IN THE HIGH COURT OF SINDH AT KARACHI

Suit 2710 of 2017	:	Iran Central Iron Ore Company vs. Pakistan Steel Mills Corporation (Private) Limited
For the Plaintiff	:	Mr. Furkan Ali, Advocate
For the Defendant	:	Mr. Zeeshan Adhi Advocate
Date of hearing	:	16.01.2020
Date of announcement	:	24.02.2020

JUDGMENT

Agha Faisal, **J**. Pursuant to Section 14(2) of the Arbitration Act, 1940 ("Act") and Rule 282(1) of the Sindh Chief Court Rules, an award dated 08.12.2017 ("Award") has been filed by the learned Arbitrator, Mr. Salman Talibuddin ASC. The defendant filed objections and sought to have the Award set aside, pursuant to Section 30 read with Section 33 of the Act. It is considered illustrative to reproduce the determinant constituent of the Award herein below:

> "a. The Claimant's claim succeeds to the extent of USD 14,264,272.98 on account of the balance due to it from the Respondent, being the balance amount due under the Agreement for iron are supplied by the Claimant to the Respondent.
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> b. The Respondent shall pay the Claimant the sum of USD 14,264,272.98 in Pakistan Rupees equivalent, calculated on the basis of the rate of exchange prevailing as on the date of payment, into an account designated by the Claimant and maintained by the Claimant's nominee with a local Scheduled Bank."

2. Briefly stated, the parties entered into a contract dated 22.06.2008 ("Contract") for the supply of iron ore. The plaintiff was aggrieved on account of non-payment of the consideration for goods supplied, hence, filed a proceedings, being Suit 1070 of 2015, in invocation of the arbitration clause per the Contract, pursuant to Section 20 of the Act. The Court was pleased to appoint the learned arbitrator, to determine the claim, vide its order dated 21.03.2017.

The arbitration proceedings were then conducted and subsequently concluded vide the Award.

3. Mr. Zeeshan Adhi, Advocate, appeared on behalf of the defendant and argued that the Award was partially capricious, partially arbitrary and also amounted to legal misconduct, hence, ought to be set aside. It was argued that the learned Arbitrator did not appreciate that the Contract had become void in view of the international sanctions upon the country where the claimant was incorporated. It was contended that the requirements imposed for the relevant exchange rate, being applicable on the date of payment, was erroneous and unmerited. It was submitted that the Award militates against public policy as requiring a public sector entity, under financial distress, to pay the amount at the prevalent rate of exchange is oppressive. In conclusion it was averred that the objections raised by the objector before the learned Arbitrator were not considered in their proper perspective.

4. Mr. Furkan Ali, Advocate, appearing on behalf of the plaintiff, argued in favour of the Award. Per learned counsel, the contention with respect to sanctions and purported voiding of the Contract had been duly addressed by the learned Arbitrator and rightfully rejected. It was submitted that the precepts of public policy require that a contractual obligation be honored and that policy cannot be used as an instrument for precipitating unjust enrichment of one party. Learned counsel relied upon the *Aeroflot case*[1] and submitted that the definition of legal misconduct provided therein was clearly not attracted in the present facts and circumstances and it was articulated that general principles of equity and good conscience would favor the plaintiff and not the defendant herein. In conclusion it was argued that the reference to the general principles of equity and good conscience are references to the procedure by which the Arbitration is conducted and does not refer to the decision arrived at, provided that the same is not incongruent with the principles and norms of justice.

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[1] *Gerry's International (Private) Limited vs. Aeroflot Russian International Airlines* reported as *2018 SCMR 662*.

5. This court has heard the arguments of the respective learned counsel and considered the documentation and authority to which its surveillance was solicited.

It is settled law[2] that an award if filed in court pursuant to Section 14(2) of the Act in order to procure the attendance of the parties concerned so as to provide an opportunity for filing objections, if required. While considering the validity of an award, within the parameters of Section 30 of the Act[3], it is pertinent to note that the court does not assume to mantle of an appellate forum and eschews reappraisal of evidence recorded by the arbitrator[4]. In principle the award is considered final, in fact and in law, and interference therewith is only merited upon the specific grounds enunciated in the Act[5]. It has also been established that an award is exceptionable only in cases where there is a patent error on the face of the record not requiring scrutiny beyond the award for discovering the same and the court is discouraged from interfering in an award if on the basis of the evidence on record the court may have reached a different conclusion[6].

