ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.838 of 2012

Date	**Order with signature of Judge**

Global Quality Foods Pvt. Ltd……..…….Plaintiff

Vs.

Hardee's Food Systems, Inc……Defendant

Date of rehearing 02.07.2015.

Dr.Muhammad Farogh Naseem, Advocate for the Plaintiff.

Mr.Muhammad Omer Soomro, Advocate for the Defendant.

Muhammad Ali Mazhar, J: This order will dispose of following interlocutory applications:-

CMA No.7103/2012. This application has been moved by the plaintiff under Order 39 Rule 1 and 2 read with Section 151 CPC with the prayer that pending disposal of the suit the defendant may be restrained from awarding/granting the license to operate/develop Hardee's Restaurants for the province of Sindh to any other person except the plaintiff.

CMA No.7280/2012. The defendant's counsel has moved this application under Order 7 Rule 11 CPC that plaint does not disclose any cause of action, therefore, it is liable to be rejected.

CMA No.7281/2012. This application has also been moved by counsel for the defendant

under Section 34 of the

Arbitration Act read with Section 4 of the Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Awards), Act, 2011 that under section 29 of International Multi-Unit License Agreement, the dispute if any is to be resolved through arbitration rather than this suit which is liable to be stayed.

2. The brief facts as alleged in this suit for permanent injunction are that the plaintiff is a private limited company incorporated under the Companies Ordinance, 1984 in Pakistan, which is licensee of the defendant for development of multiple restaurants within the Province of Sindh. The defendant is a limited liability company incorporated under the laws of USA. In the year 2008 Global Food Connections LLC, predecessor in interest of the plaintiff was permitted to enter into International Development Agreement but till the middle of 2011 the said company was unable to develop any Hardee's Restaurant, however, on 10.6.2011 the aforesaid LLC assigned all its rights and liabilities to the plaintiff and this assignment was also accepted and endorsed by the defendant. The plaintiff developed one Hardee's Restaurant by 15.9.2011 and there was some oral understanding for development of 09 more restaurants on mutually agreed terms. The timeline to open up 10 restaurants as specified in the agreement attached as annexure "A" could not have been applicable to the plaintiff as vide agreement attached as annexure "D" a fresh timeline was given by the defendant to open up one restaurant which necessarily meant that the said defendant from time to time would prescribe the timeline for remaining 09 restaurants and despite making requests by the plaintiff to prescribe the timeline for 09 remaining restaurants, the defendant kept it under the false hopes. The defendant intends to issue license to third parties to develop and manage Hardee's Restaurants. The plaintiff has also prayed for the directions against the defendant to accord necessary license and or approval to the plaintiff to develop the rest of the Hardee's Restaurants and also provide development schedule.

3. To upkeep the injunctive order and its sustenance, the learned counsel for the plaintiff referred to International Development Agreement (IDA), Multi-Unit License Agreement (MULA), New Development Rider (NDR), which were executed between the predecessor in interests of the plaintiff (Global Food Connections LLC) and the

defendant and argued that IDA is parent all-encompassing agreements which provided a development schedule and authorized the predecessor in interest of the plaintiff to develop Hardee's Restaurants by 31.12.2011. The Global Food Connections LLC vide assignment agreement dated 10.6.2011, assigned all its rights and liabilities to the plaintiff. He also referred to annexure "C" which is a document showing consent to transfer of ownership interests executed between the defendant and Global Food Connections LLC. Both the documents i.e. consent to transfer of ownership interests and assignment agreement were signed on 10.6.2011. It was further contended that in view of the aforesaid documents all the rights and liabilities of Global Food Connections LLC. under the IDA and MULA both dated 13.6.2008 stood transferred to the plaintiff on 10.6.2011 and it implies that the time limit prescribed in the development schedule by the defendant to Global Food Connections LLC through IDA dated 13.6.2008 was not applicable to the plaintiff. Since the timeline provided in the agreement except for 06 months had already lapsed, therefore, it was not possible to establish 10 restaurants in such a short period unless the time is extended through a revised development schedule. However, for the proper commencement and implementation of IDA and MULA the parties entered into New Development Rider dated 23.9.2011 and in pursuance thereof the plaintiff developed Hardee's Restaurant at Haideri Karachi, which is operational without any complaint. Learned counsel further argued that the plaintiff was engaged in the correspondence with the defendant to approve the development schedule for remaining 09 restaurants but no proper response, assurance and or acceptance was conveyed by the defendant. He contended that precise dispute between the parties is roaming around three agreements i.e. IDA, MULA and NDR, which are to be read together.

