IN THE HIGH COURT OF SINDH
AT KARACHI

SUIT NO. 575 OF 2021

Plaintiffs	:	(1) Harbin Electrical International Company Limited, and (2) HE Harbin Electric (Private) Limited, through Muhammad Shahzad and Muhammad Abdullah, Advocates.
Defendants	:	(1) Siddiqsons Limited, and (2) Siddiqsons Energy Limited, through Muhammad Umer Soomro and Danish Nayyar, Advocates.
Dates of hearing	:	06.03.2024

ORDER

YOUSUF ALI SAYEED, J. – The Plaintiffs have brought this Suit claiming an amount of US Dollars 3.8 Million or equivalent amount in Pak rupees in terms of a Termination and Settlement Agreement dated 02.03.2018 executed between them and the Defendants (the "**TSA**"), who have since come forward through an Application under Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards), Act, 2011 (the "**2011 Act**"), with a motion that the Suit be stayed in view of Clause 7 of the TSA, encapsulating an Arbitration Agreement between the parties.

2. The Plaintiff No. 1 is said to be an engineering company incorporated under the laws of the People's Republic of China, engaged in the execution of engineering, procurement and construction of infrastructure projects internationally, whereas the Plaintiff No. 2 and as well as the Defendant No. 1 and 2 are limited companies incorporated in Pakistan. The State Bank of Pakistan, albeit originally arrayed as a defendant, was omitted from the proceeding on the statement made by counsel for the Plaintiff that the Suit was not being pressed to its extent.

3. The backdrop to the Suit, as extrapolated from a reading of the Plaint, is that the Defendants entered into a Supply Contract with the Plaintiff No.1 on 16.02.2016 (as then amended vide Amendment No. 1 dated 15.04.2016) for the procurement of supplies for purpose of a 350MW coal-based power project sought to be developed at the time at Port Qasim, Karachi, as well as a Construction Contract with the Plaintiff No. 2 of the same date for the construction of that project. It is said that the parties also contemporaneously entered into a Project Coordination Agreement, and the Plaintiffs thus stood appointed as the engineering, procurement, and construction contractors of that project. It is said that pursuant to those, the Plaintiffs carried out certain works for the project and incurred costs in that regard, however the same came to be abandoned as the Defendants were unable to obtain the requisite regulatory approvals. As such, those contracts were terminated, with the parties entering into the TSA wherein the Defendants acknowledged the work done by the Plaintiffs and whereby the parties agreed to settle the claim equivalent to sums of PKR 50,000,000/- along with USD 3,800,000/- to be paid by the Defendants to Plaintiffs. Per the Plaintiffs, the Rupee amount was paid, however the USD component remains outstanding despite various reminders, hence the Suit.

4. Proceeding with the submissions, learned counsel for the Defendants invited attention to Clause 6 and 7 of the TSA, which provide as follows:-

> "**6. GOVERNING LAW**
>
> 6.1 This Agreement shall be governed by and shall be construed in accordance with the laws of England & Wales.
>
> **7. CLAIMS, DISPUTES AND ARBITRATION**
>
> 7.1 In the event the Parties are unable to resolve any controversy or claim of any nature arising out of relating to this Agreement, the controversy or claim shall be finally settled by arbitration in accordance with the Rules for Arbitration of the International

> Chamber of Commerce, as in effect on the date of this Agreement (the **"ICC Rules"**), by three (3) Arbitrators, each Party shall appoint one Arbitrator whereas the third Arbitrator shall be appointed as the Chairman in accordance with the ICC Rules. No arbitrator appointed pursuant to this Section shall be a national of the jurisdiction of either Party nor shall any arbitrator be an employee or agent or former employee or agent of the Parties. Arbitration in accordance with this Section shall be the exclusive method for dispute relation.
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> 7.2 The arbitration under this Section shall be conducted in London. The language of the arbitration shall be English. The award rendered shall apportion the costs of the arbitration. The Parties agree that the arbitrator need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Agreement and the underlying intent of the Parties, and as to such matters their conclusions shall reflect their judgment of the correct interpretation of the relevant terms hereof and the correct and just enforcement of this Agreement in accordance with such terms.
>
> 7.3 The award rendered shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the arbitrator's decision. The decision of the arbitrators shall be final and binding upon the Parties. The prevailing Party may enforce such award in any jurisdiction, including any jurisdiction where the other Party's assets may be located. Except as the Parties otherwise agree in writing pending the final resolution of any claim or controversy or arbitration proceeding."

