*Order Sheet*

**IN THE HIGH COURT OF SINDH, KARACHI**

Suit No.1318 of 2004

| Date | Order with signature of Judge |
|---|---|

For hearing of CMA No.9086/04 (U/S 34 of the Arbitration Act, 1940)

M/s Jawed Ahmed Siddiqui and Abid Shirazi for the Plaintiff.

Mr. Sajid Zahid along with Mr. Taha Alizai for defendants No.1 & 3.

Mr. Muhammad Tanveem for defendant No.2.

*Dates of hearing: 23.12.05, 10.1.2006, 24.1.2006 & 01.2.2006.*

KHILJI ARIF HUSSAIN, J.- The Plaintiff filed suit for declaration, permanent & mandatory injunction and damages against the defendants. After service of the notice without taking any step in the proceeding, defendant No.1 filed application for stay of the proceeding.

Brief facts for the purpose of deciding the application under Section 34 of the Arbitration Act, 1940, read with Section 3 of the Arbitration (Protocol & Convention) Act 1937 filed by defendant No.1, are that the Plaintiff entered into a Memorandum of Understanding with defendant No.1 on 28.2.1997 and thereafter Plaintiff was appointed as exclusive general sales distributor of the defendant No.1 to market and distribute the defendant's "Abacus System" and "Abacus Service" in the territory of Pakistan on the terms and conditions mentioned in the Distributor Agreement dated 10-5-1997. The "Abacus Service" was defined as computerized reservations services, which perform flight, hotel, car rental and other travel related products or services, reservations and ticket issuance functions and such other services as may from time to time be offered by Abacus through the Abacus System. In terms of the agreement, Plaintiff was required to provide all necessary services and supporting infrastructure to perform the business. It is alleged that in consideration of the appointment as distributor by the defendant No.1, Plaintiff from their own funds and resources and at the instance of defendant No.1 constructed RCC sales/ after sales, offices of appropriate standard, equipped



with modern equipments, furniture, etc, maintenance rooms, workshop so as to effectively carry out its operation in its sale territory and to enhance reputation of defendant No.1 Abacus System and Services and appointed trustworthy and competent employees for entire territory. The Plaintiff incurred huge expenses in this regard. The Plaintiff claimed that the Plaintiff have acquired vested rights in the distributorship. The initial agreement after expiry of three years was renewed by a Supplementary Distributor Agreement, whereby the period of distributorship of the Plaintiff was extended for another three years. Vide letter dated 26.10.2004, defendant No.1, unilaterally without disclosing of reasons terminated distributorship of the Plaintiff from the territory covered by the agreement. The Plaintiff alleged that the Plaintiff have acquired interest in the distributorship and their interest stand legally protected and cannot be assailed in such unilateral, arbitrary ignoring their services. Plaintiff also alleged that defendant No.1 coaxed and persuaded the Plaintiff to do away with the business of distributorship with renowned German Company known as Star Holding GMBH Marketing. The Plaintiff also claimed that due to illegal, unilateral act of the defendant No.1 the Plaintiff has suffered heavy financial losses on account of loss of business as well as their goodwill and reputation in market, mental torture, for which defendants are liable in law and claimed following amounts:

| "S.No. | *Description* | *Details of expenditure in Pak Rupees* |
|---|---|---|
| 1. | *Construction and purchase of Offices/building in various Localities* | *Rs. 50 Million* |
| 2. | *Maintenance & repairs* | *Rs. 3 Million* |
| 3. | *Furniture & Fixtures* | *Rs. 10 Million* |
| 4. | *Tools/equipments* | *Rs. 15 Million* |
| 5. | *Advertisements* | *Rs. 5 Million* |
| 6. | *Transport/vehicles* | *Rs. 3 Million* |
| 7. | *Loss of reputation of Company* | *Rs. 10 Million* |

| | | |
|---|---|---|
| 8. | *Loss of distributorship at the rate of $ 25000/- per month for three years* | *Rs. 54 Million* |
| 9. | *Loss of maintaining various offices* | *Rs. 5 Million* |
| 10. | *Damage for mental torture* | *Rs.100 Million* |
| 11. | *Loss of commission, income with Amadeus* | *Rs. 90 Million* |
| | *Total* | *Rs.345 Million*" |

