IN THE HIGH COURT OF SINDH AT KARACHI
HCA No. 138 / 2012

Present:
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Muhammad Junaid Ghaffar.

Cummins Sales and Service (Pakistan) Limited…..…… Appellant

Versus

Cummins Middle East FZE and others …… Respondents

Date of hearing:	**17.9.2013, 10.2.2014, 24.2.2014, 18.8.2014, 26.8.2014, 11.09.2014 & 20.05.2015**
Date of judgment:	**29.05.2015**
Petitioner:	**Through Mr. Moin Qamar and Mrs. Amna Salman Advocates.**
Respondent 1, 2 & 4.	**Through M/s. Sajid Zahid, Mansoor Sheikh & Safdar Mahmood Advocates.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant appeal the appellant has impugned order dated 7.9.2012 whereby, a learned Single Judge of this Court has allowed application bearing CMA No. 1028 of 2010 filed by respondent No. 1, 2 & 4 under sections 3 & 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2009, "(Ordinance, 2009)" read with Section 151 CPC and has stayed the proceedings in Suit till the dispute is resolved between the parties through Arbitration in terms of the relevant provisions of the Agreement between the parties. Similarly, application bearing CMA No. 3248 of 2010 filed by the appellant seeking summarily rejection of respondent's application under Section 3 & 4 of the Ordinance, 2009 has been dismissed / disposed of

in view of the findings / reasons recorded on CMA No. 1028 of 2010, as stated hereinabove.

2. Briefly the facts as stated in the Memo of Appeal are, that the appellant is engaged in the business of import, distribution, supply, sale, installation and after Sales service of various kinds of engines, power generating equipment as well as other various industrial and commercial installations. It is further stated that the appellant in order to expand its business operation entered into three Agreements with the respondents which were as follows:-

Sr.	Agreement	Parties	Status
01	Distribution Agreement dated 29.10.2006 effective January 01, 2007	Cummins Power Generation Limited (Defendant No. 2) and Cummins Sales And Service (Pakistan) Limited (Appellant)	Valid till December 31, 2009
02	Distribution Agreement effective February 21, 2005	Cummins Engine Company Limited (Defendant No. 3) and Cummins Sales And Service (Pakistan) Limited (Appellant)	Valid till December 31, 2006
03	Dealership Agreement effective February 21, 2005:	Cummins Middle East FZE (Defendant No. 1) and Cummins Sales And Service (Pakistan) Limited (Appellant)	Valid till December 31, 2006 till December 31, 2009

3. It is the case of the appellant that the Agreement dated 29.10.2006 (effective from 1.1.2007) mentioned at serial No. 1 above, regulates the whole commercial relationship between the appellant and the respondents and includes the supply and sale of generators, including engines and all other related equipment. It is further stated that the respondents after having defaulted in performance of the aforesaid Agreement dated 29.10.2006, have served a termination letter dated 15.5.2009 to the appellant, whereas the Agreement was still valid till 31.12.2009. In response to such termination

letter, the appellant had filed Suit bearing No. 1804 of 2009 before the Original side of this Court against the respondents with the following prayers:-

> "It is therefore respectfully prayed that this Honorable Court may be pleased to:
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> a) pass a decree permanently restraining the defendants from discontinuing the supply of Cummins Products to the appellant in Pakistan as and when requested by the appellant though placing orders for supply in a manner and the mode which is continuously being followed by the appellant and defendants since year 1993 owners;
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> b) pass a decree permanently restraining the defendants from terminating the existing contractual arrangements between the appellant and the defendants, particularly the power Generation Agreement dated October 29, 2006, effective from January 01, 2007 till December 2009 as well as from discontinuing performance of their continued contractual arrangements which are infield and in place between the appellant and the defendants since year 1993 for supply of Cummins Engines (diesel, gas), Cummins power generation sets, Cummins power electronic equipment, Cummins automatic transfer switches, Cummins switchgears, Cummins paralleling control system and Cummins networking and ancillary equipment etc;
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> c) pass a decree permanently restraining the defendants from giving effect to the Termination Letter dated May 15, 2009 served by the defendant No. 4 (having no dealing with the commercial dealing with appellant) upon the appellant;
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> d) pass a decree permanently restraining the defendants from interfering into appellant's business of Cummins Products in Pakistan (either directly indirectly or through any other licensee / dealer / distributor) which is being conducted by the appellant since year 1993 onwards;
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> e) pass a decree permanently restraining the defendants from appointing any other person or company as an exclusive or non-exclusive Distributor / Franchisee / Licensee for import, marketing, supply, sale and maintenance of Cummins Products in Pakistan either by replacing the appellant or otherwise;
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> f) pass a decree for payment of Rs. 6,049,105,127/- to the appellant as compensation for the loss suffered by the appellant on account of breaches and violations committed by the defendants of their contractual arrangements etc, along with profit @ 15% per annum;
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> g) cost of the suit may also be provided; and
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> h) Grant any other relief as deemed appropriate by this Honorable Court."

4. Along with the aforesaid Suit, the appellant had also filed an application under Order 39 Rule 1 & 2 CPC and on 22.12.2009 a learned

Single Judge of this Court had directed the parties to maintain status quo, whereafter, such order was modified vide order dated 9.4.2010 on an application filed on behalf of the respondents to the extent that the respondents may continue with their Commercial operations, however, subject to outcome of the Suit. Thereafter, the respondents No. 2 & 4 had filed an application under Section 3 & 4 of the Ordinance, 2009 read with Section 151 CPC, praying for stay of the Suit, as according to the respondents, the Distribution Agreement dated 21.2.2005 signed between respondent No. 1 and the appellant, read with letter dated December 2, 2008, the parties had agreed to refer their disputes, either for Mediation or for Arbitration. The learned Single Judge through the impugned order has allowed the said application and has stayed the proceedings of the Suit by referring the dispute to Arbitration in terms of the Arbitration clause in the Agreement.

