

company, established In Italy, and is involved in manufacture and sale of various poultry vaccines (live and inactivated) by the name of IZOVAC. Per plaintiff, such products were not known in Pakistan prior to 1996 and it is the plaintiff who promoted, market and sale of defendant No.1's product under the agreement known as '*Registration & Distribution Agreement*' which is dated 21.10.2010. In the year 1995 for first time defendant desired to introduce its various poultry vaccine products by the name of IZOVAC in Pakistan and was looking for a reliable entrepreneur to introduce and develop its distribution network in the market in Pakistan. The enduring nature of the business relationship and mutual benefit made the parties to enter into negotiations and initially entered into agreement dated 01.6.1996 with undertaking that the plaintiff shall not to carry any other business of similar nature having direct conflict in the interest of the defendant's business, hence the plaintiff had to work solely for the defendant's product and the agency was created against the pre-existing interest of plaintiff. Under that agreement the plaintiff was appointed as the sole distributor of the defendant No.1 for Pakistan with certain warranties and securities. Under the agreement of 1996 plaintiff was required to applications to the concerned departments including Ministry of Healthy, Government of Pakistan, for obtaining registration of their products for the importation thereof for sale and distribution in Pakistan. In terms of clause 8, the agreement was for an initial period of three years and thereafter was renewable automatically on year to year

basis unless it is not breached. In 2002 agreement, new sub-clause "C" was inserted in clause 8 which reads as follows:

8-c. The present agreement can be cancelled at the agreed upon date i.e after three years by both parties. The cancellation shall be advised at least 6 months prior to the cancellation date and shall be formally communicated with a written notice to the other party.

4. In order to give effect to the business needs of the plaintiff and to keep a healthy and endurable business relationship with the defendant No.1 the plaintiff scrupulously adhered to various oral requests and demands of the defendant No.1 from time to time including the demand in alteration of mode of payment which was initially agreed against letter of credit and thereafter it was shifted to payment against delivery with a security deposit of Euro 93000/- and thereafter it was re-shifted against Letter of Credit. Plaintiff pleaded that defendant No.1, having turned dishonest and for malafide considerations, terminated the agreement to deprive the plaintiff from the fruits of the agreement and to cause irreparable loss.

5. In above back ground, the plaintiff sought following relief (s):-

- a) Declare that the unilateral termination letter dated 20.3.14 is in violation of registration and distribution agreement dated 21.10.2002 and is otherwise illegal, unlawful, malafide and set aside/struck down/quash the same;
- b) Direct the defendant to specifically perform the terms of the Registration and Distribution Agreement dated 21.10.2002 as the agreement is still enforced and binding upon the parties;

- c) Grant permanent injunction prohibiting the defendants, its officers, employees, agents or any other person claiming through, under or in trust for the defendants from acting upon the termination letter dated 20.3.2014;
- d) Grant permanent injunction prohibiting and restraining the defendants, its officers, employees, agents or any other person claiming through, under or in trust for the defendants from applying and/or canceling the registration of the poultry vaccine products existing in the name of the plaintiff, in particular by the defendant No.2.;
- e) In the alternative, award damages to the plaintiff against the defendants;
- f) Award a sum of Rs.1095 Million by way of compensation for unlawful cancellation/termination of registration and distribution agreement dated 21.10.2002;'
- g) Grant any other relief deemed fit and proper in the facts and circumstances of the case;
- h) Grant costs of the suit;

6. The defendant No.1, through counter affidavit, denied the claims and assertions of the plaintiff and insisted that plaintiff did not approach with clean hands and even questioned maintainability of the suit while submitting that *i) defendant No.1 is an Italia Company at Brescia Italy; ii) correspondences (Ann. F/1 to F/11) made at Italy; iii) both agreements dated 01.6.1996 and 21.10.2002 made at Italy, iv) through all the payments were paid to defendant at Italy and vi) jurisdiction for settlement in case of disputes or differences arising between the parties is also specified in clause No.33 of agreement dated 22.10.2002.* Plaintiff is also distributor of more than 60 other companies in Pakistan.

7. The counsel for plaintiff has argued that since existence of the agreement between parties is not disputed, hence *prima facie* case flows in favour of plaintiff; since there has been huge investment of plaintiff in market hence balance of convenience also lies in favour of plaintiff and if the application is not allowed the plaintiff shall suffer heavy and irreparable loss.