The Plaintiff filed the suit seeking declaration that the Distributor Agreement dated 16.5.1997 between the Plaintiff and defendant No.1 is valid, binding and fully operative and enforceable as against the defendant No.1 and are in the circumstances irrevocable, coupled with interest, duly acted upon by conduct of the parties over the years since they are executed in relation to the business of "Abacus System and Services" and that the said agreements and rights thereunder cannot be revoked or assigned or given or granted by defendant No.1 to any person/corporation including defendant No.2, adverse to the rights of the Plaintiff and the Plaintiff is entitled to enjoy all rights of distributorship and benefits thereunder. The Plaintiff also prayed for permanent and mandatory injunction directing the defendants that the Distributor Agreements are distributorship coupled with interest in the subject matter of distributorship and the same cannot be revoked and shall be kept in force and operation in the entire territory of the Plaintiff as per agreement with the direction to the defendant No.1 to restore the same in favour of the Plaintiff. The Plaintiff also prayed for preliminary decree for accounts, for recovery of such sums as are found to be due and payable to the Plaintiff by the defendant No.1 and final decree be passed thereafter. The Plaintiff further claimed without prejudice to the relief of declaration, etc to grant a decree for damages in the sum of Rs.350,000,000/- with additional US$ 25,000/- per month until the restoration of Distributors Agreement.

After service of notice, defendant No.1 filed application under Section 34 of the Arbitration Act, 1940 read with Section 3 of the Arbitration (Protocol & Convention) Act, 1937 and prayed to stay the proceedings if suit so that the



matter may be referred by the parties for arbitration in terms of Arbitration clause 18 of the Distributor Agreement.

Heard Mr. Sajid Zahid, learned counsel for defendant No.1 and Mr. Javed Ahmed Siddiqui, learned counsel for the Plaintiff.

Mr. Sajid Zahid, learned counsel for defendant No.1 orally requested that the application may be read as an application under section 34 of the Arbitration Act read with section 3 & 4 of the Ordinance 2005 and argued that Distributor Agreement dated 16.5.1997 was executed between the Plaintiff and defendant No.1 for a fixed period of time. Clause 18 of the said agreement provided that all disputes arising out of or in connection with the agreement including any question regarding its existence, validity or termination has to be referred to and finally resolved by arbitration in Singapore in accordance with the arbitration rules of Singapore International Arbitration Centre. The learned counsel contended that dispute in the matter are fully covered by the arbitration clause and the suit ought to have been stayed and parties be directed to refer the matter for arbitration at the venue agreed between them. The learned counsel drew my attention to clause 12.1 of the Agreement, and argued that the Plaintiff have right to terminate the agreement without assigning any reason. The learned counsel took me to various correspondence exchanged between the parties after the termination notices and argued that the Plaintiff himself has admitted termination and the present suit has been filed malafidely. The learned counsel heavily relied upon the opinion given by a Singapore based advocate that the dispute between the parties can be resolved by arbitration at Singapore and argued that Pakistan is one of the signatories to the United Nations Convention on the Recognition & Enforcement of Foreign Arbitral Awards, 1958 and by Ordinance XX of 2005, i.e. The Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Award) Ordinance. Pakistan has accepted to enforce agreements in which parties agreed to refer their disputes for arbitration at a venue other than Pakistan. Learned advocate in support of his argument relied upon the case of Svenska Handelsbanken and others vs. M/s Indian Charge Chrome and others. AIR(1994) Supreme Court

Cases 155, and M/s. Sriventkateswara Construction and others vs. The Union of India, AIR 1974 Andhra Pradesh 278.

Mr. Jawed Ahmed Siddiqui, learned counsel for the Plaintiff, in reply argued that defendant No.1 unilaterally without any default or breach of Agreement between the parties illegally unlawfully and malafidely terminated agreements of distributorship in which Plaintiff acquired interest and said agreement cannot be revoked unilaterally by the defendants. The defendants' act of cancellation is without lawful authority and he entered into an agreement with the defendant No.2 much prior to cancellation of agreement in question. The learned counsel argued that the agreement in question was executed in Pakistan, entire evidence is available in Pakistan and it would not be in the interest of any party that the matter be referred for arbitration at Singapore. It is contended that on 16.5.1997, there was no sealed law of arbitration in Singapore and further that the arbitration clause is also silent as to the law of the country of institution, i.e. to apply to the present proceedings. The learned counsel argued that in the circumstances of the case the foreign arbitration will not be safe or convenient forum for the decision and the cost of arbitration to be held at Singapore, will be so disproportionately high and in forcing the Plaintiff to go for the arbitration will be amount to denial of justice. It is contended that the Plaintiff has sought decree jointly and severally against defendants No.2 & 3, who are not party to Arbitration Agreement and relief claimed by the Plaintiff against defendants No.2 & 3 does not cover by the said Agreement. The Court even in presence of the arbitration agreement is equally competent to try the case and decide the same.

