IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1500 of 2011

[Virgoz Oils & Fats Pte. Limited *versus* **Faisal Exports (Pvt.) Limited]**

Date of hearing	:	13.10.2023
Plaintiff	:	Virgoz Oils & Fats Pte. Limited, through Mr. Hassan Ali, Advocate.
Defendant	:	Faisal Exports (Pvt.) Limited, through M/s. Mazhar Imtiaz Lari and Syed Zeeshan Ali, Advocates.

Case law cited by the Plaintiff's counsel.

1. **2021 C L D 1069 Supreme Court**
   [*Orient Power Company (Private) Limited* ***versus*** *Sui Northern Gas Pipelines Limited*];

2. **P L D 2014 Sindh 349**
   [*Abdullah* ***versus*** *CNAN GROUP SPA through Chief Executive/ Managing Director*];

3. **P L D 2018 Lahore 597**
   [*LOUIS DREYFUS COMMODITIES SUISSE S.A.* ***versus*** *ACRO TEXTILE MILLS LTD.*];

4. **1999 P L C 1018**
   [*Conticotton S.A. Co.* ***versus*** *Farooq Corporation and others*];

5. **1999 C L C 437**
   [*Merdith Janes Co. Limited* ***versus*** *Crescent Board Limited*];

6. **1987 C L C 83**
   [*Ralli Brothers & Company Limited* ***versus*** *Muhammad Amin Muhammad Bashir Limited*]; and

7. **2007 Y L R 2287**
   [*Messrs Sign Source* ***versus*** *Humayun H. Baig Muhammad*].

Case law relied upon by Defendant's counsel

1. **2014 C L D 824 [Supreme Court of Pakistan]**
   [*A. QUTUBUDDIN KHAN* ***versus*** *CHEC MILLWALA DREDGING CO. (PVT.) LIMITED*];

2. **1993 C L C 1491 [Karachi]**
   [*TRUSTEES OF THE PORT OF KARACHI* ***versus*** *Messrs IFTIKHAR BROTHERS*];

3. **P L D 1996 Supreme Court 108**
[*M/s. JOINT VENTURE KG/RIST through D.P. Giesler G.M., Bongard Strasse 3, 4000, Dusseldorf-30, Federal Republic of Germany, C/o 15-Shah Charagh Chambers, Lahore and 2 others* ***versus*** *FEDERATION OF PAKISTAN, through Secretary Food Agricultural & Coop: and another*];

4. **2014 C L D 132 [Sindh]**
[*ENGRO FERTILIZERS LIMITED* ***versus*** *FEDERATION OF PAKISTAN through Secretary, Ministry of Industries, Government of Pakistan, Islamabad*];

5. **2019 C L D 23 [Lahore]**
[*JESS SMITH AND SONS COTTON LLC* ***versus*** *D.S. INDUSTRIES*];

6. **P L D 2018 Lahore 597**
[*LOUIS DREYFUS COMMODITIES SUISSE S.A.* ***versus*** *ACRO TEXTILE MILLS LTD.*];

7. **2010 C L C 506 [Karachi]**
[*Messrs GANDHARA CONSULTANTS (PVT.) LTD.* ***versus*** *PAKISTAN DEFENCE OFFICER'S HOUSING AUTHORITY, KARACHI*];

8. **1998 C L C 1671 [Karachi]**
[*Messrs KHAN BROTHERS And ASSOCIATES* ***versus*** *DIRECTOR-GENERAL FOOD, GOVERNMENT OF PAKISTAN*]; and

9. **P L D 2016 Supreme Court 121**
[*KARACHI DOCK LABOUR BOARD* ***versus*** *Messrs QUALITY BUILDERS LTD.*].

Law under discussion:

(1). The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011-the **Subject Law.**

(2). Convention on the Recognition and Enforcement of Foreign Arbitral Awards **(New York, 1958).**

(3). Russell on Arbitration **(Twenty-Fourth Edition).**

(4). The Contract Act, 1872

(5) The Palm Oil Refiners Association of Malaysia **{PORAM}** Arbitration Rules

JUDGMENT

Muhammad Faisal Kamal Alam, J: This Suit is filed under Section 6 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (the "**Subject Law**"), for the enforcement of Award dated 25th November 2010 [*at page-123*], handed down by the learned Tribunal under the Rules of the Palm Oil Refiners Association of Malaysia **{PORAM}** in Case Reference No.A-325.

