

ORDER SHEET
THE HIGH COURT OF SINDH KARACHI

Suit No. 449 of 2022
a/w Suit No.s 450, 451 of 2022, 2616 & 2617 of 2021

[Descon Engineering Ltd. v. Cnergyico Pk Ltd.]

DATE

ORDER WITH SIGNATURE OF JUDGE

For hearing of main application.

13-08-2024

Mr. Musadiq Islam, Advocate for the Plaintiff.
M/s. Ayan Mustafa Memon and Umair Nabi, Advocates for
the Defendant.

Adnan Iqbal Chaudhry J. - Parties to these suits are common.
Cnergyico Pk Ltd. (formerly Byco Petroleum Pakistan Ltd.) had
contracted Descon Engineering Ltd. for the following works:

- (i) for turnaround of Cnergyico's Refinery-I Plant situated at Lasbela, Balochistan under a 'Turnaround Contract' dated 02.06.2019;
- (ii) for Phased Mechanical Completion of ORC-II under an 'Electromechanical Contract' dated 14.09.2007, followed by various addendum contracts;
- (iii) for supply, testing and commissioning of 3x50 TPH Direct Fired Boiler under a 'Boilers Contract' dated 30.10.2009, following by various addendum contracts.

Cnergyico alleges *inter alia* that works performed by Descon under the Turnaround Contract and the Electromechanical Contract were not only defective and poor workmanship, but were also with substantial delay, and hence losses to Cnergyico. By Suit No.s 2616 and 2617 of 2021, Cnergyico claims damages from Descon.

On the other hand, Descon has a claim against Cnergyico for the amount not paid to it for works carried out under the three contracts. Since all three contracts contain an arbitration clause, Descon has filed Suit No.s 449, 450 and 451 of 2022 under section 20 of the Arbitration Act, 1940.

Though Cnergyico does not object to a reference to arbitration, the parties have not been able to agree on a sole arbitrator. Therefore, they fall back on the respective arbitration clauses which envisage two arbitrators, one of each party, and an Umpire to be nominated by the arbitrators before entering upon the reference. The arbitration clause in two of the contracts *viz.* the Turnaround Contract and the Boilers Contract provides that the arbitrators and Umpire shall be retired Judges of the Supreme Court of Pakistan or a High Court. Learned counsel for Cnergyico files a statement nominating such an arbitrator. Learned counsel for Descon is given time to do the same.

The dispute resolution clause in all three contracts stipulates that before arbitration the parties shall make an attempt in good faith to resolve their dispute amicably. Learned counsel submit that the parties did make such an attempt but failed. Nevertheless, and without entering into a discussion whether such a dispute resolution clause can be construed as a pre-condition to arbitration, I am of the view that before making a reference to arbitration, it would be worthwhile to refer the dispute to mediation. Even if the parties can settle a part of their dispute, that will still save them time and costs in arbitration. Learned counsel for the parties are not averse to mediation as long as a time-line is fixed.

The benefits of mediation out of the other modes of alternate dispute resolution, and especially for businesses, has been highlighted by the Lahore High Court in the cases of *Netherlands Financierings Maatschappij Voor Ontwikkelingslanden N.V. v. Morgah Valley Limited* (2024 CLD 685) and *Faisal Zafar v. Siraj-ud-Din* (2024 CLD 1). In *Province of Punjab v. Haroon Construction Company* (2024 SCMR 947), the Supreme Court of Pakistan has also urged the Courts to exhibit a pro-settlement and a pro-mediation bias.

Therefore, in exercise of powers under section 89-A read with Order X Rule 1-B CPC, the dispute between the parties arising under the three contracts discussed above, is referred for mediation to the Musaliha International Center for Arbitration and Dispute Resolution (MICADR), situated at the FTC Building, Karachi. The fee of the

Mediator is tentatively fixed at Rs. 400,000/- to be shared equally between the parties. If the parties fail to make any progress in 45 days, the matter shall be referred back to the Court for appointing arbitrators and the fee of the Mediator shall be treated as costs of arbitration. The parties shall appear before the Mediator for preliminaries on 26.08.2024 at 10:30 a.m. and for such purpose each party shall appoint an officer familiar with the facts of the dispute and authorized to make a settlement. For mediation sessions, Descon which is based out of Karachi, may opt for on-line meetings.

The office of the Court shall use the Referral Form made for the purpose while remitting the matter to the Mediator along with a copy of this order. In the meanwhile, counsel for the parties shall email soft copies of the pleadings of these suits to the Mediator.

The office shall place a copy of this order in all suit listed above.

JUDGE