IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1657 of 2020
[TCB Aviation (Pvt.) Limited vs. Sri Lankan Airlines Limited]

Date of hearings	:	01.03.2021, 26.03.2021, 12.04.2021, 15.04.2021, 16.04.2021, 26.04.2021 and 27.04.2021.
Plaintiff [TCB Aviation (Pvt.) Limited, a Private Limited Company incorporated under the Companies Ordinance, 1984, having its registered Office at Ist Floor, Block-3, Hockey Club of Pakistan Stadium, Karachi]	:	Through M/s. S. Haider Imam Rizvi, Jamal Bukhari, S. Ahsan Imam Rizvi and Asadullah Shar, Advocates.
Defendant *[Sri Lankan Airlines Limited, through its Country Manager, having its Head Office at Airline Centre, Bandaranaike International Airport Katunayake, Sri Lanka]*.	:	Through M/s. Jahanzeb Awan and Rashid Mahar, Advocates.
	:	Mr. Irfan Ahmed Memon, DAG.

DECISION

***Muhammad Faisal Kamal Alam, J*:** The present proceeding is filed by Plaintiff under Section 20 of the Arbitration Act, 1940 **[the Act, 1940]**, seeking multiple relief, including, that dispute between Plaintiff and

Defendant *(Sri Lankan Airlines)* be referred to arbitration under the above provision.

2. Relevant facts, as averred in the plaint are that Plaintiff has been acting as General Sales Agent for passengers and cargo of Defendant Airlines by virtue of two separate Agreements dated 20-5-2015 and lastly on 17-10-2018 [*Annexures P/1 to P/30 of the plaint*]- ***the GSA Agreements,*** which have been extended from time to time and finally vide two separate Agreements dated 24-8-2020 [pages-289 and 293], for passenger and cargo, the ***GSA Agreements were extended up to 31.10.2020.*** By their correspondence(s) of 26.10.2020 [in respect of both GSA Agreements for passenger and cargo] Defendant informed the Plaintiff that after expiry of the time, relationship between Plaintiff and Defendant will come to an end and thereafter accounts be settled between the Parties.

3. Plaintiff has challenged the above last correspondence of Defendant. It is argued by legal team of Plaintiff that since Defendant did not terminate the two subject agreements as envisaged under Article 3.2 and other ancillary provisions, therefore, the above correspondence is of no value; Plaintiff has made substantial investment, as per the special instructions of Defendant, for running the business in accordance with the prescribed standard of Defendant and expanded the customer base of Defendant in Pakistan, thus the Plaintiff is not an ordinary general sales agent of Defendant Airline in Pakistan, but the agency is coupled with interest, in terms of Section 202 of the Contract Act, 1877. Contended, that till date no Counter-Affidavit is filed by Defendant, therefore, contents of plaint is deemed to be admitted and consequently Article 27 of the subject GSA Agreements relating to the Arbitration, has become meaningless and Plaintiff is not bound to participate in any arbitration proceeding in Colombo and the matter can be adjudicated upon here in Pakistan under the

Arbitration Act, 1940; that even under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, the **Act, 2011,** it is not necessary that present dispute between Plaintiff and *Defendant* should be sent to Arbitration at Colombo, as mentioned in the Subject GSA Agreement(s), because in terms of Section 4 of the above Act 2011, and because of present pandemic, the Arbitration Agreement is incapable of being performed. Mr. S. Haider Imam Rizvi, Advocate, has cited the following case law to augment his arguments_

i. 2021 CLC page-423 [Islamabad]
[Tallahasee Resources Incorporated through Mrs. Maleeha Waheed Malik vs. Director General Petroleum Concessions, Ministry of Energy (Petroleum Division) and another]-***Tallahasee*** *case.*

ii. PLD 2000 Supreme Court page-841
[The Hub Power Company Limited (HUBCO) through Chief Executive and another vs. Pakistan WAPDA through Chairman and others]-**Hubco case.**

iii. 1993 SCMR page-866
[M/s. Uzin Export & Import Enterprises for Foreign Trade vs. M/s. M. Iftikhar & Company Limited]-**Uzin case.**

iv. 2015 CLC page-1 [Sindh]
[Pak Turk Enterprises (Pvt.) Ltd vs. Turk Hava Yollari (Turkish Airlines Inc.]-**Pak Turk case.**

v. 2001 YLR page-3150 [Karachi]
[Messrs Serulean (Pvt.) Ltd Karachi vs. Messrs Bhoja Airlines (Pvt.) Ltd. through Chairman and another]-**Bhoja Airlines case.**

vi. 1997 CLC page-1250 [Karachi]
[Gul son Air Cargo Services (Pvt.) Ltd vs. Compagnie Internationale Air France]-**Air France case.**

vii. 1986 CLC page-2408 [Lahore]
[re: Messrs Allied Commercial Finance Limited]

viii. 1986 CLC page-1408 [Karachi]
[Muhammad Farooq M. Memon vs. Government of Sind through its Chief Secretary, Karachi].

