HCJD/C-121
ORDER SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

C.S. No.61/2014

The Imperial Electric Company (Pvt) Limited
Versus
Zhongxing Telecom Pakistan (Pvt) Limited & another

S.No. of order/ Proceeding	Date of hearing	Order with signature of Judge, and that of parties or counsel, where necessary.
	17-11-2015	Mr. Asim Hafeez Advocate for plaintiff. Mr. Raza Ullah Khan Niazi Advocate for Defendant No.1.

C.M. No.284/2015.

Through the instant application filed under section 34 of the Arbitration Act, 1940 (*hereinafter referred to as the 'Act of 1940'*), the applicant seeks an order for staying the proceedings in suit No.61/2014.

2. The facts, in brief, are that Messrs Imperial Electric Company (Pvt) Limited (*hereinafter referred to as the 'Respondent/Plaintiff'*) has filed suit No.61/2014 relating to disputes arisen from or connected with agreement dated 07-May-2005 executed with Messrs Zhongxing Telecom Pakistan (Pvt) Limited (*hereinafter referred to as the 'Applicant/Defendant No.1'*). The latter has filed the application for seeking an order for staying proceedings in the suit on the basis of clause 19.2 of the agreement. The relevant clauses of the agreement are as follows.-

"19.2.1 Amicable Settlement

If a dispute of any kind whatsoever arise between the ZTE and the Sub-Contractor in connection with, or arising out of, the Sub-Contractor or the execution of the Works, whether during the execution of the Works or after their Completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, the parties shall attempt to settle such dispute amicably within 15 days from the date a dispute actually started and reduced to writing. The decision of Chief Executive Officer PTCL will be the final and be acceptable to both the Parties.

19.2.3 All the disputes will be resolved at Islamabad."

3. The Respondent/Plaintiff filed a reply to the application and has, *inter alia*, manifestly stated that it has no reservations or objections regarding a reference to the arbitrator to proceed with the claims/disputes *inter se* the parties. It has also been stated that the Court has to interpret clause 19.2.1 and decide as to whether it can be treated as an arbitration agreement for the purposes of section 34 of the Act of 1940. It has also been pointed out that the Applicant/Defendant No.1 may have some reservations on account of its relationship with the Defendant No.2 i.e. Pakistan Telecommunication Company Limited (*hereinafter referred to as the 'PTCL'*). It has further been stated that the named arbitrator in clause 19.2.1 may be directed to conduct/conclude the proceedings in accordance with Rule 3 of the First Schedule of the Act of 1940. The Respondent/Plaintiff has, therefore, prayed that the matter

pending adjudication before this Court may be referred to arbitration.

4. Learned counsel appearing on behalf of the Applicant/Defendant No.1 did not express any reservation regarding the disputes being settled pursuant to clause 19.2 of the agreement i.e. by the Chief Executive Officer of PTCL as has been express explicitly named in clause 19.2.1.

5. Learned counsel for the Respondent/Plaintiff has stated that the latter has no objection if the disputes are referred to the authority named in clause 19.2.1. He has, however, reiterated that this Court may conclusively declare that clause 19.2.1 is an arbitration agreement.

6. Learned counsels have been heard and the record perused with their able assistance.

7. The Applicant/Defendant No.1 unequivocally acknowledges clause 19.1.2 of the agreement to be arbitration agreement. Neither in the application nor during the arguments advanced by the learned counsel has expressed any reservation regarding the disputes being decided by the Chief Executive Officer of PTCL and the same is specifically named in clause 19.2.1. Section 2(a) of the Act of 1940 has defined "arbitration agreement" as meaning a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. The august Supreme Court in the case of

'Ch. Muhammad Saleem v. Muhammad Akram and others' [PLD 1971 SC 516] has discussed the characteristics of an arbitrator in the following words.-

> *"If a dispute is referred to a person and if that person decides that dispute by holding an enquiry and coming to a decision then undoubtedly what that person decides would constitute an award. On the other hand, if a matter is referred to a person and he is not called upon either to hold an enquiry or to give a decision but by the exercise of his sagacity, knowledge or experience to bring about merely an understanding between the parties and resorting peace between them than he would only be discharging functions other then those of an arbitrator. But in order to determine this question one must not look merely at the form adopted or the expression employed but rather at the substance of what the parties to the dispute really intended the person approached in that behalf to do and how that person acted in that particular matter."*

8. It is, therefore, critical to look at the language used by the parties in an agreement so as to discover the intention i.e. whether they had intended that the disputes be resolved through the mechanism of arbitration.