5. He submitted that the claim for recovery under the TSA fell within the scope of Clause 7 and the Suit accordingly ought to be stayed in terms of Section 4 of the 2011 Act in view of that clause.

6. Conversely, learned counsel for the Plaintiffs sought to contend that Section 4 of the Act was not attracted under the circumstances, as there was no dispute between the Parties to be referred to arbitration as the Defendants had not denied execution of the TSA or their obligations thereunder building up to the Suit, but had merely forestalled performance in fulfilment thereof on one pretext or the other. He submitted that even during the course of the Suit no denial of liability had come to the fore.

7. Having considered the arguments advanced in the matter, it merits consideration that the 2011 Act was promulgated in order to give legislative effect to the New York Convention, Section 4 of which (corresponding to Article II of the Convention) stipulates that:

> **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.

8. In the same vein, Paras 2 and 3 of Article II of the 2011 Act provide as follows:-

> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

9. As is apparent, in Section 4, the legislature has used both the expressions "may" and "shall" in different parts thereof so as to enjoin an obligation on the Court of a contracting State to refuse to entertain an action in a matter in respect of which the parties have made an agreement in writing to refer disputes which may arise between them. As such, a court concerned with a case arising under that Section is to stay the proceedings in the suit where the specified conditions are satisfied, and has no discretion in the matter unless the case falls within the excepted categories mentioned in the Section itself.

10. The conditions as are required to be fulfilled for invoking Section 4 are:

(1) there must be an agreement to which Article II of the Convention set forth in the Schedule applies.;

(2) a party to that agreement must commence legal proceedings against another party thereto;

(3) the legal proceedings must be in respect of any matter agreed to be referred to arbitration in such agreement, in as much as the Court has to be satisfied that there are disputes between the parties with regard to matters agreed to be referred. This relates to the scope and effect of the arbitration agreement, touching the issue of the arbitrability of the claim.

11. Conversely, the exceptions that can be spelt out from Paras 1 and 3 of Article II, on the basis of which a court can refuse enforcement, are that:

(1) the subject matter of the dispute is not capable of settlement by arbitration;
(2) the agreement is null and void;
(3) the agreement is inoperative; and
(4) the agreement is incapable of being performed.

12. There is no other exception that can be gathered from Article II, in pursuance of which the court can decline to recognise and enforce an arbitration agreement in terms of Section 4. Therefore, except for one of the specified contingencies, the parties must abide by the chosen method for resolution of disputes as per the arbitral mechanism laid down in the arbitration agreement and a court of the contracting State dealing with such a matter is mandatorily required to refer the matter to arbitration at the request of one of the parties to that agreement.

13. Here, it has not been disputed that Clause 7 of the TSA constitutes an arbitration agreement to which Article II of the Convention set forth in the Schedule applies. Nor is it disputed that the Plaintiffs and Defendants are parties to that agreement and that this Suit has been brought in respect of the TSA so as to enforce the same against the Defendants. As it stands, the only contention of counsel for the Plaintiff in opposition to the Application under Section 4 is that the claim advanced through the Suit does not present any dispute that can be referred to arbitration, with it being contended that this is so as no issue has been raise at any stage so as to cast doubt that the sum claimed by the Plaintiffs is due and payable by the Defendants, with the case simply being one of their unwillingness to pay.

14. Normally, the answer to the question of whether a dispute is referrable would depend upon (a) what disputes are covered by the arbitration agreement and (b) what is the real nature of the claim(s) advances. The first aspect obviously depends upon the language used in the arbitration agreement, whose construction would be relevant for deciding whether it embraces even questions of its existence, validity and scope, particularly the last, which bears on the arbitrability of the claims, and secondly whether the claims fall within its scope or purview. In other words, is the language of the arbitration agreement wide enough to cover either or both of the questions.

15. The arbitration clause in the TSA has already been set out herein above and the relevant words thereof are "any controversy or claim of any nature arising out of relating to this Agreement" shall be finally settled by arbitration in accordance with the Rules for Arbitration of the International Chamber of Commerce, at London, thus providing for as broad a scope as is conceivable.

16. Furthermore, the question at hand does not require much analysis as a dispute is nonetheless a dispute between the parties and remains so even though there may be no valid defence in law to the claim being made in the legal proceedings that have been commenced. Suffice it to say that the mere fact that the Suit was necessitated reflects that there is a dispute, and the plea taken on the part of the Plaintiffs by way of opposition to the Application at hand on that score is misconceived.

17. In view of the foregoing, the Application under Section 4 of the 2011 Act is allowed with the result that the Suit stands stayed and with the parties being referred to arbitration in accordance with Clause 7 of the TSA.

JUDGE