The Supreme Court has recently précised the law with respect to the grounds upon which an arbitration award may warrant interference, in the *Aeroflot case*[7], wherein *Mian Saqib Nisar CJ.* has illumined as follows:

> "8. The principles which emerge from the analysis of above case-law can be summarized as under:-
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> (1) When a claim or matters in dispute are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact.
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> (2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.
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> (3) The very incorporation of section 26-A of the Arbitration Act requiring the arbitrator to furnish reasons for his finding was to enable the Court to examine that the reasons are not inconsistent

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[2] Per *Nasir ul Mulk J.* in *Chaudhry Qaiser Mahmood vs. Province of Punjab & Another* reported as *2012 SCMR 1606*.

[3] 30. Grounds for setting aside award. An award shall not be set aside except on one or more of the following grounds, namely: (a) that an arbitrator or umpire has misconducted himself or the proceedings; (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35; (c) that an award has been improperly procured or is otherwise invalid.

[4] *PLD 2011 Supreme Court 506*; *PLD 2006 Supreme Court* 169; PLD *2003 Supreme Court 301*; *PLD 1996 Supreme Court* 108; 1984 *SCMR 597*;

[5] *Section 30 of the Act*.

[6] *2014 SCMR* 1268; *PLD 1987 Supreme Court 393*.

[7] *Gerry's International (Private) Limited vs. Aeroflot Russian International Airlines* reported as *2018 SCMR 662*.

and contradictory to the material on the record. Although mere brevity of reasons shall not be ground for interference in the award by the Court.

(4) A dispute, the determination of which turns on the true construction of the contract, would be a dispute, under or arising out of or concerning the contract. Such dispute would fall within the arbitration clause.

(5) The test is whether recourse to the contract, by which the parties are bound, is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction.

(6) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract.

(7) The authority of an arbitrator is derived from the contract and is governed by the Arbitration Act. A deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part but it may tantamount to mala fide action and vitiate the award.

(8) If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally.

(9) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. An arbitrator acting beyond his jurisdiction is a different ground from an error apparent on the face of the award.

(10) The Court cannot review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise.

(11) It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong.

(12) Where two views are possible, the Court cannot interfere with the award by adopting its own interpretation.

(13) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd.

(14) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.

(15) The only exceptions to the above rule are those cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award, which one can say is erroneous.

(16) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(17) It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.

(18) The Court does not sit in appeal over the award and should not try to fish or dig out the latent errors in the proceedings or the award. It can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is incorrect.

(19) The Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record.

(20) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not do so he can be set right by the Court provided the error committed by him appears on the face of the award.

(21) There are two different and distinct grounds; one is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the Courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.

(22) An error in law on the face of the award means that one can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous.
(23) A contract is not frustrated merely because the circumstances in which the contract was made are altered.
(24) Even in the absence of objections, the Award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record. The adjudicatory process is limited to the aforesaid extent only.
(25) While making an award rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like a post office but must subject the award to its judicial scrutiny.
(26) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not misconduct on the part of the arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence.
(27) Misconduct is of two types: "legal misconduct" and "moral misconduct". Legal misconduct means misconduct in the judicial sense of the word, for example, some honest, though erroneous, breach of duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any irregularity of action which is not consistent with general principles of equity and good conscience. Regarding moral misconduct; it is essential that there must be lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice.
(28) The arbitrator is said to have misconducted himself in not deciding a specific objection raised by a party regarding the legality of extra claim of the other party.
(29) some of the examples of the term "misconduct" are:
(i) if the arbitrator or umpire fails to decide all the matters which were referred to him;
(ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference;
(iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt; and
(iv) if there has been irregularity in the proceedings.
(30) Misconduct is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator.”

The scope of this determination is circumscribed per the principles mentioned supra, hence, the issue for this court to decide is whether the objections to the Award can be sustained on the anvil of the law.