Mr. Jawaid Ahmed Siddiqui, learned counsel for the Plaintiff argued that sub-section (2) of section 4 of the Ordinance 2005 provided that in case if arbitration clause is inoperative or is incapable of being performed, Court can refused the stay of proceedings. Learned counsel for the Plaintiff argued that arbitration clause in the agreement between the parties is inoperative because there is no dispute so far as to the contents of agreement are concerned and further argued that Arbitration Agreement "is incapable of being performed" because defendant Nos.2 and 3 are not parties to the arbitration agreement and



they are necessary party in the suit and accordingly proceedings of the Suit cannot be stayed. He further contended that if there is any smell of "fraud" in the matter then application under section 34 of the Arbitration Agreement has to be dismissed. It is further contended by the learned counsel that the agreement in question was executed in Pakistan, entire evidence is available in Pakistan and it would be inconvenient for the parties to appear before the Arbitrator at Singapore. The learned counsel in support of his contention relied upon the case of (1) *Muhammad Hanif V's Eckhard & Co (PLD 1983 KARACHI 613)*, (2) *Eckhard & Co V's Muhammad Hanif (PLD 1986 Karachi 1395)* and (3) *Eckhard & Co V's Muhammad Hanif (PLD 1993 SC 42), and Muhammad Amin and Muhammad Bashir vs. PAS-R and others, 2002 CLD 671*

Mr. Muhammad Tasneem learned counsel for the defendant No.2 argued that except some allegations have been made in Para-3 of the plaint against the defendant No.2 the Plaintiff has not claimed any relief against defendant No.2 and defendant No.2 has been joined in the proceedings just to avoid arbitration proceedings in terms of the agreement executed between Plaintiff and defendant No.1.

I have taken into consideration respective arguments advanced by the learned counsels for the parties and perused the record. In order to appreciate the respective contentions of the learned counsel for the parties, it would be useful to reproduce some relevant clauses of the Distributor Agreement dated 16.5.1997, which read as follows:

> *"Clause 2.1- Abacus hereby appoints Distributors during the continuance of this Agreement as the exclusive distributor of the Business in the Territory only, and Distributor accepts such appointment and hereby undertake to act as such in accordance with the terms and conditions set forth herein.*
>
> *'12. TERM AND CONDITION'*
>
> *12.1 This agreement shall be for a fixed terms of three(3) years and shall continue thereafter, for a fixed period of 3 years unless earlier terminated as provided in this Agreement.*

*Notwithstanding this, either party to this Agreement may terminate the Agreement upon three(3) years calendar months written notice given to the other party, such notice not be given earlier than twelve(12) months from the date of execution of the this Agreement.*

*13 CONSEQUENCE OF EVENTS OF DEFAULT*

*13.1 Without prejudice to any other rights and remedies which any party may have, if Distributor commits a breach of any of its undertakings under Section 3, then Distributor shall be liable to pay Abacus forthwith, as liquidated damages and not as penalty, a sum to be calculated at the rate of:-*

*Total amount received in previous year or projected to be received in current year of this Agreement has been in force for less than one year at the date of breach) by Distributor under Section 9 of this Agreement times three.*

*17. GOVERNING LAW AND NON-ENGLISH VERSION*

*17.1 This agreement and any dispute arising under or in connection with this Agreement shall be governed by the law of the Republic of Singapore and subject to the non-exclusive jurisdiction of the courts of Singapore.*

*17.2 If any non-English interpretative versions of this Agreement are created there, in the event of a conflict between this English version and any non-English version, this English version will prevail.*

*18 ARBITRATION*

*17.3 All disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Center ("SIAC Rules" for the time being in force, which rules are deemed to be incorporated by reference into this clause. The law of arbitration shall be the International Arbitration Act Cap. 143A.*

*17.4 The tribunal shall consist of 2 arbitrator(s) to be appointed by the Chairman of SIAC.*

*17.5 Awards shall be expressed in Singapore Dollars and the Arbitrator may award that simple or compound interest shall be paid by any party concerned on any sum which is the subject matter of the reference at such rates as the arbitrators determine to be appropriate, without being bound by legal rates of interest.*



*to respect in any period which the award is complied with. The parties undertake to comply with an award.*

*17.6 The arbitrators shall have the power to rule on objections that they have no jurisdiction, including any objections with respect to the existence of validity of this arbitration clause, or this Agreement. The arbitrators may make final awards on different issues at different times, each of which award shall be enforceable.*

*17.7 The award rendered by the arbitration shall be final and binding on the parties and may include costs, including a reasonable allowance for attorney's fees and judgment thereon may be entered in any court having competent jurisdiction."*

Before I proceed further and discuss the contentions of parties, I would like to discuss the case of Muhammad Hanif vs. M/s. Eckhardt & Co. Marine GMBH and two others, (PLD 1983 Karachi 613), wherein learned Single Judge dismissed the application under section 34 of the Arbitration Act. The order was upheld by the Division Bench, and reported in PLD 1986 Kar. 138. The defendant filed the appeal before the Hon'ble Supreme Court against the said order of Division Bench which too was dismissed and reported in PLD 1993 SC 42.

