

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

FAO no. 121/2021

Pak Gulf Construction (Private) Limited

Versus

Godwin Austen Johnson

Appellant by: Barrister Talha Ilyas Sheikh, Advocate
Respondent no.1 by: Malik Omair Saleem, Advocate
Date of hearing: 25.04.2024

Sardar Ejaz Ishaq Khan, J: The appellant appeals from the impugned order dated 22.09.2021, whereby the learned civil Court dismissed the appellant's objections to the arbitration award dated 03.06.2020 and made the award the rule of Court.

1 The Dispute and the Award

1.1 The dispute between the parties concerned the payments for services under the Contract titled *Design Consultancy Service-Architecture, Interior and Specialty Design for 5 Star Movenpick Hotel, Centaurus, Islamabad* (the **Contract**). The appellant was named the 'Employer', and the respondent the 'Consultant' in the Contract, and for convenience, we will refer to the parties in this judgment with the same labels. The Consultant was to provide '*comprehensive design services for all elements of the project through all design phases of concept design, schematic design, detailed design, tender drawings and documentation...*'¹.

1.2 The Contract was priced at a lump sum of USD 1,930,000/-. Schedule 4 to the Contract listed 5 phases of design services for the purposes of invoicing and payments, and each phase had one or more specified milestones that, when reached, triggered the Consultant's right to invoice and to be paid. Schedule 4 also stipulated reimbursable expenses that were to be invoiced

¹ Clause 1.2 (a), Schedule 2 of the Contract titled 'Scope of Services'.

subject to the conditions specified therein, but the pricing table did not specify any pre-agreed sum under that head.

1.3 The appellant terminated the Contract on 15.06.2017. The Consultant did not dispute the termination but claimed the outstanding payment. The Consultant invoked the arbitration clause and filed an application under section 20 of the Arbitration Act, 1940, which was allowed. The Consultant then filed its statement of claim in the sum of USD 600,001/-, the breakdown of which per the statement of claim was as follows:

- a) RCD-Visas of Kevin, Peter, Leila and Manuel amounting to US\$ 391.56 dated May 31, 2016.
- b) 50% Completion & Submission of Concept Design-Residential Apartments (Inv-7) amounting to US\$ 45,332.40 dated 30th October 2016.
- c) 100% Schematic & Detailed Design-33.33% DD Completion & Submission by Consultant amounting to US\$ 155,884.14 dated 3rd May 2017.
- d) Schematic Design-100% Residential Apartments (Inv-9) amounting to US\$ 18,667.60 dated May 3, 2017.
- e) Residential Apartments-Detailed Design 100% and Detailed Design Approval (Inv-10) amounting to US\$ 14,400.00 dated 22nd June 2017.
- f) Hotel- Detailed Design 100% and Detailed Design Approval (Inv-11) amounting to US\$ 198,009.90 dated 22nd June 2017.
- g) Total amount excluding travelling costs and expenses = US\$ 432,685.60
- h) That moreover, the Claimant has also incurred legal expenses and would have to incur travel costs of witnesses who will give evidence during arbitration proceedings, totaling up to US\$ 167,315.40 or its equivalent in Pakistani rupees.

In light of all the relevant clauses of the Contract referred to above and the unpaid invoices, the total liability of the Respondent amounts to **US\$ 600,001.**

1.4 The arbitration commenced. The parties led their evidence and each produced one witness along with the documentary evidence. The learned arbitrator framed 10 issues and rendered the award awarding US\$ 358,815/- as Contract price outstanding plus PKR 3.5 million as reimbursable expenses in

favour of the Consultant.

1.5 As the payment milestones in Schedule 4 to the Contract mentioned percentages only, and as the claim before the arbitrator and the award too mentioned the sums in Dollars, it became necessary for us to correlate the percentages with the Dollar sums. In order to comprehend the parties’ submissions in the context of the narrative in the award, and also for the reader to get a proper picture of the controversy before us, the following table was prepared, illustrating the percentage payments and the Dollar numbers thereagainst. Further, as the arbitrator awarded 80% of the phase 4 price (the implications of which we will discuss later), the table below also reflects, in additional columns, the numbers based on the award:

