IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 14 / 2019

Plaintiff:	**Tariq Chobdar through Mr. Mr. Zain A. Jatoi Advocate.**
Defendant: No. 1.	**Dubai Islamic Bank Pakistan Ltd. through Mr. M. Ilyas Ahmed Advocate.**
Defendant: No. 2.	**Hangzhou Cogeneration (Hong Kong) Company Ltd. through Mr. Arshad Tayyabaly along with Mr. Abdul Ahad Advocates.**

1) For hearing of CMA No. 87/2019.
2) For hearing of CMA No. 254/2019.

Date of hearing: **18.01.2019.**
Date of order: **18.01.2019.**

O R D E R

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Permanent Injunction. Application at Serial No.1 has been filed on behalf of Plaintiff under Order 39 Rule 1 & 2 CPC seeking a restraining order against the Defendant No.1 from releasing the amount of 4 Letter of Credit(s) dated 08.10.2018 covered by this Suit. Application at Serial No.2 has been filed on behalf of Defendant No.2 under Section 4 of the Recognition and Enforcement (Arbitral Agreements and Foreign Arbitral Awards) Act, 2011 ("**2011 Act**") for staying proceedings in this Suit and referral of the same for Arbitration in terms of the Agreement. Since the Application under Section 4 of the 2011 Act, is to be heard and decided first, therefore, Counsel for Defendant No.2 was permitted to argue his case, before hearing the Plaintiffs case.

Learned Counsel submits that admittedly there is a Contract between the Plaintiff and Defendant No.2 on the basis of which the Letter of Credits which are four in number, were opened through

Defendant No.1, and as per his instructions the goods covered by these letter of credits have been shipped and documents have been presented to the Bank in China for payment, whereas, the Plaintiff through instant Suit, seeks a restraining order against Defendant No.1, the L/C opening Bank, for withholding of the payments. Per learned Counsel, there is an Arbitration clause in the Contract which provides that if there is a dispute, it is to be referred to and finally resolved through Arbitration in Singapore in accordance with the Arbitration rules of the Singapore International Arbitration Centre and therefore, this Court in terms of Section 4 of the 2011 Act, is bound to stay the proceedings and refer the same for Arbitration. He further submits that the Plaintiff's case is that Clause 17 of the Agreement, which pertains to Force Majeure, applies as according to them, some Public Notice has been issued by the Collector of Customs, at Karachi on 3.10.2018, in respect of the assessment and the treatment of the goods i.e. whether they are prime goods, or secondary goods; however, neither such conditions of Force Majeure as provided in clause 17, are applicable in the given facts; nor Defendant No.2 has any concern with the issuance of the Public Notice as contended. He submits that there are only three exceptions in the 2011 Act, on the basis which the Court may not refer the case for Arbitration, i.e. if the Arbitration Agreement is null and void, inoperative or incapable of being performed and all these three conditions are not present in the instant case; nor any such fact has been pleaded on behalf of the Plaintiff. According to the learned Counsel, neither the Contract is denied; nor the establishment of Letter of Credits, and therefore, in terms of the Letter of Credits the payment must be made by the Bank irrespective of any dispute between the parties. Per learned Counsel, clause 21 of the Agreement only

determines the place of Arbitration, and in no manner it could be construed to plead that it is ousting the jurisdiction of the Court; hence, the case law relied upon in this regard is not applicable. Lastly, he submits it is settled law that payments through a Letter of Credit can in manner be withheld or restrained as it is the safest mode of transaction in the International Trade. In support he has relied upon ***Messrs Travel Automation (Pvt.) Ltd. v. ABACUS International (Pvt.) Ltd. and 2 others (2006 C L D 497), Far Eastern Impex (Pvt.) Ltd. v. Quest International Nederland BV and 6 others (2009 C L D 153), Shaheen Construction Company v. Fauji Fertilizer Bin Qasim Ltd. (2015 M L D 304), Metropolitan Steel Corporation Ld. v. Macsteel International U.K. Ltd. (2006 C L D 1491), Messrs Kohinoor Trading (Pvt.) Ltd. v. Mangrani Trading Co. and 2 others (1987 CLC 1533), Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd. (P L D 2003 SC 191), Liaz Anis v. Tariq Isa and others (2000 M L D 1337).***

On the other hand, learned Counsel for the Plaintiff submits that though there is an Arbitration clause in the Agreement, but such clause is null and void for the reason that Letter of Credits have been opened in Karachi and goods have been shipped from China, whereas, the venue of Arbitration is Singapore, which is not only arbitrary but capricious as well in nature as the Plaintiff would then be burdened financially to a very large extent. He further submits that it is settled law, that even if parties consent to some jurisdiction, this does not divests the jurisdiction of this Court from taking cognizance of the matter and to assume jurisdiction as the Letters of Credits were opened in Karachi and goods have been shipped to Pakistan. Per learned Counsel the Agreement is not denied, nor the opening of Letters of