4. It was further averred that IDA still subsists and in case of any conflict between the IDA, MULA or NDR the provisions of IDA will have an overriding effect while MULA and NDR are secondary and subsidiary documents. According to Section 2.2(d) of the IDA the plaintiff claims exclusivity in the development territory. He referred to the definition of development agreement provided in the Appendix "A" that IDA includes each and every term, condition, provision, limitation, attachment, exhibit, appendix, addendum and amendment, and any Ethics Certificate, Guarantee or Site Acceptance,

each as amended from time to time. According to learned counsel the forms of MULA and NDR are contained in Exhibits 3 and 4, which means that MULA and NDR are part and parcel of IDA and all three are to be read together. Learned counsel further argued that though in the deed of assignment only MULA is mentioned but it necessarily implies that the preliminary agreement upon which the right to acquire a license is IDA.

5. So far as application under Section 34 of the Arbitration Act read with Section 4 of the Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Awards), Act, 2011 is concerned, the learned counsel referred to Section 29.1(a) and 29.1(b) of MULA which contains arbitration clause and argued that the case of the plaintiff does not fall within the ambit and premise of arbitration clause as Clause (a) of Section 29 germane to exceptions and at least five such claims are mentioned which are excluded from the ambit and scope of arbitration including the claims involving the propriety of any termination of this license agreement or licensee's right to operate any licensed restaurant. It is clearly manifesting from the exceptional clauses that if the dispute is in the nature of licensee's right to operate any license restaurant then the dispute shall not be covered by the arbitration clause. The bone of contention is the defendant pleads that the plaintiff is not entitled to claim any exclusive right while the plaintiff claims exclusivity in the licensed territory; therefore, the learned counsel is of the view that the dispute is not covered under the arbitration clause.

6. Insofar as the third application filed under Order 7 Rule 11 CPC, the learned counsel argued that a meaningful reading of the plaint will substantiate that the plaintiff has sought enforcement of IDA and anything contains in MULA and or NDR in conflict with the terms of IDA then the IDA would be enforceable and prevail. The proceedings are not correlated to Section 202 of the Contract Act. No declaration has been sought by the plaintiff for determination of any relationship of principal and agent. It is well settled principle of law that for the purpose of rejection of the plaint the contents of the plaint are presumed to be true. In support of his contention, the learned counsel relied upon the following dictums:

(1) 1981 CLC (Karachi) 638 (M/s.Nawab Brothers Ltd., Karachi vs. Project Director, Special Projects, Planning & Development Department, Karachi and another). Section

62. Subsequent agreement only relating to some of terms of original agreement. Both agreements to be read together to form a complete subsisting contract. Original agreement not wiped out.

(2) 2005 CLC 1377 (Rana Abdul Hafeez vs. Muhammad Ali Khan and 12 others). It is common for commercial transaction to be concluded through a string of agreements; such arrangements are not unknown to legal jurisprudence. Back to back agreements can create effective legal relations between a series of parties provided the essential links of consent by and knowledge of the relevant persons remain present through the transactions. This divergence in treatment is highlighted in an instructive passage given in the judgment of the Indian Supreme Court in the case of Khardah Company Limited v. Raymon & Co. (India) Private Ltd. AIR 1962 SC 1810.

(3) 1980 SCMR 588 (Muhammad Aref Effendi vs. Egypt Air). Termination of agency. Case involving consideration of circumstances under which a contract of agency of kind involved in case could be revoked, whether Section 202, Contract Act, 1872 applicable to facts of case as well as true construction and scope of such section, whether plaintiff-petitioner entitled to continue agency and/or claim damages from principal on pleadings as made, whether petitioner failed to submit his account to his principal in terms of contract and whether petitioner justified in withholding same on any legal ground and whether termination of contract of agency lawful or not. Held: Such questions substantial questions of law and fact and involve careful study and scrutiny after leading of appropriate evidence. High Court not justified to refuse grant of temporary injunction as prayed for.

(4) 1992 CLC Karachi 2540 (Mrs. Naz Shaukat Khan and 3 others vs. Mrs. Yasmin R. Minhas and another). Prima facie case would not imply an indefeasible case; but would signify only an arguable case, involving serious or substantial questions of fact and law, which on proceeding to trial was capable of and had a possibility of success.