		Phase Fee	US \$	Totals	Per the Award
<u>Lump Sum Project Fee</u>				<u>1,930,000</u>	<u>1,821,920</u>
a	Preliminary Study (15% of Design Fee)	15%	289,500		
	On completion & submission of Preliminary Study by Consultant	100%	289,500	289,500	289,500
b	Concept Design Phase (30% of the Design Fee)	30%	579,000	579,000	579,000
(i)	On 50% Completion & Submission of Concept Design	33%	191,070		
(ii)	On 100% Completion & Submission of Draft Documents for aproval	33%	191,070		
(iii)	On approval of documents by the employer	34%	196,860		
c	Schematic Design Phase (35% of the Design Fee)	35%	675,500	675,500	675,500
(i)	On 50% Completion & submission of Concept Design by Consultant	33%	222,915		
(ii)	On 100% Completion & submission of Draft documents for approval	33%	222,915		
(iii)	On approval of documents by the employer.	34%	229,670		
d	Detailed Design Phase (18% of the Design Fee)	18%	347,400	347,400	277,920
(i)	On 60% DD completion and Submission by consultant	33%	114,642		
(ii)	On 100% draft DD completion & submission by consultant	33%	114,642		
(iii)	On approval of final DD by employer	34%	118,116		
e	Tender, Contract and Construction Documentation Phase (2% of the Design Fee)	2%	38,600	38,600	-

1.6 It is an admitted position between the parties that phase 5 had not arrived by that time and, therefore, with the 2% Contract price excluded from the lump sum price, the Contract price stood reduced to \$ 1,891,400/-. As the receipt by the Consultant of USD 1,463,105/- was admitted, the balance sum left was \$ 428,295/-. Giving the reason that some further work was required of the Consultant by the Employer in respect of phase (d) services that was not satisfactorily completed due to the earlier termination of the Contract, the arbitrator then reduced the phase (d) price from the contractually stipulated

sum of USD 347,400 by 80% and awarded USD 277,920/-. The resultant position can be summarised as follows:

Project Fee less 2% for Phase (e) which never arrived	1,891,400
Project Fee as above with 80% for Phase (d) awarded by arbitrator instead of 100%	1,821,920
Payment Admitted by both parties	1,463,105
Balance Fee (less reimbursables)	358,815

1.7 We have reviewed the award with the assistance of the learned counsels along with the references to the relevant items of the record and find the award to be a well-reasoned one on all issues, except issues no. 5 and 6, which were whether the Consultant was entitled to get the remuneration accrued and the amount thereof. But before we turn to discuss the grounds of appeal before us, it becomes necessary for us to take a detour on the subject of the scope of the Court's review of the award, on which the jargon of 'settled law' is an utter misnomer, and on which many hours of counsels' forceful submissions, over several hearings, with reference to scattered paragraphs from dozens of precedents were indeed a veritable pleasure for us to bear.

2 Scope of review of the award

2.1 As is the wont, the learned counsels both cited *Gerry's International (Private) Limited vs Aeroflot Russian International Airlines*², albeit, each cited different paragraphs. Other judgments cited by counsels are earlier or later iterations of the same principles, but, even if in a rather uneasy cohabited rendition, Gerry's appears to be the only judgment that has all the principles gathered in one place.

2.2 Gerry's is unfinished business. It is a judgment by a 3-member bench of the Supreme Court. The judgment set for itself at paragraph 4 an ambitious territory to cover on the law of arbitration. The expedition across the caselaw trail started from *Hodgkinson v. Fernie*³ of 1857 and ended at *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd*⁴ for foreign jurisdictions, and traversed *Abdul Ghani and Inayat Karim*⁵ up to *A. Qutubuddin Khan v. CHEC Mill Wala Dredging Co. Pvt. Ltd.*⁶ in our jurisdiction. Alas, the journey was truncated just when the destination was quite in sight, in that it stopped at

² 2018 SCMR 662

³ [(1857) 3 C.B. (N.S.) 189]

⁴ [2005 (6) SCC 462]

⁵ PLD 1960 Supreme Court (Pak) 98

⁶ 2014 SCMR 1268

mapping out the ‘30 principles’⁷ listed at paragraph 8 of the judgment, but did not proceed further to an internally consistent synthesis of those principles to reach the summit that was meant to be the endpoint of the entire exercise. For quick reference, paragraph 8 of Gerry’s listing the 30 principles is annexed to this judgment.

