ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1226 of 2011

Date	Order with signature of Judge

For hearing of CMA No. 12048/2011

Dates of hearing: 08.11, 14.11, 06.12, 17.12.2012 and 22.04.2013

Mr. Abid S. Zuberi, Mr. Ayan M. Memon and Ms. Sana Q. Valika, Advocates for the plaintiff.
M/s. Sajid Zahid and Mansoor A. Shaikh, Advocates for the defendant No. 3.

Munib Akhtar, J.: The present application has been filed by the defendant No. 3 under sections 3 and 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("2011 Act"), seeking a stay of the present suit insofar as it relates to matters between the plaintiff and the said defendant. As is well known, the 2011 Act enforces the 1958 New York Convention on arbitration agreements and awards in Pakistan, and the defendant No. 3's case is that there is precisely such an agreement between it and the plaintiff.

2. Learned counsel for the defendant No. 3 referred to the agreement dated 20.07.2006 between this defendant and the plaintiff, annexed as Annexure P/29 to the plaint. The plaintiff is a sole proprietor who trades under the name and style of SYSCO (Systems Company). Learned counsel referred to the relevant provisions of this agreement. Although the plaintiff was described therein as "local partner", learned counsel drew attention to clause 13.9, which expressly provided that the agreement did not constitute a partnership between the parties. The purpose of the agreement was, according to learned counsel, stated on the title page, and was "the provision by [the plaintiff] of commercial and marketing support leading to a successful contract as well as participation during the contract execution to [the defendant No. 3]". The agreement contained a number of definitions, and "contract" was defined therein as meaning "a binding agreement between [the defendant No. 3] and a Customer in the Territory for the sale and purchase of a Product". Products were those as itemized in the third schedule to the agreement. Territory meant Pakistan and a "customer" was defined as meaning "any potential purchaser of a Product from [the defendant No. 3] in

the Territory". There is no dispute that the intended or hoped for "customer" was the Federation (the defendant No. 7), through its defense procurement arms, the defendant Nos. 8 and 9. (All three of these defendants have since been deleted from the suit at the application of the plaintiff.) I may clarify that the defendants, including the defendant No. 3, are in the arms business and the "products" were defense weapons or systems (broadly described) intended for the Pakistan Navy.

3. It was in the foregoing context that the agreement stipulated that the plaintiff was to provide certain "services" (as described in the first schedule) to or for the benefit of the defendant No. 3. This was in consideration for the payments to be made by the said defendant to the plaintiff in terms as stated in the second schedule. In essence, the dispute between the parties appears to be that the plaintiff claims that he has provided some or all of the services, entitling him to the stipulated consideration, which has not been paid. The defendant No. 3 disputes and denies this.

4. Learned counsel relied on Article 15 of the agreement, which related to dispute resolution. Clause 15.1 provided as follows:

> "Any dispute arising out of or in connection with this Agreement, including any question regarding the existence, scope, validity, or termination of this Agreement or this clause (and including any tortious or statutory claims) shall be referred to and finally resolved by Arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause."

Clause 15.3 provided that the place of arbitration was London, while clause 16.1 stipulated that the agreement was to be governed by English law.

5. Learned counsel submitted on the foregoing basis that the matter, i.e., dispute between the plaintiff and the defendant No. 3, came squarely within the ambit of the New York Convention and hence the 2011 Act was fully applicable. The plaintiff had not even alleged, much less shown, that the arbitration agreement between the parties, as embodied in clause 15.1, was hit by any of the exclusions contemplated by section 4(2). That is, it had not been shown that the arbitration agreement was null and void or inoperative or incapable of being performed. Therefore, the present suit ought to be stayed insofar as it concerned the dispute between the plaintiff and the defendant No. 3. Learned counsel relied on four single Bench decisions of this Court, being *Travel Automation (Pvt) Ltd v. Abacus International (Pvt) Ltd.* 2006 CLD 497, *Metropolitan Steel Corporation Ltd. v. Macsteel International UK Ltd.* PLD 2006 Kar 664, *Far Eastern Impex (Pvt) Ltd. v. Quest International*

Nederland BV 2009 CLD 153 and *Cummins Sales and Service (Pakistan) Ltd. v. Cummins Middle East FZE* 2013 CLD 291. Learned counsel prayed that the application be allowed.

6. Learned counsel for the plaintiff strongly contested the application and prayed that it be dismissed. In broad outline, his case was that the contesting defendants (being the defendant Nos. 1 to 6) were all part of the same group or interlinked in such manner that they ought to be regarded as constituting (at least for present purposes) one business entity. More particularly, learned counsel contended that the "real" contracting party with the plaintiff was the defendant No. 1, or perhaps the defendant No. 5, which was the parent entity of the group. In any case, the point which learned counsel stressed with considerable emphasis was that the "real" contractual nexus was between the plaintiff and some entity other than the defendant No. 3. From this, crucially for learned counsel's case, it followed (according to him) that the "real" party was not at all party to the arbitration agreement, since that was embodied (or more precisely, embedded) in the aforementioned agreement dated 20.07.2006, which admittedly was only between the defendant No. 3 and the plaintiff. Hence the matter could not be referred to arbitration and thus the New York Convention and therefore the 2011 Act did not apply. Learned counsel bolstered this submission by pointing out that none of the "real" parties (who were party to the suit as defendants) had filed any application under the 2011 Act. Learned counsel further submitted that the point being made by him was also made clear by the written statements and counter affidavits filed by the defendant Nos. 1 and 2, the latter being to the plaintiff's application for interim relief (CMA 10340/2011). In these pleadings these defendants had elaborately set up a defense or reply to what had been averred by the plaintiff with regard to the agreement dated 20.07.2006. If, learned counsel asked (as I understood him, rhetorically), those defendants had nothing to do with defendant No. 3 or the agreement dated 20.07.2006, why then were they so insistent on setting up a detailed reply and defense to what was being averred in respect of matters with which they ostensibly had no concern?