6. The first objection articulated before this court was with regard to international sanctions precluding the defendant from making payment of its contractual dues. This objection effectively amounts to admission of liability, hence, all that remained to be determined by the learned arbitrator was whether there was any restraint placed by law upon the defendant to honor its obligation. The learned arbitrator undertook an exhaustive deliberation hereupon and concluded that the defendant’s attempt to obviate its admitted liability could not be

sanctioned under the law. It is considered illustrative to reproduce the pertinent discussion and findings upon this matter:

i. In support of its contention that payment of the admitted amount of USD 14,264,272.98 could not be made to the Claimant, the Respondent has relied on sanctions imposed by the United Nations Security Council, the United States of America and the European Union, on the Islamic Republic of Iran.

ii. In support of this contention the Respondent has relied on United Nations Security Council Resolution 1929 (2010) dated 9 June 2010 (Exhibit DW 1/6); United States Department of Treasury, Office of Foreign Assets Control, (31 CFR Part 561), Iranian Financial Sanctions Regulations, published in the Federal Register/Vol. 77, No. 217/Thursday, November 8, 2012/Rules and Regulations (Exhibit DW 1/7); Council Regulation (EU) No. 267/2-12 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No. 961/2010, published in the Official Journal of the European Union, II (Non-Legislative Acts) (Exhibit DW 1/8); an announcement dated 15 March 2012 printed from SWIFT's website (Exhibit DW 1/9); SRO 65(I)/2007 dated 23 January 2007 (Exhibit DW 1/11); SRO 742 (1)/2010 dated 3 August 2010 (Exhibit DW 1/12); and SRO 172 (I)/2016 dated 2 March 2016). Each of these is considered herein below.

iii. United Nations Security Council Resolution 1929 (20101 dated 9 June 2010 ("Resolution 1929"): Resolution 1929 relates to the Treaty on the Non-Proliferation of Nuclear Weapons' and various reports issued by the Director General of the International Atomic Energy Agency indicating, inter a1ia, that Iran failed to establish full and sustained suspension of all enrichment-related and reprocessing activities and heavy water-related projects as set out in resolutions 1696 (2006), 1737 (2006), 1747 (2007) and 1803 (2008).

iv. The sixteenth Recital (on page 3 of Resolution 1929) relates to the financial obligations of member States but is restricted to the need to exercise vigilance over transactions involving Iranian banks, including the Central Bank of Iran so as to prevent such transactions contributing to proliferation-sensitive nuclear activities or to the development of nuclear weapon delivery systems. [Underlining mine]

v. The twenty-third Recital (on page 3 of Resolution 1929) is instructive in that it stresses that nothing in this resolution compels member States to take measures or actions exceeding the scope of this resolution.

vi. Resolution 1929 contains a number of decisions relating to financial and/or commercial matters. However, these are restricted in scope to uranium mining, production or use of nuclear materials and technology, uranium enrichment and reprocessing actives, financial resources or services related to the supply, sale, transfer, provision, manufacture, maintenance or use of such arms or related material, Iran's proliferation-sensitive nuclear activities, or the development of nuclear weapon delivery systems, all of which have no bearing on the supply of iron ore to the Respondent by the Claimant, for use by the Respondent in the production by it of flat steel products such as billets, slabs and rolled sheets.

vii. While Resolution 1929 refers to individuals and entities listed in its Annex I and Annex III (copies of which were not produced along with Resolution 1929), during the course of these proceedings learned counsel for the respondent confirmed that neither was the Claimant ever on any such list, or was the good in question (iron ore) ever the subject of any sanctions.

viii. Paragraph 35 of Resolution 1929 (on page 9 of Resolution 1929) requires all member States to ensure that no claim shall lie at the instance of the Government of Iran, or of any person or entity in Iran, or any person claiming through or for the benefit of such person or entity. However, this restriction relates to contracts or other transactions where their performance was prevented by reason of the measures imposed by resolutions 1737 (2006), 1747 (2007), 1803 (2008) and Resolution 1929. As such, paragraph 35 or Resolution 1929 has no application to this case and the Respondent has not rested its defence on paragraph 35.

ix. United States Department of Treasury, Office of Foreign Assets Control, (31 CFR Part 561), Iranian Financial Sanctions Regulations, published in the Federal Register/Vol. 77, No. 217/Thursday, November 8, 2012/Rules and Regulations, ("US Sanctions Regulation"): The US Sanctions Regulation came into effect on 8 November 2012 and brought about amendments in earlier Iranian financial sanctions regulations in order to implement sections 214 through 216 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (-TRA").