Brief facts of the case are that M/s. Eckhardt & Co. Marine GmbH (supra) a foreign company with registered office in Hamburg, West German, through their agent namely Exomar (Pakistan) Limited entered into an agreement dated 12-4-1983 with respondent Muhammad Hanif for sale of the motor-vessel to be delivered at Karachi, which time was extended up to 7-6-1983. Vessel could not be delivered within the extended time for reason that there was congestion and strike in Karachi Port, hence buyer cancelled contract as contemplated by clause 4 of the agreement but he claimed that seller was intentionally delaying in discharging of cargo so that vessel could not be delivered within the stipulated time. Claiming damages on the basis of difference in the market price and the contract price of the vessel and further sum expenses to be incurred for purchase of similar vessel for the purpose of scrap, buyer filed Suit No.347/1983 in the High Court of Sindh on original side for decree jointly and severally against seller and [illegible] Karachi.

Similarly defendants No.1 and 2 filed application under section 34 of the Arbitration Act, 1940 for stay of the suit proceedings on the ground that there is an arbitration clause in the contract executed between the parties providing for arbitration to be taken place at London in the manner as prescribed in clause 8. The application was resisted by the buyer on the ground that reference to a foreign Tribunal was opposed to public policy and laws relating to the contract and arbitration in Pakistan and further the whole evidence to be required would be available at Karachi, hence it would be convenient to proceed with the suit at Karachi. Application under section 34 of Arbitration Act was dismissed by the learned Single Judge vide order dated 10.7.1983. Concluding para thereof with assessment of material and reasons is reproduced hereunder:

> *"As stated above in the present case the contract was entered into at Karachi where defendant's agents reside and carry on their business permanently. The delivery of the vessel was to be made at Karachi, letter of credit was opened at Karachi and all other formalities were to be completed at Karachi. The reasons given for rescinding the contract are the circumstances beyond the control of the defendant which include congestion and strike at Port of Karachi and other local conditions due to which the goods could not be discharged from the vessel. It is therefore, clear that the entire evidence of both the parties is at Karachi. In these circumstances to carry the entire the entire burden of this litigation to London before the arbitrators will be most inconvenient and expensive for both the parties. One other factor which has improved is that the defendant No.1 has its agent at Karachi, who is permanently stationed here and looks after its business and further it has been joined as defendant No.2 against whom the Plaintiff has sought decree singly and severally. This defendant No.2 is not a party to the arbitration agreement. In view of the relationship between defendant No.1 and defendant No.2 this may not by itself be a strong ground for refusing to stay, but the fact remains that in the circumstances of the case the foreign arbitrators would not be a convenient forum for the decision. To compel the plaintiff to seek his remedy at that forum may lead to denial of justice."*

The Hon'ble Supreme Court by upholding order passed by the learned Single Judge held that:

> *"... There is no cavil about the proposition that under section 34 of the Arbitration Act, stay can be refused by the Court if it is*





> *satisfied that there is no sufficient reason for making reference to arbitration and substantial miscarriage of justice would take place or inconvenience would be caused to the parties if stay is granted. No hard and fast rule can be laid down or line of demarcation can be drawn to say in what cases refusal can be made. Each case has different facts and grant or refusal of stay is dependent upon peculiar facts and circumstances of each case. The Court can make objective assessment and come to the conclusion whether stay of legal proceedings can be granted or refused.*
>
> *Considering legal position stated above, we are of the view that in the instant case no interference is warranted for the reason that discretion is exercised by the Court in refusing stay on cogent grounds and judiciously, we are of the view that non-performance of the contract for reason of congestion and strike at Karachi Port was beyond contemplation of the parties at the time of contract. In such circumstances, whole evidence on this point has to come from Karachi composed of documents and oral evidence and taking of such evidence in London would be inconvenient to the parties and also would be expensive. For the facts and reasons as stated above, we find no merit in this appeal, which is hereby dismissed with no order as to cost."*