(5) 2005 MLD Karachi 541 (M/s.Tradesmen International (Pvt) Ltd. vs. Federation of Pakistan and others.). Following were considered "sufficient reasons" where the Court refused to stay the suit.

(a). The dispute falls out of the arbitration agreement, (b). That the forum selected to arbitrate or the arbitrator nominated is not likely to decide the dispute fairly and justly (c). There is personal bias or prejudice against the applicant such bias or prejudice must be demonstrated through tangible material, as a matter of fact and not merely as a matter of opinion, (d). All necessary parties to the suit are not party to the arbitration agreement and it is not possible to segregate the claim or dispute between such parties without fear of conflicting decision, (e). Where difficult and intricate questions of law are likely to arise, such as inevitably necessitate a reference for the opinion of the Court under Section 13(b) of the Act, (f). Where the defendant invoked arbitration agreement after filing a written statement or taking any other steps in the proceedings, (g) Where it is shown that the defendant applying for stay of proceedings at the time when the proceedings were commenced was neither ready and willing nor still willing or ready to do all things necessary to proper conduct of the arbitration, (h) Where all the parties to the arbitration agreement are residing in Pakistan, contract was executed, breach

allegedly committed and cause of action accrued in Pakistan, evidence is local but the seat of arbitration is foreign, then plea of forum inconvenience may outweigh foreign arbitration. It may be observed that, grant or refusal to stay a suit is dependent upon peculiar facts and circumstances of each case. Above "sufficient reasons," are merely illustrative and not exhaustive.

7. The learned counsel for the defendant argued that the plaintiff was not party to the IDA under which certain rights were conferred to Global Food Connections LLC for a limited duration. The IDA was terminated by the defendant as Global Food Connections LLC failed to perform its obligations particularly as provided in Clause 2.1 and 2.4 to develop and open a set of Hardee's Restaurants during the development term in accordance with development schedule. It was further averred that IDA stood terminated on 28.02.2011, therefore, no question could arise to assign the rights of IDA to the plaintiff by Global Food Connections LLC and even the indenture of assignment does not refer to or mention any assignment of rights of IDA but it was confined to the non-exclusive rights granted under MULA dated 13.6.2008 to develop Hardee's Restaurants. He further argued that the plaintiff can neither claim any relationship of a principal and or agent nor any status of agency coupled with interest attracting Section 202 of the Contract Act. He also referred to clause 17.1 of the IDA which provides in clear terms that the agreement does not create or imply between the parties a fiduciary, representative, employment, partnership, joint venture, agency or any other relationship between the parties other than an arm's length commercial relationship. It is further provided that HFS and developer agree that the provisions of Section 202 of the Pakistan Contract Act, 1882 shall have no application to the relationship created by this agreement. In clause 17.2 it is further provided that developer is not and shall not hold itself out to be an agent distributor, legal representative, partner, joiner venture or employee of HFS affiliate or any related person of HFS.

8. So far as the application moved under Section 34 of the Arbitration Act read with Section 4 of the Recognition & Enforcement (Arbitration Agreement & Foreign Arbitral Awards), Act, 2011 is concerned, the learned counsel argued that the plaintiff is claiming exclusive rights bearing in mind IDA and MULA but without recourse to arbitration proceedings, the plaintiff has filed the suit while both the IDA and MULA make available the alleyway of dispute resolution thus the suit is liable to be stayed. In fact the instant

dispute is of general nature which does not germane to any specific site or specific restaurant, therefore, it is wrong to comprehend that the issue raised by the plaintiff through this suit is covered under the exceptional clause in which the plaintiff does not need to invoke the arbitration clause. It is clearly mentioned in the agreement that the contract has been concluded under the US Laws and the arbitration will be conducted in the American Arbitration Association Rules therefore the Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Awards), Act, 2011 profusely applies. To add force to application under Order 7 Rule 11 CPC, the learned counsel argued that no cause of action accrued to the plaintiff for filing this suit. The plaintiff has claimed the exclusive right to open and operate Hardee's Restaurants in the province of Sindh but this claim is not supported by any document conferring exclusive rights. The provision of Order 7 Rule 11 CPC may be invoked if on meaningful reading of the plaint and the material brought on record by the plaintiff, the court finds the suit as meritless and vexatious. The trial of such suit would prolong the litigation without any just cause. The learned counsel in support of his arguments referred to following case law:

(1) 2005 CLD 1805 (Roomi Enterprises (Pvt.) Ltd. vs. Stafford Miller Ltd. & others). Section 202, Contract Act, 1872 is split up in two parts, 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. 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 tantamount to the creation of interest of agent in the subject matter.