9. In the case of *'The Province of the Punjab v. Messrs Irfan & Co.'* [PLD 1956 (W.P.) Lahore 442], the Court was examining a clause which did not mention the expression 'arbitrator' and 'arbitration'. The Court, however, held that the clause was not bad for being treated as an arbitration clause for mere want of the expression mentioned that the named person

would act as an arbitrator. It was further held that the absence of the expression 'arbitrator' or 'arbitration' would not vitiate the arbitration agreement on this ground.

10. The Lahore High Court in the case of *'Governor-General in Council - Defendant – Appellant v. Simla Banking & Industrial Co., Ltd., New Delhi and another – Plaintiffs – Respondents'* [A.I.R. (34) 1947 Lahore 215] while examining a clause in an agreement which provided that matters would be decided by person of parties' selection held that the clause amounted to arbitration agreement though the word 'arbitration', 'arbitrator' or 'arbitration agreement' did not appear therein.

11. Likewise the Sindh High Court in the case of *'Shaikh Muhammad Umer v. Zakaria Adamjee Charitable Corporation and another'* [1988 MLD 1131] was examining a clause which had used the word 'referee' held that as the plain reading of the clause showed that dispute was to be referred for decision and that the decision was to be binding upon the parties, therefore, it was an arbitration agreement. It was further held that arbitration agreement was an agreement whereby the parties bind themselves to have their disputes arising out of transaction, to which such agreement is applicable, to be adjudicated upon and decided by a domestic tribunal and not by resort to the Court of law. It was, therefore, held that the language of the clause fulfilled the ingredients of arbitration agreement and, therefore, the referee as mentioned in the agreement was deemed to be an arbitrator.

12. It would also be pertinent to mention to refer to the case of *'Messrs Jugotekhstil Impex, 61001, Lubijana Yugosalvia v. Messrs Shams Textile Mills Ltd.'* [1990 MLD 857] wherein the Sindh High Court has held that in its very nature an arbitration forum has to be definite and certain or atleast capable of being made so.

13. It is, therefore, obvious that the intention of the parties has to be gathered from the language used in a written agreement and by considering other related correspondence or conduct of the parties. The Court is, therefore, to be satisfied that the parties had intended that they shall settle or resolve their disputes through arbitration. In such an eventuality the Court would give effect to the arbitration despite the fact that it may not contain the expressions of 'arbitration' or 'arbitration agreement'. Moreover, it is also settled law that whether the parties have named an arbitrator or a designation for the purposes of giving binding decisions relating to disputes arising from or connected with agreement then it would be treated as an arbitration agreement.

14. In the instant case clause 19.2.1 has named the Chief Executive Officer of PTCL to be a person who would decide the disputes and that his decision would be binding on the parties. Though the said clause has not used expression such as 'arbitrator', 'arbitration' or 'arbitration agreement', yet the characteristics and ingredients are such that it definitely amounts

to an arbitration agreement. Moreover, the parties also agree that clause 19.2.1 to be an arbitration agreement. As noted above that no reservation has been brought on record or otherwise by the Respondent/Plaintiff or Applicant/Defendant No.1 that disputes be resolved through Chief Executive Officer of PTCL as the latter has been unambiguously named in clause 19.2.1.

15. For what has been stated above, the instant application is allowed and the proceedings in the suit No.61/2014 are ordered to be stayed. It shall be open to the parties to refer the disputes arising out of or in connection of the agreement dated 07-May-2005 to the Chief Executive Officer of PTCL.

(ATHAR MINALLAH)
JUDGE

Announced in open Court on _____

JUDGE

*Luqman Khan/

Uploaded By: "Zulqarnain Shah"