8. In contra, learned counsel for defendant No.1 while rebutting the above contentions, contended that very suit of the plaintiff is not sustainable and since the plaintiff himself has breached the agreement, therefore, it (plaintiff) cannot claim any exception, hence the application was insisted for dismissal; he further contended that this Court has no jurisdiction, as, agreement in question provides that in case of any dispute, matter would be referred to ICC, in Milano Italy. He relied upon PLD 2014 Sindh 175 and seeks decision in same terms.

9. Since issue, raised by this as well agitated by defendant No.1, with regard to jurisdiction of this Court and maintainability of the suit, requires to be addressed first so as to avoid further proceedings, orders e.t.c as redundant or *coram non-judice*.

10. Before going into merits of the case, it would be just, proper and necessary to refer the relevant clause, covering disputes, of either **agreements** i.e agreement dated 01.6.1996 and 21.10.2002.

Agreement dated 01.6.1996

“DISPUTES.

33. a) If in the event of any dispute or difference arising between the parties with respect to *any matter arising from or in connection with the agreement* which cannot be settled by negotiation between the parties, such dispute or difference shall be forthwith referred for determination by the *International Chamber of Commerce (ICC) for hearing in Milano, Italy.*

Agreement dated 21.10.2002

“DISPUTES.

33. If in the event of *any dispute or difference* arising between the parties with respect to *any matter arising from or in connection with the agreement* which cannot be settled by negotiation between the parties, such dispute or difference shall be forthwith referred for determination **by the Court of Brescia, Italy.**

In either agreements the place for settlement of the dispute, *arising from or in connection with the agreement*, is **Italy** though forums were different. It is also an admitted position that through subsequent agreement (Annexure-C), the earlier agreement lost its validity as clause - 34 was agreed and was made a part of the agreement (Annexure-C), which is:

'34. The agreement constitutes the entire agreement between the parties and supersedes all written or oral prior agreements and undertaking.'

Since the execution of the agreement s and legality of the said clauses therein are not disputed, rather either parties have admitted the same, therefore, it would be safe to say that binding effect thereof is a matter of record. It is not the case of the plaintiff that it (plaintiff) was not put

or kept under any deception with regard to the clause s 'titled as **DISPUTES'** rather the plaintiff admits in the plaint that :

"10. That, in the year 2002 the 1996 agreement was *substituted* with a new agreement dated 21.10.2002 with the same terms and conditions *except that the dispute resolution clause* and term of the agreement were altered."

Thus, it can *now* safely be said that parties (plaintiff and defendant No.1) were absolutely clear in respect of binding nature of such clause and it's applicability. I am guided in such conclusion with the case law, reported as :

2012 SCMR 1027

SC UK

"45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.....'

(Underlining has been supplied for emphasis)

11. Now comes the question whether the plaintiff can seek exception to above '**binding position**' under Section 28 of the contract Act, 1872 or otherwise?. For proper understanding, it would be proper to refer the Section supra which reads as:-

'Agreement in restraint of legal proceedings void. Every agreement, by which any party thereto is *restricted*

absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the *ordinary tribunals*, or which limits the time within which he may thus enforce his rights, is void to that extent.'

The above provision speaks about the situation where right of a party to agreement is restricted for its right to approach '**ordinary tribunal**' is absolutely restricted. The term '**Ordinary**', per Black's Law Dictionary, means:

'1. Occurring in the regular course of events; normal; usual. 2. (Of a Judge) having jurisdiction by right of office rather than by delegation. 3) Of jurisdiction) original or immediate, as opposed to delegated.'

