina Management Ltd.).

"Prayer:

A.....

B.....

C. Or in alternative, this Court may be pleased to stay the proceedings in the Civil Suit No.843/2015 titled "Aroma Travel Services (Pvt.) Ltd. and others vs. His Royal Highness Faisal al Abdullah Faisal al Saud, and others".

10. Under Section 3 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 the High Court has jurisdiction to adjudicate and settle the matters related to or arising from this Act. The application to stay the legal proceedings pursuant to the provisions of Article II of the Convention may be filed in court in which legal proceedings are pending. Under Section 4, the procedure for enforcement of arbitration agreement has been laid down. Assuming that the matter is covered by the arbitration agreement, on notice to the other party, a party to the arbitration agreement may apply to the court for staying the proceedings and the court shall refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

11. Consistent with Sub-article 2 of Article II of Convention on the Recognition and Enforcement of Foreign Arbitral Awards ***(United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10.6.1958 set***

forth in the Schedule), the term ***"agreement in writing"*** includes an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. In Sub-article (3), it is further provided that the court of *Contracting State* when seized of an action in a matter in respect of which the parties have made an agreement shall at the request of one of the parties to arbitration, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The letters of the law have well-defined and reassured that 'agreement in writing' shall include an arbitration clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. So in my outlook for all intents and purposes, Sub-article (2) of Article II have wide-ranging tentacles which the court has to weigh up and explore before referring a party to the arbitration. To be precise whether there is an agreement to an arbitral clause; or an arbitration agreement signed by the parties; or any such agreement/understanding reflected in the exchange of letters or telegrams in a defined legal relationship.

12. The learned counsel for the defendant No.2 robustly argued that separable/severable binding agreement between the parties to the extent of arbitration and foreign jurisdiction survive on and enforceable even where the main contract is breached, disputed or remains unconcluded. He referred to the trite principle of severability and separability of the arbitration agreement from the main contract. It was further averred that the discretion available to the court under Section 34 of the Arbitration Act, 1940 to stay the suit

in view of an arbitration agreement is no longer available since Sections 3 and 4 of the 2011 Act are mandatory in nature. What is more he argued that a foreign jurisdiction clause/forum selection clause being in the nature of an arbitration clause can be enforced by the courts.

13. While we're on the subject, I would like to divulge my conscientious appraisal and survey of several dictums/judicial precedents together with the excerpts and annotations of law book "Agreements on Jurisdiction and Choice of Law" *(Adrian Briggs)* encompassing and exemplifying the doctrine of separability or severability of arbitration clause from the main agreement and the ramifications of forum selection clause in a contract which deduced the following affirmations and declarations:

1. An arbitration agreement is distinct and separable from the main contract.

2. Doctrine of separability could apply to save the arbitration agreement even where the main contract was void ab initio and not merely voidable.

3. If the court is arrived at the conclusion that there existed a valid agreement, only then the matter can be referred to the arbitrator under the arbitration clause.

4. Arbitration clause contained in the contract is treated as separate and self-contained contract in that if it is riot so, arbitration clause would not at all survive and attack on the main contract which is known as the doctrine of separability.

5. In Harbour Assurance v. Kansa (1993) 1 Lloyd's Rep. 455) the court of appeal has held that an arbitration clause will survive where the main contract in which it appears is invalid ab intio on grounds of illegality so that the illegality issues themselves can properly be referred to arbitration.

6. Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement.

7. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.

8. None of the IDA rights had been assigned to the plaintiff. Plaintiff was stranger to IDA and therefore could not set into motion arbitration clause.

9. Claim of exclusive rights by the plaintiff in terms of IDA could not become the subject matter of arbitration. No purpose would be

achieved to refer to arbitration as the same would be futile exercise without any corporal outcome.

10. In the dispute resolution clause the parties have mutually bargained and entered into conclusive agreement that if they will be unable to resolve the dispute within thirty days after written notice shall be submitted to the exclusive jurisdiction of the competent courts of the city of Basel, Switzerland.

11. Plea raised that by termination of contract, arbitration clause did not survive. Termination could occur due to breach in contractual obligations. Even a wrongful termination can also be made subject matter of arbitration proceedings otherwise the whole purpose and scheme of incorporation arbitration clause in contract would become redundant and superfluous.

12. Cancellation of contract or invoking arbitration proceedings both are two distinct situations. Termination clause cannot be given overriding effect on arbitration proceedings or provision made for arbitration in contract.

13. Despite termination of contract provision of arbitration survived. The agreement for arbitration contained in the contract is a separate part of contract.

14. The principle of severability is established for agreements on arbitration, and is surely not in doubt for agreements on jurisdiction, but it is necessary to consider what, precisely, is to be severed from what.

15. Certainly as an organizing tool of the common law, and of the law of international arbitration, severability is useful in pointing the way to sensible outcomes which are otherwise out of reach.

16. Severability' suggests that there are, despite appearances, two contracts which may be disentangled from each other, so that the invalidity of one does not entail the invalidity of the other.