ix. PLD 1977 Karachi page-351

[Muhammad Jamil vs. Iqbal Ahmed]-***Jamil case.***

4. It is necessary to mention here that on 26.04.2021 a proposal was made on behalf of Defendant for which Plaintiff's counsel sought time. The complete order of 26.04.2021 is reproduced herein under_

> ***"26.04.2021***
>
> ***M/s. S. Haider Imam Rizvi, Jamal Bukhari and Asadullah Shar, Advocate for Plaintiff.***
> ***M/s. Jahanzeb Awan and Rashid Mahar, Advocates for the Defendant.***
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> ****
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> ***Today learned counsel for the Plaintiff has concluded his arguments after citing couple of case law. Learned counsel for Plaintiff will file Written Synopsis not more than two pages, also containing case law on which he is relying upon.***
>
> ***However, it is necessary to make observation with regard to the present proceeding that a specific question was put to learned Advocate for Defendant considering the present pandemic situation. It is stated that arbitration proceeding as envisaged in the Arbitration Agreement (General Sales Agency Agreement) should commence but as far as possible the proceeding will be conducted through Video Link. It is stated that for travelling to Sri Lanka, all the expenditure will be borne by Defendant including stay of representatives of Plaintiff in a 5 Star Hotel in Colombo and the arbitration venue will be in the same Hotel in which representatives will be staying. The team of Plaintiff should only comprises of concerned persons.***
>
> ***Learned counsel for Defendant has also proposed that ad-interim order operating in this suit may continue for next 15 days and in the intervening period arbitration should commence, but Plaintiff may prefer an Application, inter alia, under Section 13 of the Sri Lanka Arbitration Act, 11 of 1995, for any interim relief. However, this proposal is modified to the extent that ad-interim order passed in this suit will continue for next 15 days from the date of disposal of this lis and in the intervening period arbitration will commence in Colombo as envisaged in Clause 27 of the Arbitration Agreement and an application can be preferred by Plaintiff's side before the Arbitral Tribunal at Colombo in terms of the above Arbitration Act of Sri Lanka and the same can be decided by the Tribunal. Once the application is filed within 15 days (as above), the ad-interim restraining order passed in this lis will continue upto 30 days, unless the Application is decided earlier (that is, before 30 days). The restraining order in this suit will lapse on the 30th day, from the date of filing of an application before the Tribunal at Colombo.***
>
> ***On the above, learned counsel for Plaintiff seeks one day time to take instruction from the client. It is further clarified that if Plaintiff's client does not agree to the above terms then this matter will be reserved for passing of the decision.***
>
> ***To be listed tomorrow, viz. 27.04.2021 at 10:00 am."***

5. On 26th of March 2021, a query was raised about availability of an arbitration centre of the SAARC Countries in Pakistan and the office of Learned Additional Attorney General was called upon to appraise the Court regarding this. On following dates learned Advocates for Plaintiff and Defendant so also DAG have placed on record the Rules of Arbitration of SAARC Centre at Islamabad. Learned DAG has also cited the reported decision handed down in Global Quality Foods Pvt. Limited *versus* Hardee's Food Systems, Inc. PLD 2016 Sindh 169.

6. On 27.04.2021, learned counsel for Plaintiff upon instructions, has stated, that matter may be referred to Arbitration as per the subject GSA Agreements, but after confirmation of *ad-interim* injunction to which Defendant's counsel did not agree, hence in view of the above order of 26.04.2021, the matter has been reserved for Decision.

7. At the conclusion of hearing, learned counsel for the Plaintiff has submitted **'Skeleton Arguments on behalf of Plaintiff'** containing 50 (fifty) decisions (case law), including some of the case law cited by learned counsel in earlier hearings, which are mentioned herein below _

1.	1979 CLC 307	2.	1997 CLC 1230
3.	PLD 1972 AJK 80	4.	1994 CLC 2000 (AA 1940)
5.	PLD 1974 Lahore 231	6.	1979 CLC 565
7.	1983 CLC 1695	8.	2013 MLD 1083
9.	1995 CLC 1877	10.	1987 CLC 2063
11.	2010 YLR 3331	12.	PLD 2014 Karachi 427
13.	2011 CLC 323	14.	1984 CLC 546
15.	PLD 1976 Karachi 644	16	2000 MLD 785
17.	2001 CLC 664	18.	2003 CLD 209
19.	2004 CLC 544	20.	2008 CLD 1312.