2.3 *Gerry’s* has something for everyone. It is a rare judgment, in that, almost always to the vexation of the Court, both the opponent counsels invariably rely on it, albeit always on variegated subsets of the 30 principles chosen to fit their respective client’s case. The claimant’s counsel would rely on principles no. 1 and 2 to stop the Court⁸ peering into the arbitrator’s decision on the questions of fact and law, while his opponent would, with equal validity of binding precedent for being found in the same judgment, rely on principles no. 20, 22, and 24, to argue the exact opposite that it was the duty of the Court to see that an award wrong on a material point of law or fact did not get blessed by being made rule of Court. The conundrum is real. The civil Courts cannot be blamed entirely for throwing the towel in and listing the entire 30 principles in their judgments by way of ‘applying the settled law’, as did the learned civil Court in this case. But Gerry’s sanctions no warrant for abdication of the primary judicial duty of scrutinizing an award by hiding behind the ‘arbitrator’s supremacy’ principle and making the award the rule of Court by an almost mechanical process. We say, with as much respect as we can muster, that post-Gerry’s judgments of the Supreme Court have not quite carried us yet to the summit Gerry’s aspired for, with those judgments either not citing Gerry’s at all, or citing only such of the 30 principles that support the verdict in the particular appeal. This, we say again with the deepest respect, is far from satisfactory. A later judgment by an equinumerous bench of the Supreme Court, which does not cite the 3-member judgment in Gerry’s⁹, would encounter the obstacle of *per incuriam* as much as would a judgment by an equinumerous bench that cites only some of Gerry’s

⁷ Principle no. 23 concerns frustration of contract, and is not relevant to the point under consideration, namely, the scope of scrutiny of an award.

⁸ The civil or the appellate Court.

⁹ See, for instance, *National Highway Authority vs Sambu Construction Co. Ltd*, 2023 SCMR 1103

principles¹⁰. It makes the legal staple of arbitration matters for the High Court and the Civil Courts rather unpalatable, for none of the post-Gerry's judgments can be said to have settled the law on the point of the scope of the scrutiny of the award and, we add without hesitation, that it would remain so as long as Gerry's remains in the field as it is.

2.4 The common reading of Gerry's 30 principles in a manner as if each principle operated independently is, with respect, the root cause of the 'Gerry's bewilderment' for all Courts bound under Article 189 of the Constitution to abide by a statement of the law laid down by the Supreme Court. How are they to reconcile, for instance, principles no. 1 and 2 that the arbitrator is the *sole and final* judge of all questions of law and fact and the quantity and quality of evidence, with principles no. 19 and 20, whereby the Court can set aside the award for a factual or legal error on the face of the award or where the arbitrator has not applied the law correctly? To what purpose would a Court aim its attention if, despite the existence of such error on the record, it must defer to the decision of the arbitrator for being the sole and final judge of all questions both of law and of fact under principle no. 1? We shall not tax the reader with further examples of inconsistency but trust that knowledgeable readers would not disagree on this score. Until the Supreme Court completes the next leg of the journey to a wholistic synthesis of Gerry's 30 principles, it falls upon the High Court to make an attempt at a synthesis of those principles for a signpost for the civil Courts under its supervision, and also for itself.

2.5 There is hope. After reading those principles several times over, one cannot resist the conclusion that the apparent contradictions arise primarily out of the choices of verbiage and the nuances of emphasis by the learned judges over a century and a half. The number of Gerry's principles has grown to 30 not because they are 30 distinct and self-contained principles, but because they are, in most part, restatements of much fewer core principles, restated over and over again with varying expositions. The differences are primarily dictional, but in essence express the same key underlying principles, which, despite the passage of 170 years, have not departed in any substantial sense

¹⁰ See, for instance, *Injum Aqeel vs Latif Muhammad Chaudhry*, 2023 SCMR 1361

from the statement of the principles for the scrutiny of an award laid down in *Hodgkinson v. Fernie*¹¹, which was reproduced at paragraph 6 of *Gerry's* judgment as follows:

Where a cause, or matters in difference, are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact. However, the only exceptions to that rule are cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award.