17. Severability clause means a provision that keeps the remaining provisions of a contract or statute in force if any portion of that contract or statute is judicially declared void, unenforceable, or unconstitutional. Also termed saving clause; separability clause.

18. Clause in the agreement with regard to exclusive or non-exclusive jurisdiction of court of choice was not determinative but was the most crucial factor.

19. When question arose as to the nature of jurisdiction agreed to between the parties, the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

20. Court should also consider relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of view of premises and all other practical problems that could make trial easy, expeditious and inexpensive.

21. Forum selection clause could not be held against public policy or arbitrary in nature as presumption of law is that parties were oblivious to their relative convenience or inconvenience at the time entering into a contract.

22. It may appear difficult to apply the same techniques to agreements on choice of law. But the correct line of separation may not be one which divides the jurisdiction or arbitration agreement from the remainder of the contract and its substantive provisions, but rather one which separates the entire agreement for dispute resolution, which need not but may constitute more than a jurisdiction or arbitration agreement, from the performance-defining remainder of the contract.

23. Initially the idea that an agreement on choice of law may be severable from the performance-defining provisions of the contract comes as a surprise.

24. English private international law makes two principles elementary; that every contract has a proper law from the moment of its creation,

built into it from the beginning; and that because the proper law of a contract is established at the creation of the contract, a contract may not be governed by a 'floating' proper law.

25. The common law was clear: no contract could exist without a proper law, and as a result, a postponed-chosen, or floating, proper law was a logical impossibility, as it would challenge the idea that the proper law had existed from the outset.

26. First, in Armar Shipping Co. Ltd. v. Caisse Algerienne d' Assurance et de Reassurance it had been contended that a contract which did not make an express choice of law, could nevertheless have its law determined by reference to factors which occurred after the making of the agreement, such as the decision to have general average adjusted in a particular place.

27. Questions of construction of jurisdiction and arbitration agreements are governed by the proper law of the contract of which they are terms. The discussion in the previous section, and this, proceeds on the footing that the proper law of the contact is English law, or that if it is a foreign law, then there is no evidence before the court to establish the difference between the English rules of construction and those of the relevant foreign law.

28. In the context of Article 23, a person is restricted to the jurisdiction of the courts of a named Member State, or States because he has accepted, in a formal way, the jurisdiction of that court, and has waived the jurisdiction of the court or courts which would otherwise have had jurisdiction over him.

29. No contract is required; none may even be involved. All that is called for is the agreement of the party to be bound or restricted in his choice of jurisdictional rules where a claim arises in connection with a particular legal relationship, and which is expressed in a form sufficient to ensure that it is fair and appropriate to confine him to the jurisdiction of that court and of only that court.

Reference: 2014 CLD 337 (Lakhra Power Generation Company Limited vs. Karadeniz Powership Kaya Bey). PLD 1990 Supreme Court 48 (Lahore Stock Exchange Limited vs. Fredrick J. Whyte Group (Pakistan) Ltd.). PLD 2000 Supreme Court 841 (The Hub Power Company Limited (HUBCO) vs. Pakistan WAPDA). PLD 2016 Sindh 169 (Global Quality Foods Pvt. Ltd. vs. Hardee's Food Systems, Inc). PLD 2014 Sindh 175 (Messrs Raziq International (Pvt) Ltd. vs. Panalpina Management Ltd.).2013 CLD 1451 (Messrs Sadat Business Group Ltd. vs. Federation of Pakistan). Agreements on Jurisdiction and Choice of Law" authored by Adrian Briggs, Oxford University Press. Fiona Trust & Holding Corp v Privalov (sub nom Premium Nafta Products Ltd v Fili Shipping Co Ltd) [2007] UKHL 40, at [26]. EI Du Pont de Nemours v Agnew [1987] 2 Lloyd's Rep 585 (CA); Armadora Occidental SA v Horace Mann Insurance Co [1977] 1 WLR 1098 (CA); BP plc v National Union Fire Insurance Co [2004] EWHC 1132 (Comm); Astro Venturoso Compania Naviera v Hellenic Shipyards SA [1983] 1 Lolyd's Rep 12 (CA). [1981] 1 WLR 207 (CA). (Pearl v Sovereign Management Group Inc [2003] CanLII 11857 (Ont SC) at [31]; Rickshaw Investments Ltd v Nicolai Baron von Uexkull [2006] 2 Sing LR 850 (Sing) at [17], [2007] 1 Sing LR 377 (CA); Sugar v Megawheels Technologies Inc [2006] CanLII 37880 (Ont); Noble v Carnival Corp (2006) 80 OR (3d) 392), Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488 (CA), May LJ (at 494) and Black's Law Dictionary, Ninth Edition.