2. Subject matter of the above Award and the Arbitration Proceeding was the following two Contracts (though disputed by the present Respondent-**Objector**):

1) SG/08/0562/07B02 dated 24th July 2008, 4 5000 metric tonnes of RBD [refined, bleached and D odorized] palm oil in bulk. Price was fixed as USD1080 per metric tonne, CFR BQ/K AR. Shipment date is mentioned as 15th August – 10th September, 2008.

2) SG/08/0673/08/B02 dated 27 August 2008. Commodity is RBD palm oil in bulk. Quantity: 10,000 metric tonnes. Price: USD 845 per metric tonne call Marcy Fr PQ/QR. Shipment date is mentioned as 20th September – 10th October 2008.

3. Through the above Subject Law, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, has been ratified and enacted.

4. Paragraph-41 of the Award has granted a total sum of USD [US Dollar] 6,301,250.00 together with 8% interest per annum from the date of default, which is, 15th November 2008 until the date of payment of the sum awarded, besides, costs of the reference to be decided by PORAM.

5. Mr. Hassan Ali, Advocate, for the Plaintiff while supporting the Award, has referred to Section 6 of the Subject Law, that the Award be enforced as it fulfills all the requisite conditions mentioned in the Subject Law; contends that ample opportunity was given to all sides and after

considering the record and witnesses, the Award has been pronounced, which was not appealed against and attained finality.

6. On the other hand, Mr. Mazhar Imtiaz Lari, Advocate, has argued by referring to his Objections, that the two purported Contracts [under dispute], which were the subject matter of the Arbitration Award sought to be enforced through the present proceeding, were neither signed by the Respondent / Defendant [the **Objector**], nor, acted upon by the Parties hereto; only correspondences were exchanged, which never materialized into a contract; second objection is that the Award itself is unenforceable, because it suffers from material illegality and irregularity, ***inter alia,*** it has adjudicated a time barred claim in terms of Rule 2, Sub-Rule {iii} PORAM Rules of Arbitration and Appeal [***supra***], wherein 120 calendar days is mentioned to bring a claim of the nature, after the expiry of the contract shipment period or the Bill of Lading date, whichever is later.

7. In rebuttal the Plaintiff's Counsel has stated that issue of limitation does not exists, which can otherwise be waived under Sub Rule 5 to Rule VI of Section 1, as well as Rule 8 of Section-2 of the PORAM Rules.

8. Summary of the Case Law cited by the Plaintiff's Counsel is that under the international commercial arbitration, jurisdiction of the Courts is merely supervisory and New York Convention itself advocates for a **pro enforcement bias**; one must be mindful that the public policy defence [as mentioned in the Subject Law, ***ibid,*** under the Article V (2) (b)] is an exceptional one, requiring heightened standards of proof, ***inter alia,*** if an award is patently unreasonable; "*awarding a greater quantum of compensation than that was due by an Arbitral Tribunal does not amount to violation of public policy, as the same would open floodgates and would require the courts to undertake an examination of each and every award, which is against the very spirit of the New York Convention."* **[Orient case,**

ibid, **2021 CLD 1069-Supreme Court of Pakistan].** The New York Convention, ***inter alia,*** serves the International Trade and Commerce, providing an additional measure of commercial security for parties entering into cross-border transactions [***Conan case, supra***, PLD 2014 SINDH 349].

9. Précis of the Case Law cited by the Objector's Counsel is that while examining an Award, a Court does not act as an Appellate Forum, thus, reappraisal of the evidence cannot be done, but, if the finding is contrary to the evidence, and if left unattended, causing grave injustice, then, it justifies intervention; Court has to apply its judicial mind in examining an Award, even if no objection is filed; illegality must be appearing on the face of the Award, in order to set it aside; objection about the inherent jurisdiction of an arbitrator is a point of law that can be raised at any stage; rule of international arbitration about jurisdiction, viz. '*Kompetenz-Kometenz*' discussed in Karachi Dock Labour Board case [***supra***]. The Subject Law (***ibid***) has been interpreted in the referred Decision of Jess Smith [2019 CLD 23, Lahore], that conditions for refusing enforcement of an award is to be narrowly construed; the investigation into disputed questions can be done, although framing of Issues is not mandatory. Court may adopt a procedure for deciding the Case under the Subject Law, which is in consonance of the principles of justice.