21.	2003 YLR 461	22.	PLD 1983 Karachi 613
23.	PLD 1978 Karachi 273	24.	1996 SCMR 690
25.	PLD 1993 SC 42	26.	2010 YLR 1560
27.	PLD 1989 Karachi 645	28	2005 MLD 641
29.	PLD 1986 Karachi 138	30.	PLD 2008 Islamabad 48
31.	PLD 1970 SC 373	32.	1989 CLC 1143
33.	PLD 1995 Karachi 286	34.	1998 CLC 485
35.	2014 CLD 337	36.	PLD 1966 AJK 19
37.	1994 SCMR 1555	38.	2006 CLD 1491
39.	PLD 1978 SC 220	40.	PLD 1989 Karachi 404

41. PLD 2010 Karachi 274
*[Digital World Pakistan (Pvt.) Ltd. through Chief Executive vs. Samsung Gulf Electronics FZE through Managing Director/Chief Executive Officer and another]-**Digital case.***

42. 1998 SCMR 1618
[Hitachi Limited and another vs. Rupali Polyester and others]-**Hitachi case.**

43. PLD 2018 Sindh 414
*[Aroma Travel Services (Pvt.) Ltd through Director and 4 others vs. Faisal Al Abdullah Al Faisal Al-Saud and 20 others]-**Aroma Case.***

44. PLD 2020 Islamabad 52
*[Ovex Technologies (Private) Limited vs. PCM PK (Private) Limited and others]-**Ovex case***

45. 2010 SCMR 524
[Standard Construction Company (Pvt.) Limited vs. Pakistan through Secretary M/o Communications and others]

46. 2002 SCMR 1694
[Societe Generale De Surveillance S.A. vs. Pakistan through Secretary, Ministry of Finance, Revenue Division, Islamabad]

47. PLD 2002 SC 660
[Lahore Cantt. Cooperative Housing Society Limited vs. Messrs Builders and Developers (Pvt.) Ltd and others]

48. 2012 CLC 350 [Sindh]
[Abdul Salam Ansari and 6 others vs. Province of Sindh through Secretary and 2 others]

49. PLD 2002 SC 310
[Messrs Jame's Construction Company (Pvt) Ltd, through Executive Director vs. Province of Punjab through Secretary to the Government of Punjab (Communication and Works) Department, Lahore and 3 others]

50. 1982 SCMR 673
*[Mst. Baigan vs. Abdul Hakeem and another]-**Baigan case.***

8. It is not necessary to discuss each and every decision in which a same principle has been reiterated, but, reported decisions, particularly of Hon'ble Supreme Court are considered, relevant for the present controversy.

9. Legal Team of Defendant has also submitted a rebuttal to the above referred Skeleton Arguments of Plaintiff, containing number of reported cases, which are mentioned herein under_

i. 2018 MLD 2058 [Sindh]
[Taisei Corporation vs. A.M. Corporation Company (Pvt.) Ltd].

ii. 2015 CLD 1655 [Sindh]
[Cummins Sales and Service (Pakistan) Limited through Authorized Signatory vs. Cummins Middle East FZE through Chief Executive and 4 others].

iii. 2015 MLD 1646 [Islamabad]
[Abid Associated Agencies International (Pvt.) Ltd and others vs. Areva and others].

iv. 2013 CLC 291 [Sindh]
[Cummins Sales and Service (Pakistan) Limited through Authorized Signatory vs. Cummins Middle East FZE through Chief Executive and 3 others]

v. PLD 2016 Supreme Court 358
[Sahabzadi Maharunisa and another vs. Mst. Ghulam Sughran and another vs. Mst. Ghulam Sughran and another]

vi. 2009 CLD 153 [Karachi]
[FAR Eastern Impex (Pvt.) Ltd. vs. Guest International Nederland by and 6 others]

vii. 2006 CLD 497 [Karachi]
[Messrs Travel Automation (Pvt.) Ltd. through Managing Director vs. Abacus International (Pvt.) Ltd. through President and Chief Executive and 2 others].

viii. 2004 CLD 1530 [Supreme Court of Pakistan]
[Bolan Beverages (Pvt.) Limited vs. Pepsico. Inc. and 4 others].

10. Arguments heard and record perused.

11. It is necessary to mention that learned counsel for Defendant has earlier filed a Statement dated 12-4-2021, at page-369 of the Court File, enclosed therewith is the notice of arbitration dated 1st March 2021, sent by Defendant's attorney in Sri Lanka, ***inter alia,*** for reference of dispute to arbitration in Columbo before an Arbitral Tribunal and has also nominated an arbitrator and called upon the present Plaintiff to join the proceeding. Subsequently, this notice was replied to by the present counsel of Plaintiff vide their correspondence of 16.03.2021, which was again replied by the Sri Lankan Law Firm acting on behalf of present Defendant, *inter alia,* calling upon present Plaintiff to nominate its arbitrator. In the present proceeding Defendant's counsel also filed another **Statement dated 26.04.2021** along with Annexures "**A**" to "**E**". Annexure "**A**" is the copy of plaint in Suit No.nil of 2021 filed by present Plaintiff against the present Defendant in the Court of Senior Civil Judge, Lahore, with the Prayer Clause that impugned notices dated 26.10.2020 (which is also challenged in the present proceeding) be declared illegal and void *ab initio*, Permanent Injunction and a request that the matter in dispute between the parties may be referred to Arbitration as per Article 27.1 of the Agreement dated 17.10.2018 [GSA Agreements]. Annexure "**B**" is the Advertisement by Defendant, inviting applications for appointment of General Sales Agent in respect of cargo and passenger in the territory of Pakistan. Annexures "**C**" and "**D**" are the Applications of present Plaintiff in the prescribed format submitted to Defendant in response to the said Advertisement. Both Annexures contained Stamp of Plaintiff's Company.