(2) PLD 2004 S.C. 860 (Bolan Beverages (Pvt.) Limited vs. Pepsico INC. & others). Franchise is defined as a privilege granted or sold, such as to use a name or to sell products or service. In this simplest terms a franchise is a license from owner of trademark or tradename permitting another to sell a product or to serve under that name or mark. Precisely this definition is more akin to a license rather than an agency.

(3) 2009 CLD 153 (Far Eastern Impex (Pvt.) Ltd. vs. Quest International Nederland BV & others). The discretion available to the court under Section 34 of the Arbitration Act shall not be available under Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2007 being mandatory in nature, the foreign elements could not be considered nor the discretion vests with the court to stay or not to stay the proceedings in terms of the arbitration agreement.

9. Heard the arguments. The stumbling block and or impasse between the parties is

whether IDA, MULA and NDR should be read together and whether the plaintiff is entitled to claim exclusive rights in the defined territory in terms of IDA or not?. Indeed the matter set in train from International Development Agreement dated 13.6.2008, executed between the predecessor in interest of the plaintiff and the defendant in which sub-clauses (a) and (b) of Clause 2.2 have much significance which are reproduced as under :-

> **"(a).<u>Development Rights Only.</u> This Agreement is not a license or a franchise agreement and does not grant Developer any right to open or operate, or license any Third Party to open or operate, any business, including, without limitation, a Licensed Restaurant. In addition, this Agreement does not grant Developer any right to use, or license any Third Party to use, any or all of the Hardee's System in connection with the opening or operation of any business, including, without limitation, a Licensed Restaurant. This Agreement only gives Developer the opportunity to enter into the Multi-Unit License Agreement and individual New Development Riders with HFS for the development and operation of Licensed Restaurants at Authorized Sites in the Development Territory. Each Licensed Restaurant developed pursuant to this Agreement shall be opened and operated only in Full Compliance with the Multi-Unit License Agreement and a New Development Rider.**
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> **(d).<u>Limitation on HFS.</u> Subject to Section 2.2.(c), so long as Developer is in Full Compliance, HFS shall not develop, open or operate, or license any Third Party to develop, open or operate, any Hardee's Restaurant in the Development Territory during the Development Term. The limited exclusivity granted to Developer under this Section 2.2(d) shall lapse and be of no effect upon the first occurrence of any Default that is not cured within the applicable cure period, if any, and shall thereafter be restored only if HFS approves such restoration. Any exclusive rights restored under this Section 2.2(d) shall be subject to any rights to develop Hardee's Restaurants in the Development Territory that HFS has granted to any third party during the lapse period.**

10. The clauses referred to above lay down a right and or opportunity to the developer to enter into MULA and NDR so that it may develop and operate licensed restaurants at different sites in the developed territory. It is further provided that each licensed restaurant developed pursuant to this agreement shall be opened and operated only in full compliance with MULA and NDR. However, in clause (d) it is further provided that as long as developer is in full compliance the defendant shall not develop, open or operate or license any third party to develop or operate any Hardee's Restaurant in the development territory during the development term. On the same date i.e. 13.6.2008 International Multi-Unit License Agreement was also executed between the same parties

and in clause 2.1 it is clearly mentioned that the licensee is granted non-exclusive right to open each licensed restaurant in the development territory and in sub-clause (c) of clause 2.3 it is further provided that this agreement does not give licensee any exclusive right to use Hardee's system or in proprietary marks and nothing in the license agreement prohibits HFS from, during or after agreement term, developing, opening or operating or licensing any third party to open or operate, develop any type of restaurant including Hardee's Restaurant at any location.