In ***Acro Case*** [supra, cited by both the learned Advocates], ***inter alia,*** Article II of the New York Convention is interpreted; a broad interpretation to be given to the phrase **'**agreement in writing**'** as mentioned in the Governing Law, considering the present day information system, thus, an arbitral clause or an arbitration agreement can be "**teased out**" from the exchange of letters / correspondence; for compliance of Article IV of the above Convention, *"the claimant has merely to supply a copy of the agreement, whether signed or unsigned, or based on exchange of letters or telegrams".*

10. Arguments heard and record considered.

11. The learned Advocates for the Plaintiff and the Objector have also submitted their respective written arguments / Synopsis, along with the Case Law, PORAM and FOSFA [Federation of Oils, Seeds and Fats Associations Limited] Rules and Standard Terms of Contract (CIF) for Palm and Palm Kernel Oil Products in bulk.

12. Statement of the Claim preferred by the present Petitioner / Plaintiff before the Tribunal is of 13th July 2009 and Objections [Statement of Defence] thereto by the present Objector is available in the record is dated 6th August, 2009 [received to the Tribunal on 11th August 2009, as per paragraph-8 of the Award], whereafter its Reply was filed by present Plaintiff on 31st August 2009.

13. It is not disputed that both the Plaintiff and the Defendant have a long-standing commercial relationship even before the present dispute.

14. Mindful of the fact that the appraisal of the evidence cannot be done in the present Proceeding; besides, in view of the Subject Law and the judicial consensus, ***inter alia,*** evolving the rule of 'pro-enforcement bias' [***ibid***], 'second guess principle' [Russell on Arbitration, 24th Edition, Chapter-8 {8-031}], '*kompetenz-kompetenz*', a Foreign Award is to be enforced, unless it is adversely affected by the Article V (of the Schedule) of the Subject Law [***supra***]; notwithstanding this, since a specific plea/defence is taken by the Objector about the limitation [time barred claim] and nonexistence of concluded contracts, which factors go to the very root of the arbitrability of the subject arbitration, thus, these submissions must be considered so also whether due process was followed, which is an established principle in domestic and international arbitration.

With this limited parameter, the present Award is considered along with the Record of the ***Lis.*** It would be advantageous to reproduce excerpt from Russell on Arbitration, 24th Edition, Chapter 8 **{**8-005**}_**

> ***"****Even if the jurisdiction of the tribunal is not in issue, the court has a discretion not to grant leave to enforce an award summarily. The discretion will be exercised in an appropriate case in the interests of justice.* ***It is not an administrative rubber stamping exercise."*** **{Underlined for emphasis}.**

15. The Arbitration Proceeding commenced on the basis of Clause 11 of the 'ADDITIONAL TERMS & CONDITIONS' of the Subject Contracts, so also mentioned in Paragraphs-6 and 20 of the Award, while acknowledging the fact that the above two Subject Contracts (*purportedly*) were never signed by the present Objector. This material fact is mentioned under the caption **"J. The Tribunal Findings"**, Paragraphs-17, 18 and 32; the learned Tribunal has given a finding in favour of the Plaintiff [Claimant] about the existence of the Subject Contracts and the default on the part of the Objector [Paragraph-38 of the Award]. ***Secondly,*** a bare reading of the Award shows that the Paragraphs-16 to 34 , leading to the above conclusion, is in fact mere narration of the stance as averred in the Statement of Claim of the Plaintiff / the Claimant [available in the record of present proceeding]. Undoubtedly, it is an established rule that such commercial transactions are not dependent on signing of agreements / contracts by both, Seller and Buyer, and in case of denial, particularly, by a buyer, the terms of the binding contract can be 'teased out' from the exchange of the correspondences, including emails and the other mode of modern communication, as held in Acro Case [***supra***], besides, other numerous Decisions, in local and foreign jurisdictions; but in the present case, the admitted fact is entirely different from what is mentioned above, because almost all written communications have been done by Plaintiff [Claimant] through the