7. Proceeding further with his submissions, learned counsel referred to the details and chart set out in para 3 of the plaint, which showed the relationship between the various defendants. It showed that the defendant No. 3 was a subsidiary entity. Learned counsel contended that the entire relationship between the plaintiff and the defendants (taken as a whole) flowed from the agreement between the Federal Government and the defendant No. 1, and the agreement dated 20.07.2006 was but one link in this chain or web. It could not therefore be considered or dealt with in isolation.

Learned counsel also referred to a fact, which came about after the filing of the suit, that the name of the defendant No. 3 had been altered and this, according to him, further showed the interdependency among the various defendants and the subordinate nature of the defendant No. 3. With specific reference to the 2011 Act, learned counsel submitted (without prejudice to his other submissions) that all of these facts meant that the arbitration agreement sought to be relied upon by the defendant No. 3 was "incapable of being performed" within the meaning of section 4(2) of the 2011 Act. Learned counsel prayed that the application be dismissed.

8. I have heard learned counsel as above, examined the record with their assistance and considered the case law relied upon. I may note that both learned counsel also referred to certain Indian decisions. However, during the course of the hearing, it became clear that India had taken recourse to Article I(3) of the New York Convention, whereas Pakistan has not. The manner in which the New York Convention is enforced in India is therefore somewhat different from that as stated in the 2011 Act. Hence, at least for present purposes, the Indian case law does not provide any assistance and need not be considered.

9. The statutory provisions of the 2011 Act, and the various Articles of the New York Convention, as and to the extent presently relevant, have been considered in the cases cited by learned counsel for the defendant No. 3. I mention, in particular, the decisions in the *Travel Automation* and *Cummins Sales* cases. (I may note that the *Travel Automation* case considered an earlier legislative incarnation that enforced the New York Convention in Pakistan. That enactment was *in pari materia* the 2011 Act in all material respects.) I am in respectful agreement with what has been said there, and it is therefore not necessary for me to burden the present decision with any detailed elaboration of the same. It appears to me, *prima facie*, that the 2011 Act does apply to the facts and circumstances of the present case, and therefore what needs only to be considered is whether learned counsel for the plaintiff has been able to make out any case as to why section 4 of the said Act ought not to be applied here. In my view, for the reasons herein after stated, the answer to the question just posed ought to be that section 4 does apply in respect of the dispute between the plaintiff and the defendant No. 3.

10. The primary case sought to be made out by learned counsel for the plaintiff is that the "real" parties to the transaction are the plaintiff and the defendant No. 1, or at any rate some defendant other than the defendant No. 3. Since it is only the defendant No. 3 that is party to the agreement dated 20.07.2006 and hence the arbitration agreement, the matter cannot be sent for

arbitration. With respect, this submission cannot be accepted. There can be no doubt that the agreement dated 20.07.2006 is an agreement (more precisely, a contract) in every legally meaningful and relevant sense of the word. Learned counsel for the plaintiff has not assailed this agreement as being legally defective or deficient in any manner. It follows that the arbitration agreement, embodied or embedded as a clause in the agreement, is also a valid and legally binding agreement. The parties to these agreements are clearly and properly identified, being the plaintiff and the defendant No. 3. There is no doubt whatsoever on this point in my mind. If at all the submission made by learned counsel has any validity (as to which I must, with respect, express my serious reservations) it could only mean that in addition to the defendant No. 3, and through its medium (as it were) some one or more of the other defendants are also party to the agreement. If so, then it may be that it or they (as the case may be) are also party (or parties) to the arbitration agreement and can be joined as parties to the reference. But that is all. It certainly does not mean that the dispute between the plaintiff and the defendant No. 3 cannot or ought not to be referred to arbitration. However, in order to avoid any confusion, I must state firmly that I do not subscribe to the view that any of the other defendants is also a party to the arbitration agreement or needs to be joined in any reference. All I intend to convey here is that it cannot at all be concluded, even on learned counsel's submission, that the defendant No. 3 is not a party to the agreement dated 20.07.2006 and hence the arbitration agreement.

11. The further submission that the agreement dated 20.07.2006 is to be regarded as but one link or element of an interlinked chain or web and that therefore any dispute in terms thereof cannot be referred to arbitration also cannot, with respect, be accepted. Certainly, the change of name of the defendant No. 3 is of no consequence. Even on the face of it, the claims made by the plaintiff in the plaint on the basis of the contracts therein referred are discrete matters. Even if there is any transactional relationship or connection (as to which I am not at all satisfied), I am here concerned with a specific and narrow legal issue, namely, whether the matter comes within the scope of section 4 of the 2011 Act. I am fully satisfied that the answer to this question should be in the affirmative. The arbitration agreement between the plaintiff and the defendant No. 3 can, and ought, to be treated as a standalone contract, i.e., one that is quite capable of being performed and enforced on its own, with reference to any dispute between these parties as arising out of or in connection with the agreement dated 20.07.2006.

12. In view of the foregoing, I am of the view that nothing has been shown as would warrant a conclusion that the arbitration agreement is or has become incapable of being performed within the meaning of section 4 of the 2011 Act.

13. Accordingly, the present application is allowed. The plaintiff and the defendant No. 3 must refer any dispute arising out of or in relation to the agreement dated 20.07.2006 to arbitration in terms as provided in Article 15 thereof and the present suit is stayed insofar as it concerns that dispute.

JUDGE