Credit; however, on 13.10.2018 Public Notice No.03/2018 was issued and in Para III thereof, "Assortedness" in respect of subject has been defined, by virtue of which the Letter of Credit was required to be amended, and Plaintiff immediately approached the Bank requesting such amendment to bring the goods, as well as the documents in conformity with the Public Notice, as otherwise, the Plaintiff will be heavily burdened financially in the shape of extra dues and taxes; but such request was never accepted by Defendant No.2. He submits that in any case, the proceedings and dispute between the parties will not and could not be adjudicated, under the Singapore Law, whereas, it is not denied that there is a dispute, and till such time the dispute is resolved, Defendant No.1 may be directed not to release the payment. He has also read out clause 17 of the Agreement which pertains to Force Majeure, and subunits that the case of the Plaintiff completely and fully falls within the word "governmental orders or measures or acts" and it is the case of the Plaintiff that the Contract could not be performed fully by the Plaintiff, and the amendment sought was not acceded to; hence, the goods in question cannot be accepted by the Plaintiff. In support he has relied upon ***CGM (Compagnie General Maritime) v. Hussain Akbar (2002 C L D 1528), M. A. Chowdhury v. Messrs MITSUO O.S.K. Lines Ltd. and 3 others (P L D 1970 SC 373), Pakistan Kuwait Investment Company (Pvt.) Limited v. Messrs Active Apparels International and 6 others (2012 C L D 1036)*** and ***Akari Leasing Limited v. Judge, Banking Court No. 1, Multan and another (2008 C L D 708).***

I have heard both the learned Counsel and perused the record. Admittedly, four different sales contracts / Agreements were entered into between the parties on 28.9.2018 in respect of Prime Hot Dipped

Galvanized Steel Sheet in Coils of various sizes, which were to be shipped in quantities of 500 Tons by or before 31.12.2018. To this effect there appears to be no dispute between the parties. The Agreement provides various terms and conditions and the relevant Clause(s) for the present purposes are 17 & 21, in respect of Force Majeure and Arbitration, whereas, the Application at Serial No.2 under consideration has been filed on behalf of Defendant No.2 pursuant to clause 21 ibid. These two clauses read as under:-

17. Force Majeure:

Should any circumstances preventing the complete or particle fulfillment by either of parties of the obligations taken under this contract arise, namely; fire, acts of God, war, blockage, government prohibition of import or export, governmental orders or measures or acts, revolution, insurrection, mobilization, strikes, riots, civil commotions, lockouts, accidents, destruction of material by fire or floor or other natural calamity or any other circumstances beyond the parties control, prejudicing or delaying the complete or particle fulfillment by either of parties of the obligations taken under this contract arise, the period of time for fulfillment of the obligations shall be extended for a period equal to that during which such circumstances will remain in force.

It these contingencies will continue more than 30 days, either of the parties o this Contract is entitled to refuse any further execution of their obligations under the Contract, and in such case, neither of the parties shall have the right for reimbursement of any possible damages by the other party. If the Force Majeure occurs in the period of one party's delay execution of its obligations under this Contract, this party are not entitled to cancel the Contract and is obligated to cover the other party's loss.

The party that will fall under such contingencies shall immediately (in any case within 15 working days) advise the other party as regards the commencement and cessation of the contingencies preventing fulfillment of its obligations.

Certificates issued by the Chamber of Commerce or Government authorities shall be sufficient proof of the above-mentioned contingencies.

21. Arbitration and governing law:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be settled by amicable negotiation and friendly discussion between both parties, in case no settlement can be reached, it then shall be referred to and finally resolved by Arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The arbitral award made by the Center shall be accepted as final and binding upon both parties. The Arbitration fee shall be borne by the losing party unless otherwise awarded by the Center.

> The validity, interpretation, performance and enforcement of this contract should be governed by the law of Singapore.

Perusal of clause 17 pertaining to Force Majeure reflects that it can be invoked on the basis of some *"government prohibition of import or export, governmental orders or measures or acts"*. And it is the case of the Plaintiff that issuance of Public Notice falls within the above words and situations, and therefore, Plaintiff is entitled to invoke the said clause and terminate the agreement. It is further case of the Plaintiff that notwithstanding this, immediately upon issuance of the Public Notice and being made public, an amendment request was made through the Bank concerned; but Defendant No.2 failed to give consent, hence, the only remedy available for the Plaintiff is to invoke clause 17 and seek termination of the entire Agreement. However, this Court is of the view that before any discussion is made, or even decided on this aspect of the matter, since an application has been filed in terms of Section 4 of the 2011 Act, the same has to be decided first, without dilating upon the arguments made in respect of clause 17, lest it may prejudice the case of any of the parties in Arbitration proceedings subsequently if ultimately the Application under S.4 of the 2011 Act is allowed.