2.6 *Gerry's* has indeed served a useful purpose, in that it is the only judgment of the Supreme Court in our jurisdiction further afar from which in the past we need not venture. Insofar as the collated distillation of the principles governing the scrutiny of an award is concerned, *Gerry's* serves the purpose well. Each principle stated therein is backed by judicial precedent, foreign or local, and one need no longer venture further afar before *Gerry's* on the trail of case law that has already been trekked by *Gerry's*. Out of the several forks emerging on the road where *Gerry's* rested, and until the Supreme Court holds otherwise, if at all, we make an attempt at finding our destination from where the forks arise to see if all the pathways at those forks can possibly lead to the same destination. Choosing that destination to be *Hodgkinson* – for it has served the test of time for being cited in various common law jurisdictions to build the edifice of the principles thereon – we are inclined to say that *Gerry's* principles can be synthesized and allocated to the *Hodgkinson* formulation per the following table:

Hodgkinson Principle for the scrutiny of an award	Gerry's principles
Where a cause or matters in difference are referred to an arbitrator, he is the sole and final judge of all questions, both of law and fact.	1, 2, 10, 11, 12, 13, 14, 16, 17, 18, 21, 26
However, the only exceptions to that rule are cases where:	
1) the award is the result of corruption or fraud,	15, 24, 25, 27, 29,30

¹¹ [(1857) 3 C.B. (N.S.) 189]

2)	where the question of law necessarily arises on the face of the award	4, 5, 6, 7, 8, 9, 15, 18, 20, 21, 22, 24, 25, 27, 28, 29
3)	or upon some paper accompanying and forming part of the award.	18, 19, 25, 27, 28, 29, 30

The familiar term ‘record’ is the convenient shorthand for the phrase ‘*some paper accompanying and forming part of the award*’ in the above formulation, and we will use that term instead. Quite aptly therefore, Gerry’s principle no. 19 refers to ‘record’ alongside the ‘award’.

We have no qualms in accepting that the allocation of the 30 principles in the respective rows in the table above may reasonably be differed with. It needs to be remembered that the exercise is driven by a practical objective of the need for synthesis of Gerry’s principles, and not to satisfy academic curiosity at some hypothesized serendipity of *Hodgkinson* formulation encapsulating Gerry’s principles.

2.7 Gerry’s principle no. 3 – that is not listed in the table above – is none but the statutory imperative for the arbitrator to give ‘*sufficient reasons*’ per section 26-A of the Arbitration Act, and is a development much after *Hodgkinson*. It therefore necessitates a further exception in the *Hodgkinson* principle in the Pakistani context, enabling a Court to examine the sufficiency of reasons in the award. The following exception may thus be added:

	Gerry’s principle
or where the award does not state the reasons in sufficient detail to enable the Court to answer a question of law arising out of the award.	3

2.8 Much good ground has been lost by relegating one key principle, which should, in our humble opinion, have been placed always in the foreground, namely, *where two opinions on a question of law were equally plausible, then the Court is not entitled to substitute its preferred view for that of the arbitrator*¹². But where two views were not possible, and the arbitrator’s conclusion was not valid in law, the Court would be failing in its duty to set the wrong right, thwarted by the fallacy of the impenetrability of the award by

¹² See Gerry’s principle no. 12.

the judiciary. After all, why have the civil Court review the award, or why have the appellate Court sit in appeal, if the arbitrator's decision on facts and law were the last port of call in the dispute resolution process? Why bother with the pretence of scrutiny of award at all, and why bother with appellate remedies, if the Court is meant to leave the matters at the helm of the arbitrator's door exclusively?

So we incorporate this principle also in our improvisation of the *Hodgkinson* principle and, adding two provisos for clarity and some edits for neatness, complete it as follows:

Where a dispute¹³ is referred to an arbitrator, he is the sole and final judge of all questions, both of law and fact. However, the only exceptions to that rule are cases where:

- (a) the award is the result of corruption or fraud;
- (b) the question of law necessarily arises on the face of the award; or
- (c) the award does not state the reasons in sufficient detail to enable the Court to answer a question of law arising out of the award.