x. While copies of the earlier regulations and of the TRA were not produced by the Respondent, an examination of the `Background' section of the US Sanctions Regulation discloses that on 10 August 2012, the President signed into law the TRA in order to strengthen the sanctions imposed against Iran. Sections 214 and 214 of the TRA amended section 104(c)(2) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ('CISADA") by expanding the categories of sanctionable activities set out in section 104(c)(2).

xi. Section 104(c)(2) of CISADA authorized the Secretary of State to prohibit or impose strict conditions on the opening or maintaining in the United States of a correspondent account or a payable-through account by a foreign financial institution, if the Secretary finds that the foreign financial institution knowingly engages in one or more of those activities. The activities that fall within the scope of section 104(c)(2) include facilitating the activities of a person subject to financial sanctions pursuant to a United Nations Security Council resolution that imposes sanctions with respect to Iran.

xii. Section 214 of TRA amended section 104(c)(2) of CISADA to include facilitating the activities of a person acting on behalf of or at the direction of, or owned or controlled by a person sanctioned under such United Nations Security Council Regulations.

xiii. As noted herein above, it is not the Respondent's case that the Claimant was ever a person sanctioned under any United Nations Security Council regulation. As such, the provisions of the US Sanctions Regulation and of the TRA or the CISADA would appear to have no application in so far as the present dispute is concerned. Indeed, other than exhibiting a copy of the US Sanctions Regulation (which notes certain amendments to the CISADA on account of sections 214 to 216 of TRA), the Respondent did not rest its case on any particular provision of either of the US Sanctions Regulation, TRA or CISADA, to demonstrate that the Claimant or the goods in question became the subject of any United Nations Security Council regulation and, as a result, to the provisions of these laws.

xiv. Council Regulation (EU) No. 267/2-12 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No. 961/2010 published in the Official Journal of the European Union, II (Non-Legislative Acts (“EU Regulation 267"): EU Regulation 267 builds on Regulation (EU) No. 961/2010 on restrictive measures against Iran and Decision 20 I2/35/CFSP, which provided for additional restrictive measures against Iran.

xv. Recital 3 of EU Regulation 267 notes that the additional restrictive measures comprise, in particular: trade in dual-use goods and technology, as well as on key equipment and technology that could be used in the petrochemical industry; a ban on the import of Iran crude oil, petroleum products and petrochemical products; as well as a prohibition of investment in the petrochemical industry. Moreover, trade in gold, precious metals and diamonds with the Government of Iran, as well as the delivery of newly printed bank notes and coinage to or for the benefit of the Central Bank of Iran, should be prohibited.

xvi. Additional restrictive measures sought to be imposed on Iran are noted in Recitals 4 to 29, and Recital 30 records that it was for the purpose of ensuring that these measures are effective, that EU Regulation 267 was adopted.

xvii. While EU Resolution 267 contains: export and import restrictions (Chapter II); restrictions on the financing of certain enterprises (Chapter III); freezing of funds and economic resources (Chapter IV); restrictions on the transfer of funds and on financial services (Chapter V); restrictions on transport (Chapter VI); and other general and final provisions (Chapter VII), none of those restrictions are relatable to the purchase from Iran of iron ore by an entity such as any of the parties to these proceedings.

xviii. Indeed, Article 49 of EU Regulation 267 provides that it shall apply only: within the territory of the European Union and its airspace; on board any aircraft or any vessel under the jurisdiction of a Member State; to any person inside or outside the territory of the European Union who is a national of a Member State; to any legal person, entity or body, inside or outside the territory of the European Union, which is incorporated or constituted under the law of a Member State; and to any legal person, entity or body in respect of any business done in whole or in part within the European Union

xix. EU Regulation 267 closes by stating that it shall be binding in its entirety and directly applicable in all Member States.

xx. From the foregoing, it is clear that EU Regulation 267 has no application to the parties' dispute in these proceedings.

xxi. Announcement dated 15 March 2012 printed from SWIFT's website dated 15 March 2012 ("WIFT Announcement"): The SWIFT Announcement is dated 15 March 2012 and came into effect on 17 March 2012 and announced that pursuant to an EU Council decision, it has been instructed to discontinue its communications services to those Iranian financial institutions that are subject to European sanctions.