Broker, viz. **Iqra International**, with the Objector. There is no written communication from the Objector, about acceptance of Offer (even in view of the above Case Law), to purchase the Subject Product. Unfortunately, the 'STATEMENTS OF DEFENCE' filed by the Objector before the learned Arbitration Tribunal, was not considered, wherein it is specifically stated that the past practice between Plaintiff and the Objector was / is, that contract(s) once materialized, Iqra International got it signed from the Objector and forward it to the Plaintiff ***"****so the matter be checked up from their record.****"*** [Paragraph-4 of the Statement of Defence]; not only this, the Plaintiff in its Statement of Claim {Paragraph-25} has also confirmed that how past contracts came into the existence, by stating that contracts were concluded by issuing Letters of Credit (by the Objector) ***"to pay for the cargoes"*** and bills of lading were issued to the Objector. **Admittedly, none of these significant** events happened in the present case, which can be construed as an offer and acceptance on the part of the Parties hereto. The logical conclusion that can be drawn from the pleadings of both the Parties [as available in the present Proceeding] is, that no enforceable contact was ever concluded between them. Considering, that admittedly, both the Plaintiff and the Objector have longstanding business relationship, as stated in Paragraph-27 [of the Award], the above crucial aspect about the existence of any contractual relationship was decided in favor of Plaintiff [Paragraph-36 of the Award], discarding the defence of the Objector, by stating that previously also, present Objector had performed Contracts without signed copies. If any step was taken in pursuance of the Subject Contracts, for instance, opening of Letter of Credit [by the Objector], or, shipment by the Plaintiff, even then, this Finding of the learned Tribunal would be unexceptional; but, nothing happened in pursuance of the Subject Contracts, as discussed in the foregoing Paragraphs. This is the minimum requirement of due process,

that when an issue is decided in favour of a Party and against the other, the documents [relied upon] or tangible evidence produced, should be discussed, which is clearly lacking in the present Award; besides is also violative of the statutory provisions of the Contract Act [1872 of Pakistan]. ***Thirdly***, Clause 11- Payment and Shipping Documents, which is one of the standard terms of Contract for selling Palm and Palm Kernel Oil Products in Bulk, jointly issued by FOSFA and PORAM, ***inter alia,*** an irrevocable and confirmed letter of credit be established in sellers' favour through a recognized bank, not later than 10 days from the date of contract or the business day prior to commencement of loading, whichever shall first arise [unless otherwise agreed between the parties]. Undisputedly this significant term and other requisites mentioned under the above Clause-11, were never acted upon, either by the Plaintiff or the Objector, because, there was no binding agreement / contract existed between the Parties.

16. Adverting to the claim of damages.

Although no piece of evidence was produced in the arbitration proceeding about sustaining damages [by the Plaintiff], yet, the claim of present Plaintiff has been accepted as averred by the learned Tribunal.

Undisputedly, neither letter of credits were established by the Objector, nor, the Subject Cargo was shipped to the Port of Destination [at Karachi]; rather the admission mentioned in the Statement of Claim of the Plaintiff, has in fact with some variation reproduced in the Award, that the Cargo was diverted [Paragraph-11 of the Claim, present Plaintiff admitted that it had *"planned to ship the Cargo for the two Contracts on the Vessel MT PEGASUS 7 but had diverted the Vessel to another destination because the Respondents were not in a position to establish the Letters of Credit."*]; but, no fact was put forth that what cost the Plaintiff

incurred or damages resulted, specially, when it is sold the said Cargo to the third party [whose identity was never disclosed]. In these circumstances, it was obligatory upon the learned Tribunal to at least inquire about the causation of the alleged damages or losses. Nothing is mentioned in the Award that what evidence is led to prove the claim for damages, which, cannot be granted or accepted on mere statement.