5. Mr. Moin Qamar learned Counsel for the appellant has contended that the dispute as raised in the Suit by the appellant is outside the scope of the Arbitration clause of the Agreement, whereas, even the termination letter dated 15.5.2009 could not have been issued as the Agreement dated 29.10.2006 as mentioned at Serial No. 1 in Para 2 hereinabove, was valid till 31.12.2009. Learned Counsel further contended that by mutual understanding, the Agreement listed at serial No. 2 continued to be in existence, despite the fact that it had expired on 31.12.2006. Learned Counsel further, contended that the learned Single Judge has failed to appreciate the provisions of Section 4(1) of the Ordinance, 2009, as according to the learned Counsel only those disputes could be referred for Arbitration, which are covered by the Arbitration Agreement between the parties and not otherwise. Learned Counsel further submitted that since the respondents had failed to provide requisite facilities to the appellant for commencing Generator assembling

plant and the dispute in this regard was clearly outside the ambit of the Agreement between the parties, hence; could not be referred to Arbitration. Learned Counsel further contended that the learned Single Judge in the impugned order has failed to respond to the objections raised by the appellant, with regard to filing of an application by the respondents, whereby the respondents had submitted themselves to the jurisdiction of this Court. Learned Counsel further contended that the Ordinance, 2009 has since expired on 26.11.2008 after four months of its issuance in terms of Article 89 of the Constitution of Islamic Republic of Pakistan, as it was never made an Act of the Parliament during this period, whereas, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011,("Act of 2011") was enacted on 19.7.2011, therefore, the matter could not have been referred to Arbitration by the learned Single Judge in terms of the Ordinance, 2009, which had already expired during pendency of the proceedings before the learned Single Judge. Learned Counsel further contended that the word "*shall*" used in Section 4 of the Ordinance, 2009, is merely directory in nature, and the discretion of the Court cannot be taken away by such legislation. Learned Counsel further submitted that provisions of Section 1(3) of the Act of 2011 are not applicable to the case of the appellant, as in the instant matter, the proceedings had already commenced and were pending, whereas, the said provision would be applicable to cases in which no proceedings had been initiated. Learned Counsel further submitted that before referring the matter for Arbitration in terms of Sections 3 & 4 of the Ordinance, 2009, the Court has to first satisfy itself as to whether, matter is required to be referred for Arbitration in terms of the agreement between the parties and the Arbitration law, and shall not refer each and every dispute to Arbitration as a matter of routine. In support of his contention the learned Counsel has relied upon the cases reported as *Messrs Tanscomerz AG Vs.*

Messrs Kohinoor Trading (Pvt.) Ltd. and 2 others (1988 CLC 1652), Muhammad Arif and another Vs. The State and another (1993 SCMR 1589), Messrs Travel Automation (Pvt.) Ltd. Vs. Abacus International (Pvt.) Ltd (2006 CLD 497), Province of Punjab through Secretary Health Department Vs. Dr. S. Muhammad Zafar Bukhari (PLD 1997 SC 351), M/s Pakistan Insurance Corporation, Karachi Vs. P. T. Indones Oriental Lines and 4 others (PLD 1977 Karachi 562) and an unreported judgment of this Court in HCA No. 237 of 2008.

6. Conversely Mr. Sajid Zahid learned Counsel appearing on behalf of the respondents contended that the dispute between the parties is in respect of the Agreement dated 29.10.2006 listed at Serial No. 1 at Para 2 hereinabove, which was valid till 31.12.2009 and even on the basis of this Agreement no further rights accrued to the appellant after expiry of the Agreement on 31.12.2009, whereas, the appellant has not been able to produce any supporting documents to substantiate that any further renewal of the Agreement had taken place between the parties. Learned Counsel further contended that the objections raised on behalf of the appellant with regard to submitting to the jurisdiction of this Court by filing an interlocutory application is misconceived, as the same does not amount to participation in the Court proceedings, and was only to the extent that the interim orders passed against the respondents be modified. Learned Counsel further submitted that the Agreement dated 29.10.2006 was a Non-Exclusive Agreement and after its expiry could not have been renewed by mere conduct of the parties, whereas, the Agreement itself provided that it could only be renewed in writing by the respondents; hence, does not entitle the appellant to seek enforcement of an Agreement which is no more in field. Learned Counsel further submitted that the appellant had relied upon a report published

in a Newsletter and has taken the same as a promise on behalf of the respondents to continue business with them, whereas, the same cannot be termed as a binding Agreement between the parties so as to seek any enforcement of the same under the law. Learned Counsel further submitted that it is now a settled law that mere filing of an interlocutory application, does not disentitle the party from seeking referral of the dispute to Arbitration, as it does not amount to participation in the Court proceedings and is only to safeguard its interest to a very limited extent. Learned Counsel further contended that insofar as the objection raised on behalf of the appellant to the effect that the dispute has to be stated in the application filed before the Court for stay of proceedings is concerned, the same is not valid as under the Act of 2011, it is no more required to be stated in the application and such condition was only applicable under the Arbitration (Protocol and Convention) Act, 1937 ("1937 Act"). Learned Counsel further submitted that when the Suit was filed by the appellant, the Ordinance 2009 was in vogue, whereas, when the impugned order was passed the Act of 2011 had been promulgated and therefore, the objection with regard to expiry of the Ordinance 2009, is not tenable, as a valid law / Act was in existence during the entire period of dispute between the parties. Per learned Counsel, the case of the respondents is fully covered by Section 1(3) of the Act of 2011, as it applies to all Agreements between the parties in this regard, whereas, the appellant has not disputed that there was an Agreement between the parties; therefore, the objection raised on behalf of the appellant in this regard is misconceived. Learned Counsel further contended that the use of the word **"shall"** has an importance attached to it, as Pakistan is a signatory to various International Conventions including the New York Convention on Arbitration, which requires that the matters wherein disputes have occurred between the parties, are to be governed by the Arbitration clauses / Agreements, therefore, use of

word **"shall"** in the Act of 2011, is mandatory and not directory as suggested by learned Counsel for the appellant, whereas, it completely ousts the jurisdiction / discretion of the Court in such matters. Learned Counsel further submitted that insofar as the termination letter dated 15.5.2009 is concerned, the same was issued by the respondents in view of clause 9.3 of the Distribution Agreement dated 29.10.2006 which provided a period of six months for such termination which was a sufficient period of time for the appellant to have known about the intention of the respondents. Per learned Counsel, Court do not enforce any such Agreement which already had expired, and for which, no extension has been reached upon between the parties as required under the Agreement itself, therefore, according to learned Counsel, the entire Suit of the appellant is liable to be dismissed as it has become in-fructuous. Learned Counsel further contended that the appellant has itself made an admission in its plaint that the Distribution Agreement dated 29.10.2006 governs the entire commercial relationship between the parties and that the Suit was filed only in respect of the disputes arising under the Distribution Agreement, and moreover, the language employed in respect of Arbitration in the "Distribution Agreement" and the "Dealership Agreement" are of the "widest import and amplitude" and would cover all the disputes, therefore, the contention of the appellant that the dispute raised in the Suit by the appellant is not covered by the Arbitration Agreements, is belied by appellant's own submissions. Learned Counsel further submitted that insofar as the objections raised on behalf of the appellant that at the most the dispute between the parties would be governed by the 1937 Act, the same is misconceived, for the reason that, when the Suit was filed by the appellant, the 2009 Ordinance, was in field, whereas, when the application for stay of Suit was decided, the Act of 2011 had already been enacted; hence, under no circumstances the 1937 Act, was applicable in the instant matter. Learned