11. Now I would like to take up the agreement entered into between the defendant and predecessor in interest of the plaintiff on 10.6.2011 for transfer of ownership. The purpose of this agreement was to save, protect and transfer all the rights emerging from MULA that Global Food Connections LLC transacted with the permission of defendant. Though this deal was considered a default under the MULA and give the right to the defendant to terminate the agreement but the defendant consented to this transaction, thereafter, on the same date assignment deed was signed between plaintiff's predecessor in interest and the plaintiff itself and in pursuance thereof the Global Food Connections LLC assigned its rights of Multi-Unit License Agreement dated 13.6.2008 to the plaintiff. The record do show that subsequent to the assignment of rights of MULA, New Development Rider was signed between the defendant and the plaintiff on 23.9.2011 in which also it is clearly mentioned that pursuant to an assignment agreement between GFC and licensee dated 10.6.2011, GFC assigned all its rights in the Multi-Unit License Agreement to the licensee and licensee desires to develop and operate a Hardee's Restaurant (licensed restaurant) at the licensed location identified in the attached Appendix "I" and if I look to Appendix "I" it connotes licensed location "Haideri" near Albaik, Host Country Pakistan.

12. The contention raised by the learned counsel for the plaintiff that in view of the assignment agreement rights of IDA were also assigned to the plaintiff only for the reasons that Form of MULA and NDR are the exhibits of IDA which are more particularly described in the title of contents of IDA but in my view, it is not correct legal position. Though the date of execution of IDA and MULA is one and the same but an important aspect cannot be ignored that the plaintiff is claiming the right of exclusivity either rightly or wrongly but in pursuance of assignment agreement, so it is most crucial

to see the deed of assignment which only speaks of the assignment of rights emanating from International Multi-Unit License Agreement without mentioning any right of IDA and on the basis of this assignment agreement not only the defendant accepted the terms of assignment but also signed NDR on 23.9.2011 with the plaintiff, which is only related to developing and opening and operating of Hardee's Restaurant at the licensed location identified in the Appendix "I" which permits one restaurant at the licensed location which is Haideri, Karachi, Pakistan. Why the rights of IDA were not assigned in the assignment agreement? Simply for the reasons that the defendant had already served notice of termination of IDA to the Global Food Connections LLC on 28.01.2011. The notice of termination is attached with counter affidavit of the defendant. Nothing depicted by the plaintiff's counsel that on service of notice of default or notice of termination any legal action was initiated by the predecessor in interest of the plaintiff against the defendant to protect and safeguard the IDA rights. It is quite rational to comprehend that when the assignment agreement was executed between the parties only the right of MULA were in existence and since the Global Food Connections LLC failed to honor their commitment, their IDA rights were terminated. The rights of MULA are confined to the opening of single restaurant without conferring any exclusive rights. It is clearly manifesting from the intention and the language used in the assignment agreement that parties were fully cognizant that IDA is no more in force that's why all the covenants of assignment agreement are quarantined to the rights of MULA and the defendant also consented to the assignment of Multi-Unit License Agreement only and their note of waiver of right of first refusal and consent to assignment is also attached with the assignment agreement.

13. The pros and cons lead me to an irresistible conclusion that the plaintiff has failed to make out prima facie case to claim exclusive rights of operation in the province of Sindh. The balance of convenience also does not fall in their favour and without any backing or patronage of exclusive rights there is no question of any irreparable loss and injury. Learned counsel cited different precedents in relation to the novation of agreement and string of agreements/back to back agreements which may create the effective legal relations between a series of parties with essential links of consent, but I do not find out any precedent helpful to the plaintiff's case and all are found distinguishable. The plaintiff has failed to make out the case of injunctive relief.

14. Now I would like to have discussion on the application moved for staying the proceedings under Section 4 of the Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Awards) Act, 2011. In sub-clause (b) of clause 24.1 of IDA it is clearly provided that neither the party shall be compelled to arbitrate any claim that is commenced after development term but which relates to any claim excepted from arbitration under the enforcement provisions. Let me reiterate that none of the IDA rights were assigned to the plaintiff, therefore, the plaintiff is stranger to IDA and it could not set into motion arbitration clause, but the fact remains that the plaintiff is already operating one licensed restaurant in Karachi, Pakistan in view of MULA and NDR dated 23.9.2011, therefore, for all intents and purposes MULA is in force which is duly protected in favour of the plaintiff under NDR. Let see the MULA to find out the terms of arbitration and its enforcement provisions. Learned counsel for the plaintiff took the view that the claim lodged through this suit is beyond the scope of arbitration because the claim involving the proprietary in termination of this licensed agreement or licensee right to operate any licensed restaurant is in exceptional clause which is not a correct position in my view merely for the reasons that no dispute exists between the parties in relation to MULA under which the plaintiff is already operating one licensed restaurant mentioned in NDR which provides that HFS and licensee are executing this New Development Rider (as provided in the Multi-Unit License Agreement) so that the terms of Multi-Unit License Agreement will govern the development and operation of the licensed restaurants. It is further provided that all capitalized terms used in NDR are not defined herein and shall have the meaning given them in the Multi-Unit License Agreement. As I have already held that no exclusivity can be claimed by the plaintiff under the MULA to use the Hardee's system or the proprietary marks at the licensed location or elsewhere and nothing in this license agreement prohibits HFS from, during or after the agreements term from developing, opening, operating or licensing any third party development or opening or operating any type of restaurant at any location.