17. A glaring contradiction is mentioned in Paragraph-26 of the Award, that on **15th November 2008,** the Plaintiff instructed the Broker to inform the Objector that since Letter of Credit was not established, thus, the latter [Objector] committed default, but, as a compromise, **'***the Claimant was prepared to load the 5000 metric tons of RBD Palm Oil under the First Contract on the "MT Process" with the 10,000 metric tons of RBD Palm Oil under the Second Contract lifted in December 2008 provided the Respondent immediately established a letter of credit for the 5,000 metric tons of cargo***'**, *whereas*, in **Paragraph-32** [of the Award], it is stated that on **03.03.2009,** vide Email sent to the above Broker, the two Subject purported Contracts were amended, to the extent of extension of shipment date, which was extended up to the month of November 2008. The learned Arbitrators did not appreciate the fact, rather overlooked it completely, that under what provision of law, an amendment in the Contract can be done unilaterally and that too back dated [detailed discussion on this is mentioned in the following Paragraph].

18. The Paragraphs-39 to 41 of the Award has specifically dealt with the claim of damages. The Plaintiff has not mentioned in its Statement of Claim any relevant fact about incurring the losses.

The criteria adopted by the learned Tribunal is, that it has considered the difference in sale price of the contracted goods and the price on the default date [15.11.2008], ***but,*** of the Product 'Crude Palm Oil'; *whereas*,

the Subject Product is RBD Palm Oil. On this, the learned Counsel for the Plaintiff has stated that price of Crude Palm Oil is lesser than the Subject Product, which shows that the learned Tribunal has taken a lenient view, while awarding Damages. The argument is untenable, for the simple reason, that the price difference of the product in question is to be considered and not of some other product, if actually a breach is committed by a Party. By and large the findings of the Award is basically the pleadings / averments of present Plaintiff. This material error in the Award also casts doubt on the impartiality of the learned Tribunal and due process.

19. Whether Claim was time barred.

It is clarified that the following reasoning on the point of limitation [Time Limit to invoke arbitration] is in addition to what has been discussed in the preceding Paragraphs, in particular, that enforceable commercial contracts never came into existence.

Paragraph-6 of the Award states that present Plaintiff as Claimant sent its request for arbitration to PORAM on 16.03.2009 in respect of the Contracts in question **(*ibid*)** dated 24.07.2008 and 27.08.2008. The question about limitation is examined.

20. Rule-2 [in Section-1] of the PORAM Rules is reproduced herein under for a ready reference_

> **"*2 Time Limits***
>
> *i) In the case of any dispute on quality the party claiming arbitration shall submit its notice of arbitration to PORAM within twenty-one (21) calendar days from date of receipt of the goods at the place at which quality is deemed to be final in accordance with contractual terms. If sample(s) is available the same should also be sent along with the request to PORAM where such sample(s) shall be held at the disposal of the Sole Arbitrator/ Panel of Arbitrators/ Appeal Board.*

ii) Notwithstanding the above, if the Claimant requires supporting analysis(es), further sample(s) if available shall also be dispatched at the same time to a recognised independent analyst.

*iii) In the case of any dispute other than on quality, the party claiming arbitration shall submit its notice of arbitration to PORAM within one hundred and twenty (120) calendar days after the expiry of the contract shipment period or the Bill of Lading date, whichever is later.***"**

21. The stipulations of both the above Contracts are identical except their dates and quantity of the Product, viz. RBD Palm Oil in bulk. The first Contract is of 24th July 2008, which was subsequently amended (purportedly) twice to the extent of the Shipment date, which was changed from 15th August to 10th September 2008 [the original date] to 20th September - 10th October 2008 [First amendment] and then to November 2008 [the Second amendment].