Counsel for the respondents also referred to Section 1(3) of the Act of 2011, and has contended that Section 1(3) of the Act of 2011, is applicable on all the Agreements between the parties, therefore, without prejudice to the fact that whether the Ordinance, 2009 was in field or not, Act of 2011, by itself is applicable in respect of the Agreement between the parties. Learned Counsel also relied upon Section 10 of the Act of 2011 and contended that the repeal of the 1937 Act, has been saved through Section 10 of the Act of 2011 and since the Act of 2011 was in vogue when the impugned order was passed, the objection raised on behalf of the appellants in this regard is misconceived and cannot be sustained. In support of his contention the learned Counsel for the respondents has relied upon the cases of *Lahore Stock Exchange Limited Vs. Fredrick J. Whyte Group (Pakistan) Ltd. and others (PLD 1990 SC 48), Renusagar Power Co. Ltd. Vs. General Electric Company and another (AIR 1985 SC 1156), Port Qasim Authority, Karachi Vs. Al-Ghurair Group of Companies and 3 others (PLD 1997 Karachi 636), Dar Okaz Printing and Publishing Ltd. Liability Company Vs. Printing Corporation of Pakistan Pvt. Ltd. (PLD 2003 SC 808), Novelty Enterprises Ltd, Tariqabad, Mirpur through General Manager Vs. Deputy Collector, Excise& Taxation / Sales Tax Officer and 5 others (1993 CLC 1165), M/S Royal Group Vs. Messrs Semos Pharmaceuticals (Pvt) Ltd. 2011 CLC 235, Mst. Surriya Rehman Vs. Siemens Pakistan Engineering Company Ltd. (PLD 2011 Karachi 571), Farm and Foods International Vs. Hamid Mahmood (2006 CLC 492), Muhammad Ilyas Vs. Managing Director, Suit Northern Gas Pipelines (1998 CLC 600), Messrs Pakistan Insurance Corporation, Karachi Vs. P.T. Indones Oriental Lines and 4 others (PLD 1977 Karachi 562), Akbar Cotton Mills Ltd. Vs. M/S Ves /Ojuanojo Objedinenije Tech/Amesh Export and another (1984 CLC 1605), Messrs Transcomerz AG VS. Messrs Kohinoor Trading (Pvt) Ltd. and 2 others (1988 CLC 1652), M/s Manzoor Textile Mills Ltd. Vs. Nichimen Corporation*

and 2 others (2000 MLD 641), Hitachi Limited Vs. Pupali Polyester and others (1998 SCMR 1618), Metropolitan Steel Corporation Ltd. Vs. Macsteel International U.K. Ltd. (PLD 2006 Karachi 664), Messrs Travel Automation (Pvt.) Ltd. Vs. Abacus International (Pvt.) Ltd. (2006 CLD 497), Far Eastern Impex (Pvt) Ltd. Vs. Quest International Nederland BV and 6 others (2009 CLD 153), Gas Authority of India Ltd. Vs. SPIE CAPAG, S.A. and others (AIR 1994 Delhi 75), General Electric Company Vs. Renusagar Power Company (1987 Indlaw SC 28792)and Banque Indosuez Belgium and others VS. Haral Textile Ltd. (1998 CLC 583).

7. We have heard both the learned Counsel, perused the record and the case law relied upon by the parties. By consent of both the learned Counsel, instant High Court Appeal is being finally disposed of at Katcha peshi stage.

8. Perusal of record shows that the appellant, who is engaged in the business of import, distribution and after Sales Service of various types of Engine and Power Generating Equipment, in order to expand its business operations, entered into three different Agreements with the respondents namely Distribution Agreement dated 29.10.2006 (effective from 1.1.2007), Distribution Agreement dated 21.2.2005 and Dealership Agreement dated 21.2.2005.The Agreement dated 29.10.2006 as expressly detailed in Para 2 hereinabove, was in respect of the entire commercial relationship between the appellant and the respondents, with regard to supply and sale of generators including engines and all other related equipment. It further appears from the record that the respondents served a termination letter dated 15.5.2009 to the appellant, whereby, the appellant was put to notice with regard to termination of the said Agreement which was valid till 31.12.2009. This termination notice was challenged by the appellant by filing a Suit No. 184 of 2009 in which an application under Order 39 Rule 1 & 2 CPC was also filed and after passing of

Status Quo order on such application and service of notice, the respondents No. 2 to 4 have filed application, under Section 3 & 4 of the Ordinance, 2009, for stay of the Suit, on the ground that the Distribution Agreement dated 29.10.2006 (at S. No. 1 in Para 2) and Dealership Agreement dated 21.2.2005 (at S. No.3 at Para 2) read with letter dated 2.12.2008, required that the matter was to be referred for Mediation and / or Arbitration between the parties and the Suit filed by the appellant was in clear violation of the Dispute Resolving Mechanism. The learned Single Judge through the impugned order dated 7.9.2012, has stayed the proceedings of the Suit by referring the dispute between the parties for Arbitration. The main ground urged on behalf of the appellant is that the matter / dispute which has been raised in the instant Suit by the appellant, is outside the scope of the Arbitration Clause of the Agreement in question. The main crux of the arguments addressed by the learned Counsel for appellant, is that in view of subsection (1) of Section 4 of the 2009 Ordinance, only such disputes can be referred to Arbitration, which are covered by the Agreement between the parties and not otherwise. The learned Counsel has also laid emphasis that the learned Single Judge has not examined this aspect of the matter, that whether or not the dispute was covered by the Arbitration Agreement between the parties and the matter could only be referred for Arbitration, once such aspect had been examined and dilated upon. In addition to this, there are number of other legal as well as factual objections which have been raised on behalf of the appellant and to have a clear and better understanding, it would be advantageous to formulate the controversy between the parties in the following manner which needs to be decided by this Court in the instant appeal:-

> "1) Whether the dispute between the parties is outside the scope of the Agreement, and whether the same could be referred for Arbitration in terms of the said Agreement?

2) Whether filing of application for modification of Status Quo order after expiry of Agreement on 31.12.2009 by the respondents amounts to submitting to the jurisdiction of this Court and whether such filing of application disentitles them to seek stay of the Suit pending Arbitration between the parties?

3) Whether the dispute between the parties is to be governed by the Ordinance, 2009 or by the 1937 Act or by the Act of 2011?

4) Whether after promulgation of the Act of 2011 and the use of the words **"shall"** in section 3 any discretion is left with the Court for refusing to stay the Suit, pending Arbitration?

5) Whether the provision of Section 1(3) of the Act 2011 is applicable to the Agreement between the parties?

6) Whether the provisions of Section 202 of the Contract Act are attracted in respect of the Dealership Agreement dated 21.2.2005 which expired on 31.12.2009?