Provided that, where two opinions on the question of law are equally plausible, then the Court shall not substitute its preferred view for that of the arbitrator expressed in the award; and

Provided further that, in relation to both clauses (b) and (c), reference to the expression 'award' includes the 'record' on which the award is based, if the answer to the question of law necessitates a reference to the record¹⁴.

Explanation. The expression 'question of law' includes conclusions drawn from proven facts.

The above formulation reads like a statutory provision only to borrow the precision that can be crafted in a statutory provision but can be lost in a flowing narrative of the same principles.

2.9 It also remains to be clarified that the expression 'question of law'

¹³ Replacing 'dispute' for 'cause or matters in difference'.

¹⁴ Cf. the words "or upon some paper accompanying and forming part of the award" in *Hodgkinson*. As a matter of common sense and logic for legal minds, it would be well-nigh impossible to answer a question of law or fact in some cases without reference to the record, e.g., where a party claims that a clause of a contract or contents of a letter partially reproduced in the award were read out of the context of the entire clause or the letter.

includes *conclusion of fact* drawn from the facts proven in arbitration. The legal effect of a conclusion of fact is a question of law. The Explanation in the above formulation conforms to Gerry's principle no. 18, whereby the Court's scrutiny of an award would extend to a conclusion of fact if it is not based on any evidence or the evidence does not support that conclusion rationally. Stated another way, whether there has been a failure to consider material evidence, or whether an unwarranted conclusion of fact was drawn in the award that no reasonable adjudicator would arrive at, are questions of law¹⁵, in that a neutral adjudicator is not entitled to ignore a material item of evidence nor to draw a perverse conclusion from the evidence, because, when the parties appoint an arbitrator to be their neutral adjudicator, they cannot be attributed the absurd intention that they also agreed that the arbitrator could ignore a material item of evidence or draw a perverse conclusion from the evidence.

2.10 The improvised *Hodgkinson* principle identifies the 'triggers' for, and then the 'scope' of, the scrutiny of the award by the Court. The starting point is the presumption of correctness of the award. It falls on the counsel to identify any of the exceptions in the improvised *Hodgkinson* principle and to satisfy the Court – as a threshold question – that the trigger really exists. Only then the Court will cast a deeper look at the award (and to the extent necessary, the record) to see if the presumption of correctness of the award is *possibly* a rebuttable one in the case before it. If the counsel is able to cross that threshold, only then the Court will embark on a further examination of the award and, to the extent necessitated in that quest, the rest of the record, with the assistance of the counsels. The Court '*should not try to fish or dig out the latent errors in the proceedings or the award*¹⁶, but ought ordinarily to limit itself to the triggers identified by counsel at the bar with reference to the memos of applications or appeal and the replies. We should like to think that this progression of the Court's function would strike a balance between the

¹⁵ "The question whether an inference follows from certain facts or not, is a question of law": *N. M. Khan vs The Chief Settlement and Rehabilitation Commissioner* 1970 SCMR 158; *Bibi Jan vs Habib Khan*, P L D 1975 SC 295 . "Factual points could not be allowed to be opened or (re-)agitated, unless there had been a material misreading or non-reading of the evidence, which was itself a question of law ...": *Pakistan Match Industries (Pvt) Limited vs Asst. Collector, Sale Tax & Central Excise, Mardan*, 2019 SCMR 906.

¹⁶ Gerry's principle no. 18

two extremes of a completely hands-off approach and a deeply interventionist approach concerning the triggers for and scope of scrutiny of the award by a Court.

2.11 It needs to be highlighted that the remedies – setting aside, modifying, or remitting an award – is not the subject of the *Hodgkinson* principle as improvised in this judgment; that would follow depending on the error identified. For instance, if the Court agrees that reasons for the award were insufficient, it will remit the award under section 26-A and not set it aside. This clarification is important, because the entire exercise undertaken in this section of the judgment is an attempt to elucidate and circumscribe the triggers for and the scope of scrutiny of an award and not as to what consequences are to follow therefrom, which are already prescribed in the Arbitration Act.

3 Objections to the Award, and the rule of Court order

3.1 With Gerry's synthesised and overcome, we are now poised to review the award in the appeal before us by applying the improvised Hodgkinson principle, or, we might say, the Gerry's synthesised restatement.