12. Basic facts are not disputed that under the two subject Agreements, Plaintiff is acting as General Sales Agent for passengers and cargo of

Defendant Airline. There is no adverse plea concerning both the subject Agreements, that they are the result of any fraud or its terms are unconscionable and thus unenforceable in the interest of public policy. This fact cannot be ignored also, that recently Plaintiff has again responded by filing application in response to the advertisement referred above, Annexures "**C**" and "**D**" with the Statement, for appointment of General Sales Agent for the territory of Pakistan.

13. Précis of the case law relied upon by Plaintiff is_

i. that the Court is obliged to give due preference to the desire of the parties to abide by the terms of the contract and while maintaining the sanctity of arbitration agreement between the parties to which there was no controversy and without violating the terms and conditions of the IATA [International Air Transport Association] Rules, the matter was referred to arbitration;

ii. non-filing of Counter-Affidavit means that facts of the case as stated by a petitioner in the petition is admitted; Opposing the injunction application by defendant by filing of Counter-Affidavit, will not be deemed to be any step in the proceedings, disentitling Defendant from invoking the provision of Section 34 of the Arbitration Act, 1940. Court can refuse stay of proceedings under Section 34 of the Act, 1940, if it is satisfied that arbitration proceeding would result in substantial miscarriage of justice or inconvenience; Provision for arbitration of International Chamber of Commerce in Paris would not oust the jurisdiction of Courts in Pakistan and this clause is to be treated at par with provision for arbitration within the Country, hence, arbitration proceeding was disallowed to be taken to Paris, which would be inconvenient to the parties and also would prove to be expensive; instead parties were directed to take steps for having their dispute decided through arbitration proceedings with venue at Karachi in

terms of the Act, 1940, (M/s Uzin case, *supra*); mere fact that Civil Court stayed the proceedings under Section 34 (of the Arbitration Act, 1940), does not imply that the arbitration proceedings between the appellant and respondent No.1 would be in accordance with the provisions of the above Act and not under the ICSID (International Centre for Settlement of Investment Disputes) and ICC (International Chamber of Commerce) Rules.

The other case of Pak Turk Enterprises primarily relates to board resolution as required under Order 29 of Civil Procedure Code. This judgment has reconciled the earlier case law on this law point;

iii. M/s Uzin case (***ibid***) is distinguishable, *inter alia,* as appellant had already instituted a suit for injunction and after filing of written statement also containing counter claim, matter was compromised and subsequently, application under Section 34 of the Arbitration Act, 1940, was filed which was dismissed by the learned Single Bench of this Court and maintained in Appeal, which eventually decided by the above reported case. But it is also necessary to observe that honourable Supreme Court although disallowed the arbitration in Paris but directed the parties to have their dispute decided in an arbitration proceeding with venue at Karachi, which means that sanctity of an arbitration clause mentioned in the agreement was kept intact by the Apex Court;

iv. in this reported case of Bhoja Airlines ***(supra)*** plaintiff's request for not referring the matter to arbitration was declined and dispute was referred to arbitration while allowing the application of defendant No.1 under Section 34 of the above Arbitration Act, 1940 (for stay of proceedings); this Court distinguished the reported judgment passed in Hubco Power Company – PLD 2000 Supreme Court 841;

v. in Hubco case (***ibid***), factors which weighed with the Apex Court for not sending the dispute to arbitration under International Chamber of

Commerce [ICC Rules], were, that one of the schedules appended with the main Agreement between HUBCO Power Company Ltd. and Pakistan WAPDA, was *prima facie* fraudulently amended to the utmost disadvantage of respondent WAPDA to the extent that those terms seem to be unconscionable and without consideration; allegations of corruption were raised against officials for executing such an Agreement between the two parties requiring a finding about alleged criminality against officials; few of the employees of respondent WAPDA joined Hubco company at very high salaries, which lent support to the allegations of corruption. Thus, considering all this it was held that disputes between the said parties were not commercial dispute arising from an **"***undisputed legally valid contract..... therefore, the dispute primarily relates to very existence of a valid contract and not a dispute under such a contract***"** and hence the dispute was not arbitrable but be decided by a Court of law as a matter of public policy;

vi. in Tallahassee case, matter was referred to arbitration. It is held that disputes between the appellant (which is a foreign entity) and respondent No.1 arising from and related to petroleum concession agreement is to be resolved not accordance with the provisions of the above Act, 1940, but in accordance with the ICSID [International Centre for Settlement of Investment Dispute] or ICC (International Chamber of Commerce) Rules, as the case may be, as provided in the PCA [Petroleum Concession Agreement] itself. However, such arbitration clause in the agreement does not prevent a party from seeking the proceedings before the Court instituted by the other party to the said arbitration agreement, to be stayed, so that the parties are left to resolve the dispute in accordance with the Arbitration Agreement; A Civil Court is well within its power to treat the application filed by the respondent No.1 under Section 34 of the Arbitration Act, 1940, as an application under Section 4 of the Recognition and Enforcement