9. Insofar as proposition No. 1 is concerned, the primary contention of the learned Counsel for the appellant is that the dispute as raised in the Suit filed by the appellant is outside the scope and purview of the Agreement and the Arbitration clauses as contained therein, and further, the evidence with regard to the dispute is entirely available in Pakistan as it relates to the properties connected with the dispute, therefore, the matter could not have been referred for Arbitration by the learned Single Judge. It appears that insofar as the relationship between the appellant and the respondents is concerned, the same is admittedly, covered by three Agreements between them, more specifically stated in Para 2 hereinabove. The Agreement listed at serial No. 1 dated 29.10.2006 and effective from 1.1.2007 was signed between the appellant and respondent No. 2 and was valid till 31.12.2009 and has been referred to as a "Distribution Agreement". The Agreement listed at serial No. 2, dated 21.2.2005 signed between the appellant and respondent No. 3, is also a "Distribution Agreement" which was valid till 31.12.2006, whereas, the Agreement mentioned at Serial No. 3 is a “Dealership Agreement” dated 21.2.2005 signed between the appellant and the respondent No. 1, which was initially valid till 31.1.2006, and was thereafter renewed till 31.12.2009. The primary cause of action for the appellant to file Suit before the learned Single

Judge of this Court is in fact the termination letter dated 15.5.2009, whereby, the respondents, through the legal department of the parent company have shown intention to terminate the Agreement(s) mentioned at Serial No. 1 in Para 2 hereinabove, which was valid till 31.12.2009, whereas, the Agreement mentioned at Serial No. 2, stood expired on 31.1.2006 and the Agreement listed at Serial No. 3, which was initially valid till 31.12.2006 and was subsequently renewed till 31.12.2009. The appellant in the plaint filed before the learned Single Judge has prayed for passing a decree, permanently restraining the respondents from terminating the existing contractual Agreements between the parties, and particularly the Distribution Agreement dated 29.10.2006 effective from 1.1.2007 and valid till 31.1.2009 (Agreement at Serial No. 1) as well as from discontinuing the performance of the continued contractual arrangements for supply of Cummins Engines (diesel and gas), Cummins power generation sets, Cummins power electronic equipment, Cummins automatic transfer switches, Cummins switchgears, Cummins paralleling control system and Cummins networking and ancillary equipment etc. The appellant had also prayed in the plaint to pass a decree permanently restraining the defendant No. 4 from giving effect to the termination letter dated 15.5.2009 which was served on the appellant, through defendant No. 4, with whom according to the appellant, there was no commercial dealing with regard to the Agreement(s) between the parties. On a meticulous examination of the Agreement dated 29.10.2006 (Distribution Agreement) available as annexure "F-1" at page 811 of the file, it appears that in clause 11.4 the Arbitration clause has been incorporated in the following terms:-

> "11. LAW AND DISPUTES
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> 11.1 Law: This Agreement is governed in all respects by English law and is subject to the exclusive jurisdiction of the English Courts.

> 11.2 Disputes among Cummins Distributors: In the event of any dispute between Distributor and any other distributor or dealer of Cummins Power Generation or its affiliates, all facts touching on such dispute shall be submitted promptly to Cummins Power Generation in writing, and the decision of Cummins Power Generation transmitted in writing to the parties involved shall be final and binding on said parties.
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> 11.3 Mediation: The parties will attempt to resolve any dispute between them which results from this Agreement in a spirit of co-operation. Accordingly, the parties agree to engage in good faith negotiation to reach a rapid and equitable solution. If the parties are unable to resolve a dispute through direct negotiation they will use the services of a mediator appointed by the Centre for Dispute Resolution ("CEDR") in London. The rules of CEDR will apply to that mediation. If the mediation fails to reach an equitable solution to the dispute within 45 days after the request by either party to submit the dispute to mediation, then the dispute will be settled exclusively by final and binding Arbitration initiated by either party.
>
> 11.4 Arbitration: Any question or dispute arising out of or in connection with this Agreement shall be referred to a panel of three arbitrators in London. Each party shall nominate one arbitrator and the third arbitrator will be appointed by Agreement between the two nominated arbitrators. Failing Agreement, the third arbitrator will be appointed by the President for the time being of the London Chamber of Commerce. The UNCITRAL rules will govern the Arbitration. The decision of a majority of the arbitrators shall be final and binding upon the parties."

10. From perusal of the above Medication / Arbitration clause, it appears that in the Agreement in question, it has been provided that any question or dispute arising out of, or in connection with this Agreement, shall be referred to a panel of three Arbitrators in London, wherein each party shall nominate an Arbitrator and the third Arbitrator will be appointed by Agreement between the two nominated Arbitrators, and failing Agreement, the third Arbitrator will be appointed by the President for the time being of the London Chamber of Commerce, whereas the UNCITRAL rules will govern the Arbitration. Insofar as the other two Agreements both dated 21.2.2005 and valid till 31.1.2006 and 31.12.2009 respectively, are concerned, both of these Agreements have identical Arbitration clauses and there appears to be no dispute that all the three Agreements included Arbitration clauses in the same terms. Therefore, it appears that the contention of the learned Counsel for the appellant that the

instant Suit and the dispute raised therein is not in respect of the Agreement(s) in which the Arbitration clause has been incorporated, is devoid of any merits, and being misconceived, is hereby repelled, as the entire case of the appellant is based on these three Agreements, all of which contain the Arbitration clause, hence the dispute raised in the Suit cannot prima facie be held to be outside the ambit of Agreement(s). The appellant has itself made a prayer clause in the Suit with regard to the Agreement dated 29.10.2006, which contains an Arbitration clause, therefore, the contention of the learned Counsel for the appellant that while passing the impugned order the learned Single Judge has failed to consider and apply its mind, as to whether the dispute raised in the Suit could have been referred to Arbitration or not does not seems to be appropriate and is not supported by any document or the record placed before us in the instant appeal. Once a party comes before a Court and seeks any relief with regard to an Agreement by making a specific prayer and if such Agreement contains an Arbitration clause, then it is not required by the Court to see and distinguish that as to whether the dispute being raised or agitated by that party, is specifically covered by the Agreement itself or not. In fact such objection, if any, can be validly raised before the Arbitrators, who are competent enough to adjudicate and see, as a preliminary objection, as to whether the matter referred for Arbitration, is in fact covered by the Agreement itself or not. In view of such position, we are of the view that in so far as point No. 1 is concerned, the contention raised on behalf of the appellant is misconceived and is hereby repelled.