xxii. While Clause 14(a) provides that the letters of credit to be established by the Respondent shall be advised, confirmed, and negotiated by the Claimant's designated bank, none of the parties has provided the name of the bank designated by the Claimant. One would, however, expect that if the designated bank was subject to European sanctions, the Respondent would have taken pains to lead evidence of that.

xxiii. SRO 65(1)/2007 dated 23 January 2007 ("SRO 65"): SRO 65 enforced United Nations Security Council resolution 1737 dated 23 December 2006 (which was attached as Annex-1 to SRO 65), particularly its paragraphs 3, 4, 5, 6,7, 210, 11, 12, 13, 14, 15 and 17. For the purpose of facilitating implementation, SRO 65 also annexed Document S/2006/814, Document S/2006/815 and Document S/2006/985 (which had been referred to in United Nations Security Council resolution 1737) and were attached as Annex II, III, and IV to SRO 65. The Respondent neither produced United Nations Security Council resolution 1737 nor the above referred annexures to SRO 65.

xxiv. SRO 742 (I)/2010 dated 3 August, 2010 (“SRO 742”) SRO 742 enforced United Nations Security Council resolution ated 9 June 2010 by way of updating SRO 65 and requiring ‘all concerned’ to take necessary measures for the implementation of operative paragraphs 5, 8, 9, 10, 14, 16, 17, 18, 22, 23, 24, 30, 31 and 35 of United Nations Security Council resolution 1929 of 2010, imposing additional sanctions against the Iranian individuals and entities listed in the Annexure attached to SRO 742. In facilitate implementation, SRO 742 also attached a list of: individuals and entities involved in nuclear or ballistic missile activities; entities owned, controlled, or acting on behalf of the Islamic Revolutionary guard corps; and Entities owned, controlled or acting on behalf of the Islamic Republic of Iran shipping lines (IRISL) as Annexures I. II and III. The above referred annexures to SRO 742 were not produced by the Respondent.

xxv. SRO 172 (1)12016 dated 2 March 2016 ("SRO 172"): By way of SRO 172 the Federal Government repealed the following:
SROs 65(1)/2007, 289(1)/2007, 339(1)/2008, 742(1)/2010, 698(1)/2012 and 55(1)/2013, which had been issued to implement United Nations Security Council resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1929 (2010). With the exception of United Nations

Security Council resolution 1929 (2010), none of the above referred Security Council resolutions were produced by the Respondent.

xxvi. Subject to certain conditions that are not applicable in this case, SRO 172 (in so far as it is applicable to the instant case) allowed: the transfer of funds between Pakistani persons and entities (including financial institutions) and Iranian persons and entities (including financial institutions); and the supply of specialized financial messaging services, including SWIFT CODE, for persons and entities not specified in the list attached to SRO 172, including the Central Bank of Iran and Iranian financial institutions. The list attached to SRO 172 was also produced and admitted into evidence. The Claimant's name does not feature in this list.

xxvii. With the exception of the SWIFT Announcement, which is dealt with separately herein below, none of the aforesaid documents produced by the Respondent and admitted into evidence establish that there were ever any sanction, in force that would have prohibited the Respondent trout making payment to the Claimant.

xxviii. The documents that the Respondent could have, but did not seek to have introduced into the evidence of these proceedings, are noted in paragraph 20(c)(iii) to (xxv) herein above. The fact that these were not sought to be introduced into evidence suggests that they would not have advanced the Respondent's submissions in so far as Issue No. (c) is concerned.

xxix. However I have reviewed the documents listed in paragraph 20(c)(iii) to (xxv) hereinabove and note as follows:

(A) Document S/2006/814 pertains to items, materials, equipment, goods and technology related to nuclear programs;
(B) Document S/2006/815 relates to ballistic missile programs;
(C) Document S/2006/985 relates to the proliferation of weapons of mass destruction (WMDs), certain equipment and technology relevant to missiles and space programs, as well as the potential development of delivery systems for WMDs;
(D) United Nations Security Council resolutions 1737 (2006), 1747 (2007) and 1803 (2008) pertains to the non-proliferation of nuclear weapons; and
(E) The Claimant is not mentioned in the lists attached to United Nations Security Council resolution 1929 (2010).