Since, *undisputedly* the defendant No.1 is a company, established and functional at **Italy** and manufacturing its product there. It is matter of fact that it is not an agreement within local boundaries but the parties were always in notice and knowledge of their respective status and place of residence/business, even, therefore, interpretation of the agreement, words used therein or conduct of the parties has to be examined keeping such fact in view. The plaintiff has *no where* challenged the legality of the Court of Brescia, Italy nor it is the case of the plaintiff that issue, involved/raised by the plaintiff, cannot be determined by such Court or that its (plaintiff's) right cannot be enforced by such Court. Further, the status of the plaintiff is that of '**distributor**' of the defendant No.1 for products, supplied through **shipment**, hence it is a series of events. Any breach thereof shall give a right to the plaintiff but every such right shall be subject to '*arising from or in connection with the agreement*'. Since the provision of

Section 20 of the Civil Procedure Code gives a right to sue at the place where cause of action accrues which *in said series* could be no other place but at Italy, therefore, a *lis* before such place cannot be said to be violative to that of Section 20 of the Civil Procedure Code or Section 28 of the Contract Act, even. I am guided in such conclusion by the Judgment of Honourable Supreme Court in the case of 'STATE LIFE INSURANCE CORPORATION OF PAKISTAN V. Rana MUHAMMAD SALEEM (1987 SCMR 393) wherein it was held that:

“We have considered the arguments of the learned counsel for the parties. Under section 9 of the Code of Civil Procedure the civil Courts have jurisdiction to try all suits of a civil nature excepting the suit of which their cognizance is either expressly or impliedly barred. Under section 20 of the Code of Civil Procedure every suit is to be instituted in a civil Court within the local limits of whose jurisdiction the defendant resides or carries on business or where the cause of action wholly or in part arose. Under section 28 of the Contract Act every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights, is void to that extent. **It is evident from a plain reading of these provisions that there is no absolute exclusion of jurisdiction under section 9 or section 20 of the Code of Civil Procedure nor there is any violation of the provisions of section 28 of the Contract Act when two or more Courts have jurisdiction to try a suit and the parties mutually agree to choose or take their dispute to one of them.** The civil Courts exercise their jurisdiction under the Code of Civil Procedure. If they do not possess such jurisdiction to under the Code it cannot be conferred on them through a mutual agreement of the parties to a dispute. But in a situation where two or more Courts have jurisdiction to try a suit under the Code of Civil Procedure, then **an agreement between the parties that any dispute arising between them shall be tried only by one of such Courts could not be considered contrary to public policy as it would neither contravene the provisions laid down in section 28 of the Contract Act**

nor would it violate in any manner the provisions of section 9 or section 20 of the Code of Civil Procedure.
(Underlining is provided for emphasis)

This question was also examined in the case of 'Messrs RAZIQ INTERNATIONAL (Pvt). Ltd. through Vice President v. PANALPINA MANAGEMENT LTD. (PLD 2014 Sindh) 175 where considering number of case law s it was held :

“15.....The clause in the agreement with regard to exclusive or non-exclusive jurisdiction of the court of choice is not determinative but is most crucial factor and when question arises as to the nature of jurisdiction agreed to between the parties, the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case. Court should also consider relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attending of willing witnesses, possibility of view of premises, and all other practical problems that make trial easy, expeditious and inexpensive. *In the present case the court at Switzerland has sufficient nexus and proximity to the dispute in hand and the defendant carries on business in Switzerland. Forum selection clause cannot be held against the public policy or arbitrary in nature as the presumption of law is that the parties were oblivious to their relative convenience or inconvenience at the time entering into a contract.* There are no strong reasons for exercising any discretion in favour of plaintiff. **So in my view the proper course is to stay the proceedings in this suit.**

(Underlining has been supplied for emphasis)

I am in complete agreement with the above except the conclusion that in such a case, the '**proper course is to stay the proceedings in the suit**'. With due respect, I would disagree with such conclusion because the Civil Procedure Code does explain the '**jurisdiction**', '**try all suits unless barred**', '**rejection of the plaint or return thereof for presentation before proper forum** but no where permits the Courts to stay the proceedings of the suit. Once a *lis* is brought to a file of the

Court, the law provides mechanism for disposal thereof which *in no way* could include an order of staying proceedings for an *indefinite* period. *However*, at the same time, I am conscious that procedure in Court at Brescia Italy may be different from the one, provided in the Civil Procedure Code, therefore, returning of the plaint (Order VII r 10 CPC) for presentation before proper forum would not meet the requirement of law rather may result in causing prejudice to plaintiff while resorting proper forum.

12. In view of what has been discussed above, I am of the clear in my view that suit before this Court is not maintainable and is dismissed accordingly. This dismissal *however* shall not prejudice the rights of the plaintiff to institute proper proceedings for adjudication of its grievances/claims, as per the applicable limitation of laws, if any.

J U D G E

Sajid/PA