11. The second proposition / issue as stated herein above is as to whether the conduct of respondents, whereby, an application bearing CMA No. 12255 of 2011 was filed by them, seeking modification of the status quo order passed by a learned Single Judge of this Court on 22.12.2009, would amount to

having submitted themselves to the jurisdiction of this Court and consequently debarred from praying for stay of Suit pending Arbitration, on the basis of Agreement between the parties. The learned Counsel for the appellant while making his submissions in this regard, has contended that the respondents after filing aforesaid application, seeking stay of the proceedings in the Suit, cannot file any further applications before this Court and if such applications are filed, then it amounts to submitting to the jurisdiction of this Court for adjudication of the dispute on merits, and thereafter cannot pursue the application praying stay of the proceedings before this Court. Whereas, the learned Counsel for the respondents contended that such objections raised on behalf of the appellant is misconceived, as neither any written statement was filed by the respondents nor they had participated in any other proceedings before this Court, whereas, the application bearing CMA No. 1225 of 2011 was only to the extent of seeking modification of the Ex-parte order of status quo passed on 22.12.2009, as according to the learned Counsel for the respondents, the Agreement between the parties on the basis of which the ad-interim orders were obtained, stood expired on 31.12.2009 and no further remedy for specific performance and or enforcement of Agreement was available to the Appellant. From perusal of the record it appears that the appellant had obtained the status quo order at the time when the termination letter dated 15.5.2009 was issued by the respondents, and at that point of time, the Agreement on the basis of which the Suit was filed by the appellant, was still valid, whereas, the termination letter was issued by the respondents much prior to the expiry of the Agreement as required under clause 9.3 of the Distribution Agreement, which provides for a period of six months enabling the appellant, enough time to dispose of any stock / material and to take further steps so as not to use the name of the respondents any more. It further appears that the order of status quo continued after 31.12.2009, for one reason

or the other, whereas, the Agreement on the basis of which the appellant had sought relief and obtained the status quo order, no more existed, nor it is the case of the appellant that the said Agreement stood renewed either by conduct of the respondents, or in writing, as required under the Agreement itself. In such a situation the respondents were compelled to file application bearing CMA No. 1225 of 2011, whereby, it was prayed that the order of status quo be modified, as the appellant under the garb of the status quo order, was and still continuing to use respondent's product(s) / name, despite the fact that the Agreement stood expired and the respondents were in the process of appointing any other person as Distributor / Dealer, to act further to safeguard their business interest(s) in Pakistan. In our opinion, in such a situation, the respondents were justified in filing such application before this Court, seeking modification of the order of status quo, whereas, such step taken by them, does not amount to submitting to the jurisdiction of this Court which could debar them from seeking further relief in terms of Section 3 & 4 of the Act of 2011, for seeking stay of the proceedings before the learned Single Judge of this Court. It is further noticed that while hearing this application, bearing CMA No. 1225 of 2011, the learned Single Judge vide order dated 9.4.2010 has been pleased to modify the order of status quo, to the extent, that the respondents may continue with their operation of business, however, such concession is given to the respondents, subject to result of the Suit pending before the Single Judge of this Court. Therefore, we are of the opinion that filing of application for modification of Status Quo order before the learned Single Judge of this Court, in the fact and circumstances of the instant case, cannot be termed as participation in the Suit proceedings on merits of the case, and is only to the extent of seeking modification of the Ex-parte interim order; hence, does not debar the respondents from seeking further remedy, whereby

they have sought stay of the proceedings, pending Arbitration between the appellant and the respondents. This proposition is answered accordingly.

12. The third proposition as stated hereinabove is to the effect, that whether the dispute between the parties is either to be governed under the Ordinance 2009, or under the 1937 Act or under the Act of 2011. Insofar as this issue is concerned, it is an admitted position that when the respondents filed application bearing CMA No. 1028 of 2010, seeking stay of the Suit and for referral of the dispute to Arbitration, the 2009 Ordinance, was in field and the application for staying the proceedings was filed under Section 3 & 4 of the Ordinance 2009. There is no dispute with regard to the issue that the Ordinance 2009 lapsed after a period of four months as the same was not placed before the Parliament for its enactment as an Act. This Ordinance was subsequently re-promulgated on 20.7.2010, and thereafter on 9.7.2011 the Act of 2011 was promulgated. The Ordinance of 2009 provided for the enforcement of the Arbitration Agreements through Section 4, whereas the repeal and saving clause was incorporated in Section 10 of the 2009 Ordinance. It would be advantageous to refer to the provision of Section 4 and 10 of the Ordinance 2009 which reads as under:-

> "**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 concern that matter.
>
> (2) On an application under sub-section (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."
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> Section 10 of the Ordinance XXXIII of 2009, which deals with repeal and saving, is as under:-
>
> "**10. Repeal and saving.---**(1) The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937) (hereinafter in this section referred to as "The Act") is hereby repealed.
>
> (2) Notwithstanding the repeal of the Act, it shall continue to have effect in relation to foreign arbitral awards made---

> (a) before the date of commencement of this Ordinance; and
> (b) within the meaning of section 2 of the Act which are not foreign arbitral awards within the meaning of section 2 of this Ordinance."

13. From perusal of the provision of Section 4 of the Ordinance 2009 as referred to hereinabove, it appears that 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 parties to the proceedings, apply to the Court, in which the proceedings have been brought, to stay the proceedings, insofar as they concern the matter and on filing of such application, 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. Similarly Section 10 provided for repeal and saving of the 1937 Act, which stood repealed by the Ordinance 2009, however, it provided in sub-section (2) of Section 10, that notwithstanding the repeal of the Act, it shall continue to have effect in relation to foreign arbitral awards made before the date of commencement of this Ordinance and within the meaning of Section 2 of the Act, which are not foreign arbitral awards within the meaning of Section 2 of this Ordinance. From a meticulous examination of the provisions of Ordinance 2009, and the settled proposition of law on the subject of expiry of Ordinance after a period of four months from the date of its issuance, for having not either been placed before the Parliament, or approved by the Parliament, as required under the Constitution, the position which emerges is, that on the expiry of such Ordinance, the Act which stood repealed through the said Ordinance, stands revived in its original form. On the touchstone of this settled proposition of law, in the given facts and circumstances of the instant case, it appears that when the application for stay of proceedings was filed by the Respondents, the Ordinance 2009 was in field, and as soon as the Ordinance expired, the 1937 Act stood revived and

was applicable. Whereas subsequently the Act of 2011 has been enacted and Section 4 and 10 of the said Act are pari materia to Section 4 & 10 of the Ordinance 2009, whereas the Act of 2011 further provides that it repeals the 1937 Act. Therefore, when the application filed under Section 3 & 4 of the Ordinance, 2009 was decided by the learned Single Judge, the Act of 2011, was validly enacted and in field, hence; the dispute between the parties is governed by the Act 2011, and merely for the fact that the application was titled and filed under the Ordinance 2009, would not have any effect or bearing so as to require the respondents to withdraw the said application and re-agitate and file the same under the Act of 2011. In our view, the learned Single Judge has correctly dealt with the application filed under the Ordinance, 2009 as an application under the Act of 2011, as mere change in the nomenclature of Ordinance / Act, would not, ipso facto mean that the application was liable to be dismissed. The other point proposition No. 5 is also somewhat equally related to and inter-linked with proposition issue under discussion, and we would also like to decide the same along with this proposition. The Act of 2011 in Section 1(3) provides that it shall apply to Arbitration Agreements made before, on or after the date of commencement of this Act. It would be advantageous to reproduce the relevant provisions of the Act of 2011 which reads as under:-

> **1. Short title, extent, application and commencement.**—(1) This Act may be called the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act, 2011.
> (2) It extends to the whole of Pakistan.
> (3) It shall apply to Arbitration Agreements made before, on or after the date of commencement of this Act.
> (4) It shall not apply to foreign arbitral awards made before the 14th day of July, 2005.
> (5) It shall come into force at once.