Clause 21 as above provides that *any dispute* arising out of or in connection with this contract, including any question regarding its *existence*, *validity* or *termination*, shall be settled by amicable negotiation and friendly discussion between both parties, and in case no settlement can be reached, it then shall be referred to and finally resolved by Arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force, which rules are deemed to be incorporated by reference in this clause. It further provides that the Arbitral Award made by the

Center, shall be accepted as final and binding upon both parties. It also provides that the Arbitration fee shall be borne by the losing party unless otherwise awarded by the Center, whereas, the validity, interpretation, performance and enforcement of this contract should be governed by the law of Singapore. Insofar as the Agreement itself and the Arbitration clause thereof is concerned, it has not been denied on behalf of the Plaintiff that there is an Arbitration clause; rather, at least to the extent of the Agreement, it is the case of the Plaintiff that clause 17 is applicable. Therefore, this is to be kept in mind that the Agreement itself is admitted. However, it is the case of the Plaintiff that since going to Singapore will cause great inconvenience, in addition to the financial burden, therefore, this clause is non-est., capricious, arbitrary, and even void and against the interest of the Plaintiff. However, I am not impressed with such line of argument inasmuch as once the parties agree for Arbitration and a forum to refer such matter for Arbitration, then it is binding upon the parties. Mere causing of inconvenience is no ground to term the Agreement as void. Once it is agreed, then it is binding as well. Moreover, the argument that this Court cannot be divested of its jurisdiction by means of such a clause and even consent to this effect, this again is a misconceived argument and is in effect fallacious. The case law relied upon in this regard is also not applicable and is rather distinguishable. It may be noted that clause 21 is not exclusively a jurisdiction clause, or forum conveniens or non-conveniens; on the basis of which such an argument can be entertained. It is rather providing a place of Arbitration and the selection of procedure for Arbitration, which has been agreed upon and therefore, it has no nexus with the proposition and the case law that even by agreement no jurisdiction can be conferred upon a Court nor

can be taken away from the Court. As to this perhaps there is no cavil and the law is settled in this regard. But in essence, this is not the case of conferring any jurisdiction on a particular Court; or taking it away from the Court for that matter.

It is not in dispute that the Agreement has a foreign Arbitration clause, and the enforcement and procedure regarding Arbitration in International Contracts / Agreement, the 2011 Act fully applies and Section 3 & 4 reads as under:-

> **"3. Jurisdiction of Court.**—(1) Notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act.
>
> (2) An application to say legal proceedings pursuant to the provisions of Article II of the Convention may be filed in the Court, in which the legal proceedings are pending.
>
> (3) In the exercise of its jurisdiction, the Court shall,--
>
> (a) follow the procedure as nearly as may be provided for the Code of Civil Procedure, 1908 (Act V of 1908); and
>
> (b) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act of 1908).
>
> **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 say 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, in operative or incapable of being performed"

Perusal of s.4 of the above Act reflects that it appears that if 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. Here in this matter, I am of the opinion that the case of the Plaintiff does not fall within any of the exception as provided in s.4 ibid, nor a case to that effect has even been argued or made out. It is of utmost importance to note that unlike the previous legislation on the subject i.e. The Arbitration Act, 1940, here in this 2011 Act, the word used is "shall", and the moot question, therefore is that, as to whether after promulgation of the 2011 Act and the use of the words "shall", in Section 4 ibid, any discretion is left with the Court for refusing to stay the proceedings in the Suit, pending Arbitration. The statute on this subject previously was called as the Arbitration (Protocol and Convention) Act, 1937 ("1937 Act"), and even from that Act, now a bigger change has been introduced by the legislature. The language of Section 3 of the 1937 Act, and of Section 4 of the 2011Act, are not *pari-materia* with each other, whereas, in Section 4 of the 2011 Act, 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. So this change in law is to be seriously considered by the Court while adjudicating upon an application under s.4 ibid.

It is equally pertinent to observe that the international Conventions 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. 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.

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.

The only argument which was raised as against the referral of the matter for Arbitration in terms of clause 21 of the Agreement was to the effect that it cannot be so done under the Singapore law and at Singapore as it would be of great inconvenience in addition to the financial burden. Additionally it was argued that it even otherwise can't be done at Singapore as the L/C was opened in Karachi, and goods were shipped from China, therefore, Singapore has no nexus with the facts of this case. However, such a situation is not covered under s.4 ibid, whereas, it is but very common in

International Contracts and Agreements, or Agreements entered into by Foreign Companies with Pakistani Companies that they choose a safer and reliable forum for Arbitration. It is not that in this matter, the Chinese Company has asked for or compelled the Plaintiff to agree for Arbitration in China. In Singapore in fact both parties have equal and fair opportunity, whereas, the Centre in Singapore is world renowned and an established Centre for such Arbitration proceedings. Lastly, even otherwise the dicta laid down by the Hon'ble Supreme Court in this regard fully applies to the case of the Plaintiff and is binding on this Court as well; hence, no case of an exception to the settled proposition is made out.

In view of hereinabove facts and circumstances of the case, on 18.01.2019, by means of a short order, the Application at Serial No.2 (CMA 254/2019) was allowed and the proceedings in this Suit were stayed. The above are the reasons thereof.

J U D G E

ARSHAD/