While agreeing with the conclusion Mr. Justice Amal Mian appended separate note on the ground that two courts below have exercised jurisdiction 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, which I would like to reproduce:

> *"I may observe while dealing with an application under section 34 of the Arbitration Act in relation to a foreign arbitration clause like the one in issues, 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 honored 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 system 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 the Court attaches to contracts, must be applied with more vigour*

*to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a terms 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 the 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, to 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 unreasonable or would amount to forcing the Plaintiff 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."*

From the Judgment of the Hon'ble Supreme Court, it appears that Hon'ble Supreme Court refused to interfere with the discretion exercised by the two Courts below as same was not perverse, even if it would have different views.

Mr. Jawaid Ahmed Siddiqui learned counsel for the plaintiff also relied upon the case of *Muhammad Anis and Muhammad Bashir vs. PAS-R and others, 2002 CLD 671* in support of his contention that defendant is not entitled for stay in the proceedings. I am afraid that the principle laid down in the case of *Muhammad Anis and Muhammad Bashir (supra)* does not attract to the facts of this case as in the said matter learned Single Judge has not discussed the effects of section 3 & 4 of Ordinance XX of 2005.

Keeping in view the principle laid down in the case of M/s. Eckhardt & Co. Marine GmbH (supra), now I would like to examine present case.

Mr. Jawaid Ahmed Siddiqui, learned advocate for the plaintiff, questioned the maintainability of application on the ground (a) inconvenience



of parties, as every evidence is in Pakistan, (b) arbitration agreement is inoperative and (c) impossible of performance, as, the defendant Nos. 2 & 3 are not parties to the arbitration agreement, (d) the agreement between the plaintiff & defendant No.1 was coupled with interest and defendant No.1 cannot unilaterally cancel the same.

In order to appreciate the first question, it would be useful to reproduce Section 34 of the Arbitration Act, 1940, preamble of Ordinance XX of 2005, Section 3, and 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Award) Ordinance, 2005.

*"Section 34. Power to stay legal proceedings where there is an arbitration agreement. – Where any party to an arbitration or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings, and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."*

*"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 Ordinance.*

*(2) An application to stay legal proceeding pursuance 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 in the Code of Civil Procedure 1908 (Act V of 1908) as amended from time to time; and*

*(b) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908) as amended from time to time.*

*4. Enforcement of arbitration agreement - (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 the 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 terms of Section 34 of the Arbitration Act where any party to arbitration agreement or any person claiming under him commenced any legal proceedings against any other party to the agreement or person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, can apply to the Court before which the proceedings are pending to stay the proceedings, and the Court if satisfied that there is sufficient reason why the matter should not be referred to in accordance with arbitration agreement may make order an order staying the proceeding. Discretion has been given under Section 34 of Arbitration Act, 1940 to Court to stay or not to satay a legal proceedings that is to say that the proceedings despite arbitration clause between the parties Court on its satisfaction that there was no satisfactory reason for making an arbitration and substantial miscarriage of justice would take place or inconvenience would be caused to the parties if stay was granted, is entitle to refer the matter for arbitration in terms of arbitration clause agreed by the parties.

While dealing with the matter under Recognition and Enforcement (Arbitration agreements and Foreign Arbitral Awards) Ordinance 2005, such discretion is not available with the Court. Sub-section (1) of Section 4 provided that a party to arbitration agreement against whom legal proceedings has been brought in respect of the matter which is covered by the arbitration agreement





may upon notice to the other party to the proceedings apply to the Court to stay the proceedings in so far as it concerned matter.

On comparing Sub-section (1) of Section 4 with section 34 of the Arbitration Act 1940 one can see that under Section 34 of the Arbitration Act, 1940 any party to arbitration agreement or person claiming under him commenced any legal proceedings against any other party to the agreement in respect of the matter agreed to refer before filing of the written statement or taking any other step in the proceeding can apply to the Court, and if Court is satisfied that there is a sufficient reason why matter should not be referred in accordance with arbitration agreement may make order staying the proceedings whereas under Sub-section (1) of Section 4 of Ordinance 2005 a party to arbitration agreement against whom legal proceeding has been brought in respect of the matter which is covered by the arbitration agreement, upon notice to the other party to the proceedings can apply to the court in which proceedings have been brought to stay the proceedings in so far as it concerned matter. In other words a suit can be partly stayed to the extent of the relief which is covered by the arbitration clause and or to which relation to party to a suit applied for stay of the proceedings.