14. In our view, even otherwise the case between the appellant and the respondents is with regard to the Agreement which contains Arbitration clause, and whether the application was filed under the Ordinance, 2009 or not

is immaterial to the extent, as Section 1(3) of the Act 2011, specifically provides that it shall be applicable for all the Arbitration Agreements made before, on or after the date of commencement of this Act, i.e. 19.7.2011, therefore, even otherwise the dispute between the parties was required to be governed by the Act of 2011, as it has been made applicable to all such Agreements, whether made before or after the promulgation of the Act. In support of this contention it would be advantageous to refer to the case of ***Novelty Enterprises Limited, Tariqabad, Mirpur through General Manger Vs. Deputy Collector, Excise and Taxation / Sales Tax Officer and 5 others (1993 CLC 1165)***:-

> "There is yet another aspect of the case. The Azad Jammu and Kashmir Excises and Salt Act, 1974, which repealed the Salt Act, 1944, was not repealed by the Ordinance known as Central Excises and Salt (Adaptation) Ordinance 1978. This Ordinance was re-enacted twice but there is no provision in any of these Ordinances to the effect that the Azad Jammu and Kashmir Excises and Salt Act, 1974 would stand repealed. It is settled principle of law that if a permanent legislation is repealed by a temporary legislation such as by an Ordinance, that revives when the Ordinance expires or is repealed. In the instant case, Ordinance LIX of 1979, which was a re-enactment of Ordinance LXV of 1978, was repealed by Ordinance XCVII of 1979 and the Act VII of 1979 was promulgated by the Azad Jammu and Kashmir Council. Thus, when Ordinance LIX of 1979 was repealed, the Azad Jammu and Kashmir Excises and Salt Act, 1974 revived. Therefore, even if it is Ordinance 1978 (Ordinance LXV of 1978) or any other subsequent Ordinance on the subject had the effect of repealing the Azad Jammu and Kashmir Excises and Salt Act, 1974, by implication, the said Act would be deemed to have revived when the said Ordinance came to an end or in other words the Ordinance LIX of 1979 was repealed. There is a ring of authorities on the point that if temporary legislation repeals a permanent legislation the permanent legislation would revive when the life of temporary legislation, i.e. an Ordinance, comes to an end or the same is otherwise repealed. Reference may be made to Crown v. Ghulam Muhammad (PLD 1950 Lah. 479), Arbar Muhammad Hasham Khan v. The Crown (PLD 1953 Pesh. 72), Abdur Rashid v. the State (PLD 1957 Lah.400), the Sargodha-Bhera Bus Service v. The Province of West Pakistan (PLD 1958 Lah. 77), the State v. Muhammad Sharif (PLD 1960 Lah. 236) and Messrs Nau-Asio Trading Co. Ltd. v. Sh. Saeed Ahmad, Civil Judge, III Class (PLD 1966 Lah. 269.)

15. Therefore, we are of the view that the contention of the learned Counsel for the appellant to the extent that the dispute is required to be governed under the 1937 Act, is misconceived and is hereby repelled and it is held that since

the Act of 2011 had been promulgated and validly enacted at the time when the impugned order was passed by the learned Single Judge and the 1937 Act, stood repealed, the dispute between the parties is to be governed by the provisions of the Act of 2011.

16. This brings us to the fourth proposition that as to whether after promulgation of the Act of 2011 and the use of the words "shall", in Section 3 of the Act of 2011, any discretion is left with the Court for refusing to stay the proceedings in the Suit, pending Arbitration. The learned Counsel for the Appellant, in this regard has heavily relied upon the case of ***Transcomerz AG vs Kohinoor Trading (Pvt) limited and 2 others (1988 CLC 1652)*** and has contended that the learned Single Judge while passing the impugned order has seriously erred in law by not considering the aforesaid judgment of this Court which was delivered by a Division Bench of this Court and instead had relied upon a decision of a learned Single Judge of this Court in the case of ***Travel Automation (Pvt) Limited vs. Abacus International (Pvt) Limited & 2 others (2006 CLD 497)*** which per learned Counsel, was even otherwise per in-curiam. It is the case of the learned Counsel for the Appellant that since a Division Bench of this Court had already held, while interpreting Section 3 of the 1937 Act, the word "shall" herein can be read as "may" and the discretion of the Court cannot be taken away, therefore the impugned judgment to this extent is bad in law and cannot be sustained. The judgment in the case of ***Transcomerz AG (Supra)*** has dealt with the provision of Section 3 of the 1937 Act, and it would be advantageous to refer to the said provision which reads as under:

> **3. Stay of proceedings in respect of mattes to be referred** to Arbitration.—Notwithstanding anything contained in the Arbitration Act, 1940 or in the /Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an Agreement which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under

> him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respective any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, unless satisfied that the Agreement or Arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

In the aforesaid judgment, the learned Division Bench while hearing an appeal against the order of a learned Single Judge, whereby the application for referring the matter for Arbitration had been dismissed, concurred with the findings of the learned Single Judge and had dismissed the Appeal. On a meticulous examination of the entire judgment, it appears that the main question which was dealt with by the learned Division Bench in that case was with regard to the use of the words *"a submission made in pursuance of an Agreement"* used in Section 3 of Act VI of 1937 and the learned Division Bench came to the conclusion that these words signify not merely an Agreement to Arbitration, but submission made in pursuance of Agreement to Arbitration to which protocol set forth in First Schedule applies. However, this issue is not in dispute nor has been raised before us. The second issue, and which appears to be a secondary issue in that matter, considering the discussion on it, was with regard to the use of the words "shall" in Section 3 of the 1937 Act, and the Court came to the following conclusion:

> 6. As regards the second submission of Mr. Vellani that the learned Single Judge also erred in holding that the word "shall" use in Section 3 of the Act is to be construed as "may" and , therefore, the Court has discretion either to stay or not to stay a suit, it may be observed that he has referred to the case of Societe Anonyme Hersent v. United Towing Co. Ltd and another, reported in The Weekly Law Reports, 1962 Volume 1, page 61 in which Karminski, J, while construing section 4(2) of the Arbitration Act, 1950 which relates to the protocol set out in the First Schedule held that the Court had no jurisdiction to refuse a stay where, as in the case, the Arbitration clause was governed by protocol.
>
> However, a contrary view was taken by Fakhruddin G. Ebrahim, J in the case of Messrs Pakistan Insurance