(Arbitration Agreements and Foreign Arbitral Awards) Act, 2011. Prayer for interim injunction moved by appellant, restraining encashment of bank guarantee was not considered as it was dismissed concurrently by the learned Trial and Appellate Courts. Hence, sanctity of a foreign Arbitration Clause was kept intact and suit proceeding was stayed. This reported Decision of Tallahassee is contrary to the argument of Plaintiff.

14. Now adverting to the case law cited by Plaintiff in his 'Skeleton arguments'_

i. PLD 1977 Karachi page-351
*[Muhammad Jamil vs. Iqbal Ahmed]-**Jamil case.***

The decision was given in a partnership dispute while explaining the import of sub section (1) of Section 20 of the Arbitration Act and plea of respondent that Arbitration Clause is vague, was not accepted, by holding that when number of Arbitrators are not mentioned in the Arbitration Agreement then Section 20 of the Arbitration Act, 1940, is to be invoked. Receiver was appointed as partnership business was dissolved. On the facts alone, this case law is not applicable to the controversy of present case.

ii. 1982 SCMR 673
[Mst. Baigan vs. Abdul Hakeem and another]

This Judgment is cited in respect of arguments that this Court has ample power to mould the relief and convert the present proceeding into a regular suit. This is a settled rule and its applicability to the present case will be discussed in the following paragraphs.

iii. 2012 CLC 350 [Sindh]
*[Abdul Salam Ansari and 6 others vs. Province of Sindh through Secretary and 2 others]-**Ansari case.***

This Judgment is cited in respect of arguments of Plaintiff, that statutory notice is mandatory. The above cited Judgment of this Court is given on Sections 54, 70 and 70-A of the Cooperative Societies Act, 1925, concerning issuance of prior notice to the Society before filing of proceeding. In the reported case plaintiffs were elected as office bearers of the society but were superseded by an Administrator appointed by Registrar of Cooperative Societies, which was challenged in the suit proceeding and in the written statement, the maintainability of the suit was challenged, which was finally decided in favour of Defendant and the suit was dismissed. This decision does not support the case of Plaintiff.

iv. PLD 2002 SC 660
[Lahore Cantt. Cooperative Housing Society Limited versus M/s Builders and Developers [Pvt.] Limited].

The above case law is in fact a leave granting order, once again in respect of a dispute concerning a Cooperative Societies and a developer whose access was blocked by petitioner's society after construction of a boundary wall. Both decisions are irrelevant because the notice required under Arbitration Act, 2011, and in the Cooperative Societies Act, 1925, have different aspects and import, besides, facts of both cited case are completely different.

v. 1998 SCMR 1618
[Hitachi Limited and another vs. Rupali Polyester and others]-
Hitachi case.

The issue before the Hon'ble Supreme Court was post award dispute. The Award was given by an Arbitral Tribunal at London. The main controversy agitated by appellant (of the

reported case) before the Apex Court was that English Courts have exclusive jurisdiction in respect of the arbitration proceeding conducted under the Rules of Conciliation and Arbitration of the International Chamber of Commerce [ICC Rules], whereas, the case of respondent was that both English and Pakistani Courts have concurrent jurisdiction. A significant feature of the contract in dispute was, that governing law was Pakistan law, whereas, arbitration in case of dispute was to be settled under the ICC rules; *secondly*, it was already conceded by the appellants counsel (of the reported case) that the erstwhile Arbitration (Protocol and Convention) Act, 1937, would not apply to the two awards in question. It is an exhaustive judgment dealing with characteristic of an arbitration clause and the governing law vis-a`-vis jurisdiction of Courts. It is also observed that applicability of ICC Rules would not divest the Court in Pakistan of the Jurisdiction vested in them under the law. If the parties fail to choose the law governing the arbitration proceedings, those proceedings will almost certainly be governed by the law of the country in which the arbitration is held. Further ***held,*** that parties should honour their contractual commitment, particularly, involving multi-national parties, while, referring to the ratio of another Case-*Messrs Eckhardt & Co. vs. Muhammad Hanif* (PLD 1993 SC 42, relevant portion at page 52)_

> ***"I may observe that while dealing with an application under section 34 of the Arbitration Act in relation to a foreign arbitration clause like the one in issue, the Court's approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honoured as generally the other party to such an arbitration clause is a foreign party. With the***