14. Undoubtedly and indisputably, to constitute a valid contract between parties one of the essential conditions is consensus ad idem with regard to all the terms of contract. Fundamentally this phrase in law of contract connotes and epitomizes a meeting of the minds inures to describe the intentions of the parties. This also speaks of

set of circumstances where there is a reciprocal understanding in the manifestation of contract. Whether the parties had reached a concluded contract or not is a question of fact to be reckoned from the correspondence and oral evidence which in fact required to be proved in this case at the time of recording evidence by the court. Where an agreement in writing and its formal execution is intended by the parties as a condition precedent to its completion, there can be no contract until then, even if the actual terms have been agreed upon. An agreement to negotiate is not recognized as an enforceable contract but in unison oral agreement is also not prohibited in law. Section 10 of the Contract Act, 1872 does not exclude oral contract from being enforced although in case of an oral contract, clearest and more satisfactory evidence would be demanded by the court. Reference can be made to an order authored by me between the same parties which is reported in **2017 YLR 1579**.

15. The judicious and sagacious rudiments required to be evinced and proved a valid contract may be featured for instance an offer; acceptance of that offer; intention of parties to be bound by its terms; consideration; and certainty of terms. The absenteeism of a written agreement if all details of a business deal have been come to an understanding and nothing left for future settlement, the dearth and scarcity of a writing did not leave the transaction uncompleted or imperfect and or without binding force in absence of positive agreement that it should be binding until so reduced to writing and formally executed. In the situation, where the parties have not signed the legal document of contract, the court may take stock of whether meeting of the minds come

into sight in between the parties but this aspect of the case can be determined alone by means of evidence as may be led by the parties because at this initial stage the stratum with regard to the intention of parties or meeting of minds do not manifest translucent image.

16. Here I recapitulate that right through the pleadings the defendant No. 1 and 2 have clenched to a plea that there was no concluded contract with the plaintiff but only drafts/conscripts were exchanged for the purposes of negotiations and dialogues whereas the plaintiffs have come out and emerged with the standpoint that if all correspondence including the draft agreements exchanged between the parties are taken into consideration this will unequivocally stand for and represent that the parties had envisioned to join in a contractual bargain and in the same premise, the plaintiffs have sought the declaration that the documents available on record in totality amount to demonstrate the binding agreement and relationship between the parties and this is the reason for which in my earlier order passed on the application moved for rejection of plaint, I have dilated and expounded that the plaintiffs in fact want the enforcement of oral agreement which despite deliberation could not be materialized or jot down in writing. At this juncture, I have no reluctance in my mind to espouse and embrace straight away the doctrine of separability and severability of arbitration clause which surely survive on notwithstanding the termination of contract between the parties being a contrivance and pragmatic apparatus to settle down and resolve the dispute between the parties to a contract through a purposeful vehicle of arbitration. At one fell swoop, large sacrosanctity is also attached to the choice of forum

selection agreed between the parties but in the case in hand, the nucleus of the entire case is based on oral agreement and understanding without signing any document including MoU, Joint Venture Agreement and Shareholders Agreement. However, the plaintiffs have claimed to have invested some amount on the promise and understanding for which they have also claimed the recovery of said amount, rendition of accounts and damages besides specific performance, declaration and injunction. This segment cannot be established unless an equal opportunity is given to prove and disprove the case.

17. The learned counsel for the defendant No. 1 and 2 made much emphasis that though no agreements have been signed between the parties but let this question be decided by the Arbitrator. Despite robust attack and challenge by the defendant No. 1 and 2 to the main lis on the ground of non-signing of agreement, this application has been moved for referring to the dispute for arbitration which is quite astonishing. When nothing was put in writing and the infrastructure of the whole suit is based on oral understanding and promises then referring to a matter to the Arbitrator would be nothing but a futile and pathetic exercise with wastage of time so in all fairness I do not think it appropriate rather it seems to me sneering and mocking of law to send blank/unsigned agreements for arbitration leaving the question to be decided first by the Arbitrator the effect and aftermath of non-signing of agreement and moreover for this limited purpose he should assemble the parties to examine the providence of drafts agreements which are in its present form inoperative and incapable of being performed. The exchange of correspondence though showing the

intention to make headway towards a concluded contract but nothing was signed in writing. During course of arguments, the learned counsel for the plaintiffs tendered unqualified offer to the counsel for the defendant No. 1 and 2 to ask his clients to sit together and sign all agreements even in this reluctant relationship and if they agree to sign the contracts, the plaintiff is also willing to take recourse of their grievances through arbitration but after signing agreements and not before. So far as a choice of forum selection is concerned, I have also no disagreement that in case of valid and binding contract the parties must honor their bargain to invoke a particular forum by mutual agreement but in this case as I have already sensed and comprehended that this is not a fit case for referring it to the Arbitrator not on the basis of my own discretion rather than the circumstances of the case do reflect and stay my hands from directing to invoke arbitration or honour the forum selection clause on the strength of unsigned agreements.

18. In the wake of above discussion, CMA No.5424/2017 is dismissed.

Karachi:-
Dated.03.04.2018 **Judge**