> Corporation, Karachi v P.T. Indones Oriental Lines and 4 others reported in P L D 1977 Karachi 562.
>
> It is true that under section 3 of the Act it has been provided that unless the Court is satisfied that the Agreement for Arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, it shall make an order staying the proceedings. It has, therefore, been contended by Mr. Vellani that the word "shall" leaves no discretion with the Court as to the stay of the suit if the conditions contained in Section 3 of the Act are fulfilled. It cannot be denied that the word "shall" is interchangeable with the word "may" and therefore if the context of the relevant provision of a statute demands the word " shall" can be construed as " may" and vice versa. In the present case we are inclined to agree with the view taken in the above Karachi case of 1977 (Pakistan Insurance Corporation, Karachi v. P.T. indones Oriental Lines and 4 others) that the word, " shall " in context of section 3 of the Act conveys the meaning of the word "may" and , therefore, the Court has discretion. We may observe that the Court always leans to an interpretation of a provision of a statute which may preserve the jurisdiction of the Court instead of ouster.
>
> 7. We are inclined to agree with Mr. Nasim Farooqui that the learned Single Judge in the instant case has exercised discretion properly and, therefore, it does not call for interference by this Court, particularly, keeping in view the factum that, whether respondent No.1 had agreed to the above-quoted clause 16 of the confirmation letter is itself in doubt at this stage and cannot be resolved without evidence.

17. From perusal of the findings of the learned Division Bench as referred to hereinabove, it may be observed that the crux of the findings in the aforesaid case is dependent on two factors. One being the reliance on the judgment of a learned Single Judge of this Court in the case of ***Pakistan Insurance Corporation, Karachi vs P.T. Indones Oriantal Lines and 4 others (PLD 1977 Karachi 562)*** and the other, that the Court always leans to an interpretation of a provision of a statute which may preserve the jurisdiction of the Court instead of its ouster. Insofar as reliance on the case of ***Pakistan Insurance Corporation (Supra)*** by the learned Division Bench is concerned, with utmost respect to the learned Division Bench, the facts of that case were entirely and materially different with the case in hand with the learned Division Bench. In the case of ***Pakistan Insurance Corporation (Supra)***, an application was filed under Section 3 of the Arbitration (Protocol

and Convention) Act, 1937, by defendant No. 5, who was in fact a shipper of certain goods to the buyer namely Trading Corporation of Pakistan, whereas the cargo had been short shipped and the other defendants were carriers of the said cargo. It was the case of Defendant No.5 that since they had an Agreement with the buyer (Trading Corporation of Pakistan), wherein the Arbitration clause provided for settlement of any dispute arising there from in accordance with the Rules of F.O.S.F.A. Contract No.60, including the clause of the domicile. The learned Judge was of the opinion that since the other defendants were not party to such a contract, at best the defendant No.5 could ask for stay of the Suit against themselves and not others which would mean that the Suit will be tried piecemeal, for while the Suit against Defendant No.5 will be stayed, it will continue against the rest of the defendants. The learned Judge further observed that such a course would be most undesirable and therefore, unless compelled by cogent reasons [is] to be avoided. To be exact the learned Single Judge held as under:

> This is an application under section 3 of the Arbitration (Protocol and Convention) Act, 1937 by the defendant No.5, the consignors for stay of the suit filed by the appellant insurance company in which the other defendants are the carriers of the cargo allegedly short shipped or short landed. The case of the respondent No.5 is that under the contract for the supply of the cargo in question between them and the buyer, the Trading Corporation of Pakistan, the Arbitration clause provides for settlement of any dispute arising therefrom in accordance with the Rules of F.O.S.F.A. Contract No.60 including the clause of the domicile. Since the other defendants to this suit are not parties to this contract at best the defendant No.5 can ask for stay of the suit against themselves and not others which would mean that the suit will be tried piecemeal for while the suit against defendant No.5 will be stayed it will continue as against the others defendants. Such a course is most undesirable and, therefore, unless compelled by cogent reasons to be avoided. The argument of Mr. Jan Muhammad Dawood, the learned counsel for defendant No.5 was that stay under said section 3 was not within the discretion of the court but mandatory for the words used in the section are “shall make an order staying the proceedings” which words were sought to be contrasted by the learned counsel with reference to section 34 of the Arbitration Act, 1940 which by the use of the word “may” give discretion to the Court to make an order of stay of the proceedings. The use of word “shall” or “may” by itself is not decisive. These words have long ceased to be a conclusive or unerring index of the intention of the Legislature as

> representing the permissive or compulsive nature of the act intended to be done. On principle I am unable to understand why an Agreement to go to a foreign Arbitration must be considered more sacred than an Agreement to go to Arbitration under Arbitration Act, 1940. It will be noticed that in order to enable a party to obtain a stay under section 34 he has to show that he was ready and willing to do all things necessary for the proper conduct of the Arbitration while section 3 makes no such provision. It will follow therefrom that if the word "shall" in section 3 gives a mandatory meaning then notwithstanding a party's unwillingness to proceed with the Arbitration or to cooperate in the Arbitration, such a party can obtain as a matter of right a stay from the Court making it difficult if not impossible to resolve the disputes between the parties. It is a well-established rule of interpretation that the Court's jurisdiction is not to be easily ousted. If the meaning contended by the learned counsel for the defendant No.5 is given to section 3 the Court's discretion in the matter will be subject to Agreement between the parties which could not have been the intention of the Legislature. In my view, therefore, the prevent the ouster of the ordinary jurisdiction of the Court by Agreements of parties and Court will, therefore, have power to refuse stay of any application under the provisions of section 3 though other conditions of the section are satisfied.

18. From perusal of the entire facts and the conclusion drawn by the learned Single Judge, at the very outset, we may observe that the facts of this case were peculiar in its own nature and were quite different from the facts of the case of ***Transcomerz AG Supra***, hence, the reliance placed by the learned Division Bench while deciding the case before hand, perhaps, was not required. Secondly, in the case of ***Transcomerz AG Supra***, there was another crucial distinguishing factor which had prevailed upon the learned Division Bench to stay the proceedings in the Suit and needs to be discussed in detail so as to arrive at a just and fair conclusion in the instant matter. In that case the appellant / defendant No.2 had its business office in Switzerland, who had been exporting goods to various countries including Pakistan, whereas, respondent No.2 / defendant No.1 was its indenting agent in Pakistan and respondent No.1 / Appellant was the importer of the goods in Pakistan. The respondent No.1 had imported certain goods on the basis of an indent issued by respondent No.2 which on its back side had clause 12, whereas, the

appellant had issued a confirmation letter dated 20.5.1986 pursuant to such indent which included clauses 15 & 16. These clauses read as under:

> *Clause 12 of indent:*
>
> "In relation to any dispute arising under, out of / or in respect of this indent the Court of Karachi shall only have jurisdiction to entertain proceedings."
>
> *Similarly Clauses 15 and 16 read as under:*
>
> 15) The place of execution of contract for Buyer is Basle.
>
> 16) Any controversy arising in connection with this contract has to be settled definitively and according to Swiss Law in a Court of Arbitration;
>
> (a) Controversies arising from a contract with a customer abroad according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbiters designated according to these Rules,
>
> (b) Controversies arising from a contract with a domestic customer of the Civil Court, Basle."