15. Initially the learned counsel for the plaintiff focused on the rights arising from in International Multi-Unit License Agreement not only in the plaint but also in the supporting affidavit of injunction application, however, vide order dated 21.6.2013 learned counsel for the plaintiff on oral motion made a request that due to typing error

instead of the words “International Multi-Unit Development Agreement”, “Multi-Unit License Agreement” has been typed at various places and by consent of the learned counsel for the defendant correction was allowed and office was directed to make correction through red-ink in the concerned paragraphs of the plaint and in the supporting affidavits of injunction application. It is quite visible that there is no dispute between the parties in relation to Multi-Unit License Agreement and the present suit has been filed to protect the alleged rights emerging from International Development License Agreement attached as Annexure “A” to the plaint. Under sub-section (2) of Section 3 of Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 it is provided that an application to stay the legal proceedings pursuant to provisions of Article II of the Convention may be filed in the court in which the legal proceedings are pending and under Section 2 (definition clause) ‘Convention’ means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June, 1958 set for in the schedule to this Act. Pakistan is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Under Article II of the Convention it is provided that each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all of any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration and under Section 4 of the same Act, a party may apply to the court in which proceedings have brought to stop the proceedings insofar as they concern that matter and under sub-section (2) 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. The plaintiff has not raised or highlighted any arbitral dispute germane to MULA and both the learned counsel argued that in the terms of MULA the plaintiff was licensed to open and operate a single location restaurant therefore no purpose would be achieved to refer to the parties to arbitration except a futile exercise without any corporeal outcome.

16. Now I would like to take up third application moved under Order 7 Rule 11 CPC for the rejection of the plaint. According to the plaintiff the cause of action arose within the territorial jurisdiction of this court on 22.7.2012 when the plaintiff learnt that the

defendant intended to award license to run the Hardee's Restaurant to third parties. This is a suit for permanent injunction alone in which ancillary relief as well as consequential relief is one and the same. If the contents of the plaint are read in juxtaposition it transpires in pith and substance that the plaintiff has claimed rights streaming from IDA with the line of argument that MULA cannot be read in isolation but it should be read with IDA and NDR. The plaintiff's counsel robustly argued that the controversy involved herein cannot be agitated or settled through arbitration and I have also held that so far as the MULA and NDR are concerned there is no dispute between the parties and the ambit and parameters of both the agreements are limited and confined to opening and operation of single outlet therefore no meaningful purpose would be served rather it would be redundant to entreat the recourse through arbitration. IDA's Clause 24.2 re-counts the choice of law, choice of forum, limitation period, waivers, remedies not exclusive, injunctive relief and survival of enforcement provisions. It is lucidly postulated that any claim arising out in connection with, or any relation to this agreement shall be governed by and construed in accordance with laws of the jurisdiction in the U.S. where the principal offices of HFS are located as of the effective date without regard to conflicts of laws principles. In the same clause choice of forum is also provided with respect to claims not subject to arbitration or that may be pursued by means other than arbitration, the developer may file any claim against HFS only in the federal or state court having jurisdiction in the city, county and state in which HFS has its principal offices. Similar provision regarding the choice of law and choice of forum are provided in the MULA but again the present suit has not been filed to agitate the rights of MULA but the plaintiff wants to hold back IDA rights in its favour through the present proceedings, therefore, resort should have been made in accordance with the terms and conditions of IDA. If the plaintiff still believes that rights of IDA were also conferred upon the plaintiff by its predecessor in interest while assigning rights of MULA then the plaintiff should have sued the defendant for declaratory relief within the agreed jurisdiction of laws and forum and not in Pakistan.