These documents do not therefore disclose any sanctions that would prevent the Respondent from making payment to the Claimant.**"**

Learned counsel for the defendant has been unable to demonstrate any infirmity with the rationale and findings, of the learned arbitrator, hence, no case for interference therein is made out before this court.

7. The next issue was whether the contract between the parties should be treated as void in view of the sanctions referred to supra. The learned arbitrator, after already having established that the imposition of the sanctions under reference did not discharge the defendant of its liability, went on to reason that the said sanctions did not render the underlying contract as void. The pertinent observations and delineated herein below:

"i. The Respondent's case on this issue is that payment to the Claimant was not possible due to the sanctions imposed on Iran by the United Nations Security Council (imposed in Pakistan by SROs 65 and 742) as well as Resolution 1929, the US Sanctions Regulation, EU Regulation 267, and the SWIFT Announcement.

ii. According to the Respondent this supervening impossibility had the effect of rendering the Agreement void under Section 56 of the Contract Act, 1872. Thus, once the Agreement became void, it could not revive automatically once the application of the sanctions were lifted in Pakistan in 2016 vide SRO 172.

iii. The Respondent also argued that Section 65 of the Contract Act, 1872 could not be relied upon by the Claimant since compensation under Section 65 was not specifically claimed by the Claimant in the Statement of Claim, and the Claimant did not produce any evidence as to the advantage received by the Respondent in monetary terms on account of the iron ore for which payment was, as per the Respondent, impossible to make.

iv. While the answer to Issue No. (c) itself suggests how this Issue is to be determined, the doctrine of supervening impossibility is even otherwise not applicable to the facts of this case.

v. For this doctrine to be applicable, the change that brought about the impossibility must not have been in the parties' contemplation at the time that the contract was entered into. However, Clause 4(d)(ii) of the Agreement clearly demonstrates that the parties were conscious that at some point in future the sanctions that did exist at that time may become stricter, and may indeed make it impossible to effect payment in the currency of the Agreement. Clause 4(d)(ii) of the Agreement reads as follows: *[in case of any restrictions on the seller or buyer in terms of payment in US Dollars, the base FOB Price will be considered as EURO 89.50/DMT.]* Additionally, the change of circumstances must be of a permanent and fundamental nature. The doctrine of supervening impossibility is not available if the change is of a temporary nature, which leaves the contract alive and capable of being performed at a future date.

vi. Indeed, the evidence in this case is that except for the two payments in Pakistani Rupees, all payments that were made to the Claimant were in Euros.

vii. Another important aspect of this matter is that at all times, even up to the filing of the Defence Statement, the Respondent held out that the Claimant should, inter alia, wait till such time that sanctions on Iran are lifted and transactions can be made "easily/legally". It is also important that so far as the Claimant was concerned, the Agreement had been fully performed up to the extent of 611,087.3 67 MT iron ore and only payment of the balance amount due was to be made by the Respondent. As noted herein above, the parties' agreement of 2013 as evidenced in the minutes of meeting held on 20 and 21 May 2013 had the effect of amending the Agreement, to provide that the balance amount due to the Claimant would be paid in Pakistani Rupees; the endeavour being to keep the Agreement alive…"

The findings of the learned arbitrator in this respect, being a corollary to determination of the earlier issue, appear to be unexceptionable and no case is made out for interference there with.

8. Learned counsel for the defendant had averred that the requirements imposed for the relevant exchange rate, being applicable on the date of payment, was erroneous, unmerited and contrary to public policy.

The Award demonstrates that the base price, per the Contract *inter se*, was quoted in foreign exchange, all payments, save for two, were made to the plaintiff in foreign exchange and the issues settled reflected the claimed amounts in foreign exchange. It may be pertinent to record that it was never the case of the defendant, argued before this court, that payments, if any, were required to be denominated otherwise. This objection, of the defendant, is not rested on the foreign exchange denominated quantum of the award, but the objection is with respect to the stipulation in the Award that payment was directed to be made in Pakistani Rupees, on the exchange rate prevailing on the date of such payment.

It was argued that the exchange rate stipulation was unmerited as the appropriate exchange rate ought to have been the prevailing rate upon the date that the relevant amount/s became due. With respect, this court is unable to sustain this objection.