The learned Division Bench had observed that the above quoted clause 12 of the indenting order and clause 16 of the confirmation letter indicates that they were inconsistent with each other. The final conclusion drawn by the learned Division Bench and as referred to hereinabove is of utmost importance in this regard and is once again reproduced for convenience and reads as under:

> 7. We are inclined to agree with Mr. Nasim Farooqui that the learned Single Judge in the instant case has exercised discretion properly and, therefore, it does not call for interference by this Court, particularly, ***keeping in view the factum that, whether respondent No.1 had agreed to the above-quoted clause 16 of the confirmation letter is itself in doubt at this stage and cannot be resolved without evidence***. (Emphasis supplied)

Therefore, a bare perusal of the aforesaid findings of the learned Division Bench reflects that in fact it was the question of having different forums for dispute resolution and the knowledge of the respective parties in this regard which had prevailed upon the learned Division Bench to refuse stay of proceedings in Suit by upholding the decision of the learned Single Judge, and not merely for use of and interpretation of the words "shall" and

"may". From the above discussion and the discussion to follow it can be safely held that the findings of the learned Division Bench in the case of ***Transcomerz AG Supra***, in respect of subject controversy are not applicable in the instant matter.

19. Without prejudice to hereinabove legal position emerged pursuant to above cited judgments, it may be observed that even otherwise the language of Section 3 of the 1937 Act, and of Section 4 of the Act of 2011, are not pari materia with each other, whereas, in Section 4 of the Act of 2011, an entirely a new phenomenon has been introduced, whereby in terms of sub section (1) an application can be filed to stay the proceedings insofar as they concern the matter, however, in terms of sub section (2), on an application under sub section (1), the Court ***shall*** refer the parties to Arbitration, unless, it finds that the Arbitration Agreement is null and void, in-operative or incapable of being performed. In section 3 of the 1937 Act, the Court was not required to compulsorily refer the parties to Arbitration, and it was only to the extent of stay of proceedings, which has in fact been interpreted in aforesaid judgment of the learned Division Bench. Hence, the ratio of the said judgment to the extent of and the use of the words "shall" as "may" is also not of any help in the instant matter, as the entire complexion of the law and the convention on which such law had been enacted has changed, whereby, the Courts while staying the proceedings in Suits in respect of agreement containing Arbitration clause(s), are also required to refer the matter to Arbitration in terms of Arbitration clause and the provisions of Act of 2011, except in cases where Court is of the opinion that the Arbitration Agreement is null and void, in-operative or incapable of being performed.

20. It is equally pertinent to observe that the convention on the basis of which these Acts of 1937 and 2011 had been enacted, have also changed, and

there has been a lot of development and understanding of the use of Arbitration methods in settlement of disputes between the parties, whereas, in order to provide special safe guard and to protect the interest of the contracting parties several protocols and Agreements have been signed amongst the countries, including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Needless to mention that in view of International obligations the participating countries are sometimes required to enact laws which may create some inconvenience, however, due to international commitments and obligations they are enacted, which may be implemented to honor international commitments and conventions. The Hon'ble Supreme Court in the case of ***Messers Eckhardt & Co V. Muhammad Hanif (PLD 1993 SC 42)***, while dealing with such issue of inconvenience and difficulty in conducting the proceedings of Arbitration in Foreign Countries observed that such ground cannot furnish basis for refusal to stay the Suit under Section 34 of the Arbitration Act, 1940. The additional note in the said judgment has been authored by *Mr. Justice Ajmal Mian*, as his lordship then was, who in fact was also the author of the judgment in the case of ***Transcomerz AG Supra,*** on which the learned Counsel for the Appellant has heavily relied upon. It would be advantageous to refer to the relevant observation / additional note authored by his Lordship which reads as under;

> 51. AJMAL MIAN, J.--- I have had the advantage of reading the judgment proposed by my learned brother, Sajjad Ali Shah, J, in the above appeal. Though I am inclined to agree with the conclusion that the above appeal merits dismissal, as the two Courts below have exercised discretion under section 34 of the Arbitration Act against the appellant by refusing to stay the suit and since the above exercise of discretion cannot be said to be perverse or arbitrary or capricious, this Court cannot interfere with the same even if it would have taken a different view in the matter. However, I would like to add a few lines.
>
> 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 a contract, must be applied with more vigor 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 for 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 appellant 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.

21. The above finding has also been reiterated by his Lordship *Mr. Justice Ajmal Mian*, in the case of ***Hitachi Limited V. Rupali Polyester Limited (1998 SCMR 1618)*** at Pg.: 1686 Para 18. Therefore, in view of hereinabove and what has been discussed in preceding Para we are of the view that reliance being placed by the learned Counsel for the Appellant on the case of ***Transcomerz AG Supra*** is no more valid and is hereby repelled.

22. This brings us to the final point of consideration that whether the provisions of Section 202 of the Contract Act 1872 are attracted in the instant case in respect of the dealership Agreement dated 21.2.2005 which stood expired on 31.12.2009. The learned Counsel for the Appellant had submitted that the learned Single Judge despite framing this question as an issue had not recorded any finding on such point; therefore, it is a fit case for remand of the matter to learned Single Judge to decide this issue afresh. However, keeping in view the facts and circumstances of this case, we may observe that such

contention of the learned Counsel for the appellant, besides being incorrect is also misconceived. It may be observed that the learned Single Judge has not decided the issue on merits, and has only dealt with the question as to whether the Suit is to be stayed, and the matter may be referred for Arbitration or not. For this reason no such finding was required to be recorded by the learned Single Judge, who has rightly abstained himself from dilating upon such aspect of the matter, which relates to the merits of the case. Since we are of the view that the learned Single Judge has rightly not recorded any finding on the above issue in the impugned judgment, therefore, we are also not inclined to dilate upon such aspect of the matter, hence, the same is answered accordingly.

23. In view of hereinabove facts and circumstances of the case we hold that impugned judgment does not suffer any error or illegality, whereas, the learned Single Judge has passed a well-reasoned order, whereby the Suit has been stayed by exercising discretionary powers in accordance with law, hence, the same does not require any interference by this Court. Accordingly instant High Court Appeal is hereby dismissed along with pending application, however, with no order as to costs.

Dated: 29.05.2015

JUDGE

JUDGE

ARSHAD/