17. The choice of forum and or selection of forum have much significance. All local and foreign agreements containing choice or selection of forum clause are to be seen minutely. So far as the Section 28 of the Contract Act is concerned, two or more courts having jurisdiction to try a suit and agreement between the parties that any dispute

arising between them shall be tried only by one of such courts is not contrary to public policy as it would neither contravene provisions laid down in Section 28 of Contract Act, 1872 nor violates in any manner provisions of Section 9 or Section 20 of Civil Procedure Code.

18. The exclusive jurisdiction clause in an agreement cannot be ignored lightly merely at the whims of one of the parties to the contract and unless there is "strong cause" to displace the forum that the parties have agreed to resolve their dispute. In the case of **M/s.Raziq International (Pvt.) Ltd. v. Panalpina Management Ltd. (PLD 2014 Sindh 175)**. I have discussed in detail the conflict of laws, jurisdiction and choice of law, justification, forum non conveniens and legal effect of valid jurisdiction clause which are reproduced as under :-

> "8..... To start with I would like to refer to relevant excerpts from Dicey, Morris and Collins on **"The Conflict of Laws"** (Fifteenth Edition) as under:-
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> **Jurisdiction and choice of law.** The questions that arise in conflict of laws cases are of two main types: first, has the English court jurisdiction to determine this case? And secondly, if so, what law should it apply? There may sometimes be a third question, namely, will the English court recognize or enforce a foreign judgment purporting to determine the issue between the parties? Of course this third question arises only if there is a foreign judgment, and thus not in every case. But the first two questions arise in every case with foreign elements, through the answer to one of them may be so obvious that the court is in effect only concerned with the other. The law of every modern country has rules dealing with these questions, called conflict of laws in contrast to its domestic or internal law.
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> **Justification.** What justification is there for the existence of the conflict of law? Why should we depart from the rules of our own law and apply those of another system? This is a vital matter on which it is necessary to be clear before we proceed any further. The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence. This can best be seen by considering what would happen if the conflict of laws did not exist.
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> **Forum non conveniens.** The doctrine of Forum non conveniens, i.e. that some other forum is more "appropriate" in the sense of more suitable for the ends of

justice, was developed by the Scottish courts in the 19th century, and was adopted (with some modifications) in the United States. The Scots rule is that the court may decline to exercise jurisdiction, after giving consideration to the interests of the parties and the requirements of justice, on the ground that the case cannot be suitably tried in the Scottish court nor full justice be done there, but only in another court. In England, forum conveniens was always a relevant factor in the exercise of the discretion to grant permission to serve out of the jurisdiction under what is now Rule 6.36 of the Civil Procedure Rules, i.e. Rule 34, but until 1984 the English courts refused to accept that the jurisdiction to stay actions commenced against defendants who were sued in English as of right could be based on forum non conveniens grounds.

Scope and reach of jurisdiction clause. In cases in which there is no dispute as to the validity of a jurisdiction clause, the principal question is likely to be to determine that the dispute in question falls within the material scope of the clause, or the within the jurisdiction clause ratione materiae. As the common law regards these clauses as ordinary contractual terms, the question is one of construction and interpretation. In principle, where it is a matter of dispute, the construction and interpretation of a jurisdiction clause is a matter to be referred to the law which governs the jurisdiction clause, which will usually be the law governing the contract of which it forms a part, albeit a separable part…….

Legal effect of valid jurisdiction clause. As a general rule, but subject to important exceptions, English courts (in common with the courts of other countries) will give effect to a choice of jurisdiction. If the English court is the chose forum, the jurisdiction clause will be effective to confer jurisdiction on the English court; in certain circumstances, the court will have discretion not to exercise it. If a foreign court is the chosen forum, then the English court will give effect to the choice by staying proceedings brought in breach of the jurisdiction clause or by refusing to give permission to serve process outside the jurisdiction; but (except in cases within the scope of Article 23 of the Regulation or the Convention) the English court has a discretion to override the choice of jurisdiction.

9. The term "Forum non convenience." is defined in **Black's Law Dictionary** (Sixth Edition) as under :-

"Forum non conveniens. Term refers to discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum, Johnson v.

Spider Staging Corp. 87 Wash.2d 577, 555 P.2d 997, 999, 1000 See 28 U.S.C.A. & 1404.