9. If the objection of the defendant was to be sustained, the same would amount to sanctioning unjust enrichment. The Contract and the obligation emanating therefrom have not been denied and it is also admitted that such liability was denominated in foreign exchange. The payment of the adjudicated liability, to the plaintiff, in Pakistani Rupees has not been demonstrated to be barred by any sanction, foreign or domestic. Therefore, the objection stands circumscribed with respect to the applicable rate of exchange.

10. The Supreme Court has held[8] that a creditor should not suffer from fluctuations in the value of the Pakistani Rupee and if a person's contract is for a foreign currency and he has bargained for the same, he should get that currency and no other. Upon the issue of the applicable rate of exchange, it was observed that where the money or amount in respect of a contract is a foreign currency, or where it is not so but under the contract the particular amount claimed is payable in a particular foreign currency, and demand is made for payment in that foreign currency, the Pakistani Courts can give judgment in "so much of that foreign currency or the Pak rupees equivalent thereof at the time of payment". Where the decree is in such terms, the language of the decree, would give the judgment-debtor the option to either make payment in foreign currency or in Pak Rupees, and execution can always be taken out by the decree-holder if no payment is made by the judgment-debtor in respect of so many Pak rupees as equals the foreign currency at the rate of exchange prevalent on the date the payment is made.

Ajmal Mian J. also observed[9] that if a contract was denominated in a foreign currency, a party thereto must not suffer from fluctuations in the value of Pakistan's currency and be paid in that currency. The decree, in such cases, was required to give the judgment debtor the option to either make payment in foreign currency or in Pakistan currency, at rate of exchange prevalent on the date the payment was made.

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[8] Per *Rustam S. Sidhwa J.* in *Terni SPA vs. PECO Limited* reported as *1992 SCMR 2238*.
[9] *Sandoz Limited vs. Federation of Pakistan* reported as *1995 SCMR 1431*.

11. The rate of exchange reflects the measure of value between currencies *inter se* and the learned arbitrator has decided that the applicable rate shall be that prevalent upon the date at which the actual payment is made of the amount awarded. It is the considered view of this court that the mechanism provided by the learned arbitrator is just and does not suffer from any infirmity.

On the other hand it is the defendant's contention, that a debt, adjudged to have been due, may be diminished on account of the financial distress of the debtor, is considered incongruous and demonstrably devoid of merit.

12. It had also been argued on behalf of the defendant that award militates against Section 23 of the Contract Act 1872. Per learned counsel for the plaintiff, public policy required that contractual obligations be honored and not avoided precipitating the unjust enrichment of one party. The Award discussed the issue and the observations delivered are delineated herein below:

> "In its preliminary objections, the Respondent had additionally submitted that payment to the Claimant during the imposition of international sanctions is against the public policy of Pakistan and void under section 23 of the Contract Act, 1872. However counsel for the Respondent did not elaborate in this regard during the course of the proceedings, whether by written or oral submissions. Even otherwise, the basis of the objection is unfounded…"

13. The Supreme Court has considered[10] the import of Section 23 of the Contract Act 1872 and observed that the object of an agreement is considered lawful, unless it is forbidden by law; or is fraudulent; or defeats the provisions of any law; involves or implies injury to the person or property of another; or the court regards it as immoral or opposed to public policy.

In the present facts and circumstances it is apparent that Contract, and / or its enforcement, does not fall under any of the categories identified by the aforementioned pronouncement.

14. There has been no cavil to the proceedings having been conducted in accordance with the law. The Award is well reasoned and appears to be predicated upon due consideration of the

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[10] Per *Iftikhar Muhammad Chaudhry CJ.* in *Maulana Abdul Haque Baloch & Others vs. Government of Balochistan & Others* reported as *PLD 203 Supreme Court 64*.

evidence. The learned counsel for the defendant has been unable to demonstrate any infirmity with respect to the Award, within the ambit of Section 30 of the Act or otherwise, and as a consequence thereof the objections to the Award are hereby dismissed.

15. In view of the reasoning and rationale herein contained, this court sees no cause to set aside or remit the Award for reconsideration, hence, the Award is upheld, maintained and hereby made the rule of court. The office is directed to draw up a decree in terms of the Award.

JUDGE

Khuhro/PA