> ***development and growth of international Trade and Commerce and due to modernization of Communication/Transport systems in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the Court should not lightly release the parties from their bargain, that follows from the sanctity which the Court attaches to contracts, must be applied with more vigour to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will tarnish the image of Pakistan in the comity of nations. A ground which could be in contemplation of party at the time of entering into the contract as a prudent man of business, cannot furnish basis of refusal to stay the suit under section 34 of the Act. So the ground like, that it would be difficult to carry the voluminous evidence or numerous witnesses to a foreign country for Arbitration proceedings or that it would be too expensive or that the subject-matter of the contract is in Pakistan or that the breach of the contract has taken place in Pakistan, in my view, cannot be a sound ground for refusal to stay a suit filed in Pakistan in breach of a foreign arbitration clause contained in contract of the nature referred to hereinabove. In order to deprive a foreign party to have arbitration in a foreign country in the manner provided for in the contract, the Court should come to the conclusion that the enforcement of such an arbitration clause would be unconscionable or would amount to forcing the plaintiff to honour a different contract, which was not in contemplation of the parties and which could not have been in their contemplation as a prudent man of business."***

The above finding of Hon'ble Supreme Court also addresses the contention of Plaintiff in the present ***Lis,*** rather repelling this contention, about *forum non conveniens* and that the entire record

and evidence available in Pakistan and particularly at the premises of Plaintiff in Karachi.

The Hon'ble Supreme Court had given sanctity to foreign arbitration as per ICC Rules, while holding that English Courts will have jurisdiction as far as applicability of Curial law (procedural law) is concerned. Pakistani Courts would be competent to go into the question, whether the arbitrators and/or the Chairman have misconducted themselves or the proceedings.

vi. PLD 2010 Karachi 274
*[Digital World Pakistan (Pvt.) Ltd. through Chief Executive vs. Samsung Gulf Electronics FZE through Managing Director/Chief Executive Officer and another]-**Digital case.***

the contention of Plaintiff in the reported case about agency coupled with interest was based on a joint venture agreement, installation of assembly plant and heavy investment of more than rupees one billion and uncontroverted record was produced at the stage of injunction, which was granted, particularly on consideration of existence of exclusive joint venture agreement. However, no specific finding was given on the issue of agency coupled with interest. This case is distinguishable from the facts of present case **as there is no joint venture agreement between present Plaintiff and Defendant nor there is anything tangible on record to show that heavy investments** were made by present Plaintiff, as was done in the reported decision.

vii. PLD 2018 Sindh 414
*[Aroma Travel Services (Pvt.) Ltd through Director and 4 others vs. Faisal Al Abdullah Al Faisal Al-Saud and 20 others]-**Aroma Case.***

an application of defendant under Sections 3 and 4 of the Arbitration Act, 2011, was dismissed on the ground that earlier same defendants filed application under Order VII Rule 11 of CPC, which was dismissed; learned Judge was of the opinion and that too based on the pleadings of defendant that there was no concluded contract with the plaintiff but correspondence and drafts were exchanged for the purposes of negotiations and hence it was held that when the infra-structure of the whole suit is based on oral understanding and promises, then referring the matter to the arbitrator would be a futile exercise. Consequently, this judgment is also of no help to the arguments of Plaintiff; **conversely,** propriety demands, that a case law having no relevancy to the subject controversy, should not have been cited in the first place, in order to save valuable time of the Court.

15. To augment his plea about confirmation of *ad-interim* injunction granted earlier while referring the dispute to arbitration, around 25 reported decisions have been cited. It is not necessary to discuss each and every case law except the following, because it is a discretionary power of a Court to pass such kind of direction, if the facts of a case so warrant, as envisaged in Section 41 read with Second Schedule of the Arbitration Act, 1940_

i. 2002 SCMR 1694
[Societe Generale De Surveillance S.A. vs. Pakistan through Secretary, Ministry of Finance, Revenue Division, Islamabad]

ii. PLD 2020 Islamabad 52
*[Ovex Technologies (Private) Limited vs. PCM PK (Private) Limited and others]-**Ovex case.***

iii. 2010 SCMR 524
*[Standard Construction Company (Pvt.) Limited vs. Pakistan through Secretary M/o Communications and others]- **Standard Construction Company case***