3.2 The objections to the award and the impugned order of the civil Court making the award the rule of Court furnished the grounds of appeal by the Employer before us. The ground of appeal claiming insufficiency of reasons for awarding the phase (d)(iii) Contract price requires a separate section because we agree therewith. But before we do so, we need to address briefly the other grounds of appeal which do not meet the thresholds of the Gerry's-Hodgkinson synthesis.

A) The termination for default versus termination for convenience

Mr. Talha Sheikh for the Employer took the position that the Consultant was at default under the Contract, in that the design deliverables were defective, and relied on the correspondence whereby deficiencies in the design deliverables were pointed out by the Employer from time to time. Under clause 10 of the Contract, the Employer could terminate the Contract either for convenience or for the Consultant's default. The termination

notice, however, did not mention that the Contract was being terminated for default; rather, the termination notice specifically referred to clause 10.3 stipulating termination for convenience and not to clause 10.2 that stipulated termination for default. Accordingly, the learned arbitrator correctly answered the question of law as a conclusion from the proven facts that it did not lie with the Employer to claim later that the Contract was terminated due to default in the services by the Consultant.

B) The non-compliance with the Company Law

The objection taken before the learned trial Court in this behalf was that under Parts XIV and XII of the Companies Ordinance 1984 and Companies Act 2017, respectively, titled “Provisions as to Establishment of Places of Business in Pakistan”, the Consultant, a foreign concern, was disabled from bringing any legal proceedings in Pakistan, for it had not filed the prescribed corporate documents with the Registrar of companies. This objection was turned down by the learned civil Court in para 10 of the impugned order for the reason that the Consultant had not established any office in Pakistan and therefore the referred provisions of the Company Laws did not apply. This was a correct finding in law.

C) Counterclaim

The Employer also filed a counterclaim that was rejected by the learned arbitrator while rendering his findings under issue no.7, the reasoning whereof is unexceptional. Terminating the Contract for convenience, and then claiming compensation for the fee paid to another consultant engaged to rectify the allegedly defective design delivered by the Consultant, are two rationally, legally, and logically, contradictory positions, and cannot be countenanced in a case of termination for convenience by the Employer.

D) Reimbursable expenses

The other objection to the award was that, despite the arbitrator determining that the Consultant had not produced any evidence to establish his claim in the sum of US\$ 167,315/- under the heading of 'Reimbursable Expenses', the arbitrator had nonetheless awarded Rs. 3.5 million under that head of claim. We also find this objection to be without substance. We say so because the award reads that evidence to substantiate the large claim of USD 167,315/- as reimbursable expenses was not before the arbitrator, but there was evidence that the visas of the Consultant's team members were likely obtained and that they had travelled to Pakistan, and with this contextual conclusion on the facts before him, his awarding Rs.3.5 million only against the USD 167,315/- claimed was by no means an unreasonable or arbitrary award of reimbursable expenses.

4 Sufficiency of reasons for the question of law

4.1 We now come to core of the appellant's case, namely, that the learned arbitrator did not give sufficient reasons to arrive at the conclusion of law that Schedule 4 of the Contract enabled invoicing and consequent payment for phase (d)(iii), when there was no evidence on record that the final drawings of phase (d) had been approved by the Employer.

4.2 It so happened that, fairly soon after the Contract was terminated, the Consultant delivered the remaining drawings that were due under phase (d), titled 'Detailed Design Phase'.

4.3 This ground of appeal has two limbs.

- (a) The first limb is that a good number, if not all, of the detailed design drawings deliverable under phase (d) were submitted after the Contract stood terminated for convenience. The Employer's stance is that those 'post-termination' deliveries of detailed design could not be taken into account for the purposes of payments under phase (d).
- (b) The second limb was that, in any event, the Employer had not given its approval for those deliverables *qua final drawings*, and

the pre-conditions under Schedule 4 to the Consultant's right to invoice and receive payment under phase d(iii) were therefore not triggered.