Sub-section (2) of Section 4 of the Ordinance 2005 has taken away discretion of the Court whether or not to stay the proceeding in terms of the Arbitration Agreement, even on the ground of inconveniences etc. except where the arbitration agreement be itself is null and void, inoperative or incapable of being performed.

Article II of United Nation Convention on the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 read as under:

*"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationships, whether*

*contractual or not concerning a subject matter capable settlement by arbitration.*

*2. The terms "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange, signed by the parties or contained in an exchange of letter 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."*

As have been held hereinabove that in the matter under Ordinance XX of 2005, Court has no discretion but to stay the proceedings under an arbitration agreement between the parties except where the arbitration agreement is null and void, inoperative, and or incapable of being performed.

In the case of Svenska Handelsbanken and others vs. M/s Indian Charge Chrome and others (1994) 2 Supreme Court Cases 155, in case where High Court of India refused to stay the proceedings against defendant on the ground that Plaint does not make severeable allegations against different defendants who are parties to the different contracts with different arbitration agreement and the allegation made by the Plaintiff against different defendants are such that they cannot be separated from other and since arbitration proceeding between Plaintiff and different defendants may have to go to different arbitrators also the arbitration clause must be treated as being inoperative, the Hon'ble Supreme Court of India held that "is totally erroneous" and held that "Plaintiff by merely entering into other contract with different parties cannot prejudice or defeat the right of different parties under different contracts particularly when foreign arbitration has been provided by the parliament as an indispensable right which court does not have any kind of discretion.

In the case of Gas Authority of India Ltd. vs. SPIE CAPAG, S.A. and others, AIR 1994 Delhi 75, it has been held that:



"Under section 3 of Foreign Awards (Recognition and Enforcement) Act (1961) and Article II (3) of New York Convention referred to the arbitration is mandatory as these provisions do not leave any discretion in the court, once all the conditions for referral are fulfilled, i.e., the Court does not find the arbitration agreement to be null and void, inoperative and incapable of being performed. The effect of Section 3 of the FARE and Article II(3) of the Convention is to deprive the court of any discretion in the matter when the aforesaid limitations are not present. This mandatory character of the referral is uniformly applicable to the convention States."

After the enforcement of Ordinance XX of 2005 radical changes have been made in law and discretion of Court which was available under Section 34 of the Arbitration Act 1940 apparently is no more available to court. The question on which earlier while exercising discretion under section 34 of the Arbitration Act about convenience or inconvenience of the parties, availability of evidence on a place other than the place of arbitration whether to stay proceedings or not was within the discretion of the Court. However, while dealing with the matter under Section 4 of the Ordinance XX of 2005 court has no such discretion except where cases fall within exception categories mentioned in the section itself. It is interesting to note that Section 3 of the Ordinance 2005 open with the non-obstacle clause that notwithstanding anything contained in any other law for the time being in force the court shall have exclusive jurisdiction to adjudicate and settle matter related to or arising from the Ordinance. On reading Sub-section (2) of Section 4 with Article II of United Nation Convention, it is clear that on filing of an application by any party to the proceeding the court has to stay the proceeding unless its find that the agreement is null and void or inoperative or incapable of being performed. So far as the agreement in question is concerned it is not the case of the Plaintiff that the said agreement is void agreement and in fact plaintiff has sought declaration, that the said agreement is valid binding and fully operative and enforceable against the defendant and in these circumstances irrevocable coupled with interest, and for mandatory injunction restoring the same in favour of the Plaintiff.

Now I will deal with the question whether the arbitration agreement is inoperative or incapable of being performed. Mr. Jawaid Ahmed Siddiqui, learned counsel for the Plaintiff argued there is no dispute so far as the contents of the agreement are concerned, and accordingly Arbitration Agreement is inoperative and

incapable of being performed. Learned counsel for the Plaintiff argued that since defendant Nos. 2 and 3 are not party to arbitration agreement suit cannot be stayed.

Clause 18 of arbitration agreement provided that all disputes arising out of or in connection with this agreement including any question regarding its existence, or termination shall be referred to and to be finally resolved by arbitration in Singapore in accordance with Arbitration Rules of Singapore International Arbitration Centers. The said clause is widely worded. The plaintiff by this suit questioned the termination of the agreement, or its validity. Plaintiff has asked declaration that the agreement is still operative and further mandatory injunction in the form to direct the defendant to restore the agreement i.e. to say to declare termination notice is unlawful. Such dispute is fully covered under the arbitration clause and arbitrators have exclusive jurisdiction to decide the same and contention of the plaintiff that arbitration clause is inoperative because there is no dispute or incapable of being performed is without any force.