16. In the famous SGS case, matter was sent to arbitration and direction was given to the Trial Court to nominate any retired judge to be the sole arbitrator. An exhaustive discussion has been done on bilateral treaty and its applicability in view of the Article 175 (2) of the Constitution of Pakistan. Held, that despite termination of agreement between SGS and Government of Pakistan for providing pre-inspection service, the arbitration clause will survive, but since, inter alia, SGS had not made any investment in terms of Bilateral Investment Treaty as envisaged in ICSID (International Centre for Settlement of Investment Disputes), therefore, SGS could not invoke the provisions for ICSID arbitration; secondly in the first round of litigation the SGS already lost court case up to the Supreme Court in Switzerland regarding the same subject matter which was brought before the Courts in Pakistan. In these peculiar circumstances, Parties were directed to submit to the jurisdiction of local arbitration. Significantly, while dilating upon Section 41 of the Arbitration Act, 1940 {relating to passing of interim orders, ***inter alia,*** for preservation of subject matter}, the view taken by the learned Lahore High Court was not approved. This judgment, in my considered view, does not advance the case of present Plaintiff, **because the arbitration clause as contained in the agreement was recognized**. The international arbitration was refused for the reasons already mentioned herein-above, which reasons have no similarity with the facts of present ***Lis,*** considering the fact, that subject GSA Agreements contain the mechanism of settling dispute, which is to be governed by the laws of Sri Lanka [Article 6 of the Subject Agreement] as well as the Arbitration clause [Clause 27 of the General Conditions under Schedule I of the Subject Agreement]. On the contrary, in paragraph 19 of the Plaint, present Plaintiff has reiterated that the two GSA Agreements provide ***"a mechanism of arbitration for resolving all***

disputes" between the Plaintiff and Defendant and it be referred to arbitration as per Article 27.1 of the GSA Agreements dated 17.10.2018.

In **Ovex case *(supra),*** the learned Islamabad High Court stayed the proceeding in suit filed by the respondent under Section 4 of the Arbitration Act, 2011, while rejecting the plaint against other respondents, who were not party to the contract containing arbitration clause. In this exhaustive judgment it is also held that if an arbitration clause excludes certain matter in express terms then no arbitration can arise in respect of such matters and it will be decided by the Courts; it is held that right to arbitration can be waived. A waiver of the right to arbitrate may properly be implied from any conduct which is inconsistent with the exercise of that right; acquiescence to the jurisdiction of a Court may amount to waiver of the right to claim arbitration. There are countless examples of Courts refusing to stay legal proceedings at the instance of a party which has conducted itself in a manner as to constitute a waiver of its right to arbitrate. This particular finding, on which present Plaintiff has relied upon, is not applicable to the facts of present ***Lis***, because Defendant has not taken any step in the proceeding, which can be construed as waiver of the right to arbitrate. Since beginning Defendant is insisting upon the arbitration proceeding in terms of Clause 27 of the GSA Agreements.

In the case of a **Standard Construction Company** – 2010 SCMR 524 ***[ibid]***, the matter was referred to the arbitration but restraining order was granted in respect of encashment of that bank guarantee, because condition precedent for its encashment was not proved at that stage of proceeding and it was left to the arbitrator to deal with such question of encashment while making the award. Again this rule is not applicable to the facts of present case, *inter alia*, because here no restraining order is sought with regard to encashment of any bank guarantee.

17. The crux of the case law relied upon by the legal team of Defendant is that Arbitration Act, 2011 (***ibid***) has repealed the erstwhile the Arbitration (Protocol and Convention) Act, 1937; through Section 4 of the Arbitration Act, 2011, an entirely a new phenomenon has been introduced, by using the term **"shall"** which was not there in the above Arbitration Act 1937, which contained the word "may", hence court was not required to compulsorily refer the parties to arbitration; **but** now under the Arbitration Act, 2011, unless the case falls within the exception of subsection (2) of Section 4 itself, the court shall refer the parties to arbitration, in terms of the undisputed arbitration clause mentioned in the contract. Contention of appellant was repelled as misconceived, that court must answer that a subject dispute is specifically covered by an arbitration clause or not, which can be validly raised before and decided by the arbitrator. Order of the learned single bench was maintained, which upon application of defendant under Section 3 and 4 of the Arbitration Act, 2011, stayed the proceeding by directing the parties to resolve the dispute through arbitration as provided in the agreement.

In Far Eastern Impex case (***supra***), this Court has ruled that Section 4 of the Arbitration Act, 2011, is **mandatory** in nature, while rejecting the argument of plaintiff (of the reported case) about applicability of the Arbitration Act, 1940, besides, holding, that discretion available to the Court under Section 34 of the Arbitration Act, 1940, **is not available under the Act 2011.** Even factors of convenience or inconvenience of the parties, availability of the evidence at a place other than the arbitration place and whether or not to stay the proceedings, was no more within the discretion of the court and the arbitral tribunal shall have exclusive jurisdiction to adjudicate and settle such matters, unless, if the case falls in exception as mentioned in Section 4 of the Act 2011, that is, sub-Section (2), *inter alia,*

that agreement is null and void, inoperative, or is incapable of being performed. This reported case which has based its reasoning by reference to other reported judgments, **is applicable to the facts of present *Lis*** and answers (though adversely) to the arguments of legal team of present Plaintiff. This Court in the above reported decision, dismissed the suit of plaintiff against some of the defendants and stayed the proceedings by allowing the application of defendant number one and the matter was referred to arbitration in terms of the arbitration clause contained in the agreement.

18. It is pertinent to mention here that while citing case law, it may be kept in mind that unnecessarily Court should not be burdened with a number of citations expounding an identical rule. Multiple citations can be referred on a point of law when they contain some degree of variation in them and have modified and developed the rule in support of the proposition. Citing numerous decisions in support of a proposition, results in wasting precious time of the Court and at times may be viewed as a delaying tactic.