22. The Second Contract for ten thousand metric ton of RBD Palm Oil is of 27th August 2008, in which the shipment date was from 20th September to 10th October 2008, which was amended to November 2008. It means that shipment date for both the contracts was changed to November 2008 **[**this is also averred in the pleadings of present Petitioner/Plaintiff in Paragraph 5(iv)**].**

23. Admittedly, there is no direct exchange of correspondences, (including emails) between the present Plaintiff and the Objector about the above Contracts and their purported extension / amendments. It was Iqra International as Broker, which has sent the Emails to Plaintiff about the alleged confirmation of business. Subsequently, the above Iqra International has also addressed a Correspondence of 11th December 2008 (at page-185 of the Court Record) to Defendant/Respondent along with the Letter of same date of Plaintiff [Claimant], ***inter alia,*** requesting for

opening of LC and lifting subject cargoes; ***whereas,*** above referred enclosed Letter of Plaintiff, has held the Objector in 'technical default' on 15th of November 2008 for non-performance of contract; besides mentioning the claim towards losses suffered by the Plaintiff. The text of the above two Missives is contradictory to each other.

24. If the shipment date is allegedly extended upto November 2008, then under what circumstances or rule, Plaintiff/Claimant has held the Objector in default on 15th of November 2008; that is, even before the expiry of the Contract period, viz. 30th November 2008. Interestingly the above version of the Plaintiff [self-contradictory though] has been accepted in the Award also [Paragraph 38], without giving any plausible reason for such a finding. With regard to these extensions in Shipment period, the determination of the learned Tribunal as mentioned in its Paragraph-32 is also quite surprising; it is stated that on **3rd March 2009** the present Plaintiff/Claimant sent **an e-mail** to the Broker [*supra*], intended for the Objector, attaching copies of the second amendment in the First Contract and the amendment in the Second Contract, altering the shipment date to November 2008 [as already discussed in the foregoing Paragraphs]. It means that these amendments [purported] were sent on 3rd March 2009, but the shipment dates **were altered back dated** to November 2008. Thus, both the Contracts were purportedly amended by the Plaintiff unilaterally and that too in back date. Admittedly, these amendments were not signed by the Objector [so is observed in the Award] and devoid of any sanctity.

25. Even if the original shipment dates of both the purported contracts are considered, that is 15th August to 10th September 2008 [First Contract] and 20th September to 10th October 2008 [Second Contract], then, in terms of above Rule 2, sub rule 3 [of Section-1], a notice of arbitration is to be submitted within 120 (one hundred and twenty) days, after the expiry of the

contract shipment period. Therefore, in respect of the First Contract, a notice of arbitration should have been sent on or before the 10th January 2009, ***whereas,*** with regard to the Second Contract, the notice of arbitration should have been sent by or before 10th of February 2009, but admittedly it was sent on 16th March 2009, that is, after the expiry of limitation period. With regard to the argument of Plaintiff's Counsel, that in terms of Rule 5 [of Section-1], the Arbitrators can vary the time frame, is untenable, because no such finding has been given by the learned Arbitrators, about condoning the delay in filing a time barred claim before the Arbitration Tribunal.

26. This glaring error is not addressed in the Award and without basing its conclusion on any tangible material, the Award has treated the date of default as 15th November 2008 [Paragraph-38], by accepting the one-sided version of the Plaintiff. The above finding is contrary to the record.

27. Judgments relied upon by Plaintiff Counsel in respect of the international arbitration and the Governing Law is distinguishable from the peculiar facts of the present ***Lis;*** for the reasons stated in the foregoing paragraphs.

In my considered view, 'pro enforcement bias' and 'second guess' principle(s) cannot be made applicable in the present case, otherwise Article-V of the Subject Law would be redundant. Although the grounds to refuse recognition and enforcement of a Foreign Award as enumerated in the Article-V, are exhaustive, but still it empowers the Courts to consider an Award on its own merits and with a judicial mind. In these peculiar circumstances (stated in the foregoing paragraphs), non-filing of an Appeal by the Objector, in the present case, cannot be treated as fatal; the contention of Plaintiff's Counsel in this regard cannot be accepted.

28. Since the subject matter was not arbitrable, therefore, the learned Arbitration Tribunal did not have the jurisdiction to decide the ***Lis*** through the Award, which is adversely affected by the sub-Article 2 of Article-V of the **Subject Law** and similar provisions of The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

29. Consequently, the present ***Lis*** is dismissed, with no order as to costs.

JUDGE

Karachi.
Dated: 05.08.2024
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