From perusal of the record it appears that the Plaintiff also questioned the arbitration clause on the ground that on 16-5-1997, the date of agreement there was no coded law of arbitration in Singapore and that arbitration clause has also been silent as to the law of the country to be applied to the proceeding. The defendant through his rejoinder affidavit placed on record Annexure-D legal opinion of the law forming in Singapore wherein it is specifically stated that Singapore have coded law of arbitration on 16/5/1997 and International Act Chapter 143E has been enforced in Singapore since 27/1/1996 and the law of Singapore being the governing law of distributorship agreement applicable to arbitration agreement. The Plaintiff has not denied the contention of the defendant nor placed on record any document in rebuttal.

Now I will deal with the ground that Arbitration Agreement is inoperative, incapable of performance. Objection of the Plaintiff that defendant Nos. 2 and 3 are not party to the arbitration agreement and as such application for stay of the proceedings cannot be granted. From the perusal of the record it appears that the Plaintiff is not asking any relief against defendant Nos. 2 and 3 and the only relief asked is that distributorship agreement dated 16-5-1997 executed between the Plaintiff and defendant No.1 are valid binding and fully operative and enforceable agreement against defendant No.1 and is irrevocable coupled with interest and



defendant No.1 cannot revoked or assigned or grant by defendant No.1 to any person including defendant No.2 adverse to the interest of or the prejudice of the Plaintiff.

Under section 4(2) of the Ordinance 2005 pre-condition for refusing stay, the proceeding is that arbitration agreement is null and void inoperative or incapable of being performed.

The word null and void and inoperative or incapable of being performed should be read keeping in view the rule of ejusdem generis i.e when a particular word pertaining to class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified.

On reading Section 20 of Contract Act (Agreement void where both parties are under mistake as to matter of facts) along with Section 56 of the Contract Act one can say that in case when at the time of execution of the Arbitration Agreement same was void or become void, subsequently by some reason or some event such as by an act of the Government the performance of a contract become impossible or by change of law contract become incapable of being performed, in that event, court can refuse stay of the proceedings.

Mr. Muhammad Tasneem learned counsel for defendant No.2 rightly stated that no relief has been asked for against defendant No.2. A party to proceeding cannot allow to defeat arbitration clause by way of joining a party not a party to arbitration agreement as defendant No.2 who is not a party to the arbitration agreement and while dealing with such matter court has to see whether any relief has been asked against such defendant or not. Reliance can be placed on the case of *Sreenivasaswara Construction* vs. *Union of India*, AIR 1974 Andhra Pradesh 278, and *Messrs Mansoor Textile Mills Ltd.* vs. *Nishimen Corporation and two others*,2000 MLD Kar. 641

In the case of M/s Srivenkateswara Construction and others vs. The Union of India, AIR 1974 Andhra Pradesh 278, the Hon'ble Supreme Court held as under:

> *"It often happens that in order to circumvent an arbitration clause, a plaintiff adds some unnecessary parties to the suit and in such cases it has been held that the court can grant stay of proceedings. In Cakop vs. Asian Refractories Ltd. (1969) 73 Cal WN 191) it was [illegible]*

*party to an arbitration agreement cannot defeat the agreement between the parties merely by joining a third party in the suit against whom no relief is claimed. Following the said decision, a Bench of this Court of which one of us (Enshanna, J) was a member in C.M.A. No.467 of 1986 D/- 18/12/1969 (2nd Pvt) held that though the plaintiff added a prayer as against an unnecessary defendant who was not a party to the agreement it was nevertheless a case for granting stay."*

In the case of M/s Manzoor Textile Mills Ltd. vs. Nichimen Corporation and 2 others, 2000 MLD 641, learned Single Judge of this Court while dealing with the Arbitration (Protocol and Convention) Act 1937 held:

*"I cannot be unmindful of well-established principle that the Court should not lightly release the parties from their bargain, that follows from the sanctity which the Court attracts to contracts. In the present case a foreign firm is involved, which entered into the contract in question on the basis that in case of any dispute the same would be adjudicated upon as per arbitration clause but the plaintiff wish to defeat the above clause with the aid of the court. In order to acquire a respectable place in the community or nations not only the Government, but even the individuals are expected honour their commitments."*

*In my view a party having entered into an agreement after having full knowledge of its consequences cannot be allowed to defeat the arbitration clause."*