- (c) The first limb was rejected by the learned arbitrator with reference to clause 10.5 of the Contract, which stipulated the Consultant's right to all remuneration that had accrued to it up to the date of termination, with the corresponding obligation to deliver to Employer the work products performed up to termination, as that would be paid for by the Employer. The Consultant did not claim for any work carried out after the date of termination, but claimed that the drawings delivered after termination had been completed before and up to the date of termination. The arbitrator on the basis of the evidence led before him proceeded on the basis that those deliverables were completed before termination, and we do not find that premise to be implausible when no error has been demonstrated by the Employer's learned counsel with reference to any material items of evidence positively demonstrating that the drawings submitted after the termination were not completed before and up to the termination date. Referring to the first proviso to the improvised Hodgkinson principle (*supra*), the implausibility of the arbitrator's opinion has not been demonstrated in the first place for us to start exploring the possibility of another view. Counsel's reference to a bunch of Employer's emails written at the earlier stages on some shortcomings in various drawings is in vain, because such 'to-and-fro' between the respective design teams of an employer and its consultant is a routine incident in design services contracts of large construction projects. The design evolves from concept drawings to detailed drawings, and inherently entails an iterative process where the employer requires, on an on-going basis, fine-tuning, refinements, error-rectifications, and the like, as the design evolves to its marketable maturity, but the design work, entailing hundreds if not thousands of man hours, continues in parallel.

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- d) As for the second limb, on which after much thought we find ourselves in agreement with the Employer, its case is that the arbitration award did not contain sufficient reasons for the conclusion on this second limb. Section 26-A of the Arbitration Act, 1940, requires the award to state “...*reasons for the award in sufficient detail to enable the Court to consider any question of law arising out of the award.*” We find, respectfully, the reasons in the award to be insufficient for the determination on the issue of the Consultant’s entitlement to invoice for and receive the percentile fee under the payment milestone phase d (iii) of the Project. The question of law answered in the award in this context pertains to the proper construction of the Contract; the construction of a contract is a question of law¹⁷.
- (e) It may be remembered that phase d (iii) conditioned the payment of the corresponding sum “*on approval of final DD by Employer*”. We have reviewed the award and do not find any mention therein that such approval of the detailed design drawings *qua final drawings* was duly given by the Employer.
- (f) Dealing with the question of accrued remuneration under issues no.5 and 6, the award records that the arbitrator asked the parties as to how the payment under phase (d)(iii), which was contingent on the Employer’s approval, was due. The answer is recorded in the award as follows¹⁸:

The reply given by learned counsel was that so far as the entitlement is concerned that accrues as soon as the claimant completes and submits the drawings, but 34% payment was to be made on approval by the respondent. According to him it only relates to the payment schedule and it has nothing to do with the entitlement of the claimant. The learned counsel for the respondent does not share the views of the counsel for the claimant and submits that 34% of the 18% meant for phase D

¹⁷ “[t]he true meaning, scope and applicability of a contractual provision is in the end a question of law, to be determined by the courts”: *Captain Salim Bilal vs Pakistan International Airlines Corporation*, 2013 PLC (C.S.) 1212. Also see *Mohammad Ashraf vs United Bank Limited*, 2009 CLD 1250.

¹⁸ Unfortunately, the award does not have numbered paragraphs, which makes cross-referencing rather impossible.

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is only payable on the approval of final drawings by the respondent.

- (g) We therefore take it that there was no evidence before the arbitrator of the Employer's approval of the detailed design drawings submitted qua final drawings under phase (d)(iii) of the Project. Otherwise, there would have been no occasion for him to ask the aforesaid question and receive the respective answers reproduced above.
- (h) The question of law before the learned arbitrator then was this: *whether, on a proper reading of Schedule 4 of the Contract, the Consultant was entitled to invoice for and receive the payment under phase (d)(iii) without the Employer's approval of the final drawings?* He answered this question of law as follows:

I tend to agree with the learned counsel for the claimant. The reason being that clause 5 of Schedule 4 deals *at what time the invoice is to be issued by the Consultant*. This clause therefore only relates to the schedule of issuance of the invoice and the payments to be made against the said invoice and *has nothing to do with the entitlement of the remuneration* for the services rendered. (emphasis added)