The rule is an equitable on embracing the discretionary power of a court to decline to exercise jurisdiction which it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. Leet v. Union Pac. R. Co., 25 Cal.2d 605, 155 P.2d 42, 44. The doctrine presupposes at least two forums in which the defendant is amenable to process and furnishes criteria for choice between such forums. Wilson v. Seas Shipping Co., D.C.pa., 78 F.Supp. 464, 465. In determining whether doctrine should be applied, court should consider relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of view of premises, and all other practical problems that make trial easy, expeditious and inexpensive. Di Lella v. Lehigh Val. R.Co. D.C.N.Y., 7 F.R.D. 192, 193".

19. In the counter affidavit filed in response to C.M.A No.7281/2012, the plaintiff has also raised the issue of forum conveniens. The last portion of paragraph 3 of the counter affidavit reads as under:

"since the establishment of the restaurants is liable to take place in Karachi and the territory of Sindh the scales of forum convenience are also in favour of the plaintiff. The entire record is in Karachi".

20. The doctrine of **Forum non conveniens** means some other forum is more proper in the sense of more suitable ends of justice. At the same time the choice of forum selection clause is made in an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honoured by the parties and enforced by the courts. This clauses cannot be objected being improper because it tends to oust a court of jurisdiction is hardly more than a vestigial legal fiction. In the case of **M/s.Raziq International (Pvt.) Ltd.,** exclusive jurisdiction of the courts in the city of Basel, Switzerland was agreed between the parties but the plaintiff in that case also filed the suit for declaration, injunction and damages in this court and the defendant had filed an application under Order 7 Rule 10 and 11 CPC. In the concluding paragraph of case cited supra, I held as under

"under Order 7 Rule 10 CPC the court can return the plaint at any stage of the suit with

the direction to present to the court in which the suit should have been instituted and while returning of plaint the judge shall endorse thereon the date of its presentation and return with a brief statement of the reasons of returning it. In this case neither the plaint can be returned nor rejected keeping in view the forum selection clause and naturally when parties had agreed to resolve their dispute by a particular court then mere returning of plaint would not serve any purpose as the same cannot be presented as it is by the plaintiff in the court at Basel, Switzerland, as while filing the case in that jurisdiction the plaintiff has to follow the laws of that particular country for setting the law into motion. 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 attendance 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 the plaintiff. So in my view the proper course is to stay the proceedings in this suit".

21. It is well settled that the court may take the judicial notice of the facts and circumstances of each case. The plaintiff has not asked for any declaration of IDA rights but the permanent injunction alone. Whether the plaintiff is entitled to claim exclusive rights or not? This altercation cannot be decided by this court in view of bar contained in the choice of law and selection of forum but for this right, the plaintiff should have sued the defendant within the agreed jurisdiction of court and applicable law. Keeping in mind the case of **M/s.Raziq International (Pvt.) Ltd.,** instead of rejection of plaint, it would advance the cause of justice to stay the suit as return of plaint would simply not serve the purpose and the plaintiff if interested to set the law into motion within the agreed jurisdiction of court, it has to abide by and follow the protocol of applicable law and mere endorsement with return of plaint would not be sufficient to institute the plaint in the competent court of law. The claim of exclusive rights by the plaintiff in terms of IDA cannot become the subject matter of arbitration and with respect to the claims not subject to the arbitration or that may be pursued by means other than arbitration, the plaintiff has to invoke the jurisdiction of competent court in the City, Country and State in which HFS/defendant has its principal offices as of the date such suit is filed.

22. Neither the plaintiff has made out the case for confirmation of interim orders nor any dispute has been put on view or divulged to refer to the arbitrator in terms of MULA, therefore, the injunction application "CMA No.7103/2012" and "CMA No.7281/2012" both are dismissed. So far as "C.M.A No. 7280/2012" is concerned, in order to advance the cause of justice, the suit is stayed with an option to plaintiff to institute the legal proceedings for seeking declaration against the defendant in terms of Clause 24.2 of the International Development Agreement dated 13.6.2008 in the competent court of law if they are of the view that while assigning the rights of MULA and execution of fresh NDR, the rights of IDA were also assigned to them which question cannot be decided by this court in this suit for permanent injunction.

Karachi:-
Dated:18.11.2015. **Judge**