Coming to the last contention of the learned counsel for the plaintiff that agreement of distributorship between the plaintiff and defendant No.1 was coupled with the interest and defendant No.1 cannot unilaterally cancel the same. It is an admitted position that distributorship agreement entered into between the parties from time to time was for a specified period of time. Clause 12.1 provided that agreement shall be for a fixed period of three years and to be continued thereafter for a fixed period of three years unless earlier terminated as provided in the agreement. The said clause further provided that notwithstanding this, either party to this agreement may terminate the agreement upon three calendar months written notice given to the other party, such notice not to be given earlier than twelve months from the date of execution of the Agreement. Clause 12.2 provided events of default on which defendant can terminate the agreement and all licenses and permissions immediately. Likewise clause 12.3 provided that plaintiff can terminate the agreement by written notice to Abacus on event of default provided in this clause. Clause 12.4 provided that upon termination of the agreement for any cause, all rights



of the distributor shall be terminated and distributor shall immediately cease to use the trademark, service mark and other intellectual property belonging to Abacus and shall return forthwith all existing copies of the standard agreements, manuals, publicity material and all other materials of every nature etc. The plaintiff's case is that the plaintiff has not violated any of the stipulation mentioned in clause 12 of the agreement dated 1-5-1997 and that plaintiff has acquired vested right in the said distributorship and their interest stand legally protected and cannot be assailed much less taken away in such a unilateral, arbitrary unreasonable manner ignoring their services, sacrifices, investments which have all gone waste in view of the illegal and malafide termination of their distributorship. Be that as it may, since agreement itself was for a fixed period of time provided stipulation for the cancellation and termination of it. Reliance upon section 202 of the Contract Act has no application to the facts of the present case for more than one reasons. I will not like to discuss this issue in detail as the same is of no relevance for the purpose of deciding the application for stay of the proceedings and further any finding on this issue may adversly effect the interest of the plaintiff in the arbitration proceedings, however, since learned counsel for the plaintiff raised objection, I would like to reproduce the quotation from the unreported Judgment in the case of Roomi Enterprises (Pvt.) Ltd. vs. Stafford Miller Limited & others, HCA No. 242 of 2002, which read as under:

*"..... Reliance has been placed upon section 202 of the Contract Act which, in our opinion, has no application to the facts of the present case for more than one reason. The Agreement dated 01.11.1997 provided stipulation for the cancellation and termination of it. The phrase "in the absence of any express contract" used in Section 202 of the Contract Act has a great significance and even if an agency, due to any reason creates an interest in the property which forms the subject matter of the agency, if agreement itself provided for termination and cancellation of such Agreement of Agency then Section 202 of the Contract Act cannot be invoked. Section 205 of the Contract Act further stipulated that even where there is an agency for any period of time and if it is terminated before the expiry of the period as stipulated in the Agreement, compensation is to be paid for the loss suffered, if any, by him due to such termination by the principal or agent, as the case may be, if such termination was without sufficient cause.*

*In the case of M/s. Bhimji Computing International (Pvt.) Ltd. v. IBM World Trade Corporation (1997 CLC 1996), one of us (namely Salahuddin Ahmed, J.) while dealing with the question of agency coupled with interest, held that making of substantial investments in business of agency does not make the agency irrevocable and reproduce the passage from the case of Worldwide Trading Company vs. Sayyo Trading Company (PLD 1966 Kar. 234) that [illegible]*

*agent, forming subject matter of the agency, is to be some sort of an adverse nature qua the principle.*

*In the recent case of Indus Sovereign (Private) Limited vs. Pepsicola (PLJ 2005 SC 349) Honourable Supreme Court held that Section 202 of the Contract Act is split up into two parts. The first portion of the section is clearly indicative of the fact that either the agent must have an interest pre-existing in the property or creation of such interest should be the direct result of the agreement itself and any interest other not pre-existing or not forming subject matter of the agreement but created subsequent to the agreement or any matter, would not be called as the creation of interest of the agent. It was further held by the Honourable Supreme Court that only that agency is irrevocable which is created with adequate consideration and is designed to serve as security for some interest of the agent. Any expenditure in setting up office and necessary infrastructure for carrying on business of agency does not contribute to the creation of interest of agent in the subject matter."*

For the foregoing reasons I am of the view that the plaintiff has failed to bring the case within the exception provided under Sub-section (2) of Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005, so as to refuse to stay the proceedings. The listed application is granted and the proceeding of the suit is stayed. It is further ordered that the disputes between the plaintiff and defendant No.1 be referred to arbitration in term of Arbitration Clause. I would like to make it clear that any observation made hereinabove are tentative in nature, and arbitrator while deciding the matter will not influence from it.

14/2/06