19. It would be necessary to reproduce herein under the relevant provisions of the above Arbitration Act, 2011_

> "Section 4. **Enforcement of arbitration agreements.** (1) A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the Court in which the proceedings have been brought to stay the proceedings in so far as they are concern that matter.
>
> (2) On an application under subsection (1), the Court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

SCHEDULE

Article I

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Article II

1. Each Contract State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal prelateship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters of telegrams.

3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article shall, at the request one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative, or incapable of being performed."

Conclusion

A- The undisputed factual aspect of the present Case, particularly, the two GSA Agreements, if seen in the light of the above reproduced provisions of the Arbitration Act, 2011, it is not difficult to conclude that both GSA Agreements fulfil the term "agreement in writing" containing an **"arbitral clause"** as mentioned in the Article II of the Schedule of the said Arbitration Act, 2011; thus, Arbitration Act, 2011, will govern the present ***Lis*** and not Arbitration Act, 1940.

B- Contention of Plaintiff's legal team that Defendant has not filed an Application for stay of present proceedings; *alternatively*, present proceeding be converted into a regular suit by moulding the relief, because the Defendant has waived its right to refer the dispute for arbitration, as envisaged in the subject GSA Agreements, is devoid of merits and self-contradictory, ***because,*** it is a matter of record that an arbitration notice has already been served upon Plaintiff by a Sri Lankan Law Firm representing

present Defendant, which is discussed in the foregoing paragraphs and the said notice has been replied to by Plaintiff through present counsel; ***secondly,*** the above provision of the Arbitration Act, 2011, that is, Section 4, is phrased in such a manner, which does not mandatorily require a party or defendant to make a formal application in the proceedings, but continuous stance of present Defendant through its Advocate, besides, filing of documents in support of their contention that the arbitration clause of the two undisputed GSA Agreements, be implemented, by sending the dispute for arbitration, is suffice in the circumstances and can be considered an application under this provision; ***thirdly,*** as already mentioned in the preceding paragraphs, that Plaintiff itself has prayed for referring the dispute to arbitration as per the GSA Agreements.

C- Since the validity of arbitration clause and the two GSA agreements has not been questioned in the present proceeding by Plaintiff, therefore, no discretion is left with this Court, for not sending the matter to arbitration as envisaged under Article 6 and Clause 27 of the said GSA Agreements, as correctly **held** by this Court in the case of Far Eastern Impex [***ibid***] and other reported decisions in the preceding paragraphs.

D- With regard to the arguments of the learned Advocates for Plaintiff, that after confirmation of restraining order granted on 31.10.2020, matter may be referred to arbitration, cannot be acceded to, as no case is made out by Plaintiff for such kind of interim injunctive relief, considering the afore referred reported decisions. ***Secondly,*** since the subject GSA Agreements not only contain foreign arbitration clause **but also** the governing law is that of Sri Lanka **[**Clause 27 and Article 6, respectively, *supra***], hence,** present Plaintiff may avail this remedy of interim relief/protection**,** under the relevant provisions of the Arbitration Act No.11 of 1995, enacted by the Parliament of Sri Lanka or any other law of Sri Lanka for the time being in

force. ***Thirdly,*** in view of the present facts, an interim injunctive relief as requested, ***inter alia,*** suspension of termination notice(s), is not available to Plaintiff. In my considered view, a specific provision for extending different interim injunctive reliefs and preservation of property as provided in the Arbitration Act, 1940, in terms of **Section 41** read with the **Second Schedule,** is not there in the Arbitration Act, 2011, for the reason, that under the Arbitration Act, 2011, it is mandatory to refer the arbitrable dispute to arbitration (as already held in the above cited case law) and in ordinary course there is no justification for grant of an interim relief; unless the three exceptions or any of them as mentioned in Section 4 and Article II of the Arbitration Act, 2011, viz. *an arbitration agreement is null and void, inoperative or incapable of being performed*, exist in a case. In the latter event, then Court can take further proceeding, *inter alia,* as provided under Section 3 of the above Act, 2011, that is, invoking Civil Procedure Code. It must be clarified that grant of interim relief is not prohibited under the scheme of Arbitration Act, 2011, *inter alia,* in view of Section 3 thereof, but, in exceptional circumstances.

E- Consequently, present proceeding of this ***Lis*** is stayed under Sections 3 and 4 of the Arbitration Act, 2011, and *ad-interim* order passed on 31.10.2020 is hereby vacated / recalled. CMA No.11705 of 2020, under Section 41 of the Arbitration Act 1940, read with Order XXXIX, Rules 1 and 2 and Section 151 of the Code of Civil procedure, is dismissed. Arbitration can proceed in terms of the Subject GSA Agreements.

Dated: 17.05.2021 **JUDGE**

M.Javaid.PA