- (i) We are unable to understand for what reason the learned arbitrator read clause 5.1 of Schedule 4 on a standalone basis, without reading it in its entirety along with clauses 1.1 and 6.1 of the same Schedule 4. The reasons for confining the words "*on approval of the final DD by the Employer*" in the 3rd bullet under phase (d) governed by clause 5.1 only to the timing of the invoicing, and not as a condition for payment, are quite insufficient. A wholistic reading of Schedule 4 is absent. It is a fundamental principle of interpretation of contracts that a contract is to be construed as a whole¹⁹, a corollary of which is that if a clause appears in a self-contained schedule to the contract, then that schedule must be read as a whole too. In fact,

¹⁹ It is a well settled principle of construction of documents that no provision of the document has to be read in isolation or in bits and pieces but the entire document has to be read as a whole to gather the intention of the parties: *Pakistan State Oil Company Limited vs. Muhammad Tahir Khan and others*, PLD 2001 SC 980, at page 1007.

the obligation to read Schedule 4 as a whole was contractually agreed by the parties themselves per clause 1.1 of Schedule 4, which reads as follows:

In consideration of the Consultant performing the Services, the Employer shall pay to the Consultant remuneration calculated *and payable in accordance with clauses 2 to 8 inclusive.* (emphasis added).

Clause 5.1 of Schedule 4 reads as follows:

During the performance of each of the following parts of the Services, the Consultant shall submit to the Employer an invoice for the applicable percentages shown below *for each applicable stage/phase* together with any relatable reimbursable expenses ... (emphasis supplied)

Clause 6.1 of Schedule 4, titled ‘Payment’, conditions the Employer’s obligation to pay on “...*receipt of an invoice prepared and substantiated*”, and we don’t find the reasons in the award stating why the word ‘substantiated’ can be ignored to confine clause 5 merely to the timing of the invoices, without demonstrating that the condition for triggering the relevant payment has been fulfilled.

- (j) It appears to us that when the parties have themselves agreed on the condition under clause 5.1 that the Consultant’s right to invoice will accrue only once the respective conditions in clause 5.1(d) have been fulfilled, which is to be substantiated per clause 6.1, then we are at a bit of a loss to understand how the Consultant’s right to invoice for the 3rd stage of phase (d) could have arisen when there was no Employer’s approval of the final drawings in place.
- (k) In such design contracts, the Employer’s approval of final drawings has a recognised commercial rationale, namely, that the drawings are fit for purpose. The Consultant is not deprived of its reward, in that circa 2/3rd of the stage-payment is due to him for work done, regardless of the Employer’s approval, but the Employer retains the right to withhold the balance 1/3rd

stage-payment if the deliverables remain unsatisfactory for his purpose. To deprive an employer of this final say is tantamount to a rather commercially absurd premise that the consultant is entitled to invoice and receive payment for those work products even if they are commercially useless for the Employer, and even though the Employer while negotiating made the balance 1/3rd contingent on its approval²⁰. It is not explained in the award that, in the absence of express words to that effect, how was it a valid construction of Schedule 4 read as a whole that the Employer had agreed to pay for the detailed drawings regardless of whether they were indeed final (i.e., useable for the project) or, as Mr. Talha put it, were mere garbage. In the absence of express words to the contrary in Schedule 4, the reasons for depriving the Employer of its final say in the acceptability of the work-products are absent in the award. It appears that, out of the two alternatives of the Consultant giving the customary warranty of fitness for purpose versus the Employer's right to reject the deliverables and not pay the final one-third of the Contract price for phase (d), the parties agreed on the latter in Schedule 4, but the award does not expound this bargain of the parties.

- (l) We therefore conclude that the award does not give sufficient reasons for not reading Schedule 4 as a whole nor how the *applicable stage* for payment under phase (d)(iii) had been accomplished without the Employer's approval of the final drawings.
- (m) Further, the learned arbitrator allowed the recovery of payment for phase (d) but reduced the phase payment by 20% by observing with reference to the earlier correspondence between the parties that some of the drawings were to be revised by the Consultant but were not so revised. We find this too rather strange, for the award gives no reasons how the learned

²⁰ It is clarified that the dispute whether the final approval was unreasonably withheld by the Employer was not an issue in this arbitration.

arbitrator calculated this discount of 20%, instead of 10% or 30%. Unless we have sufficient reasons for the 20% discount given, the question of law that arises, namely, *whether the phase (d) payment was susceptible to a discount without elucidating the basis for that discount*, appears to have been answered, with respect, rather arbitrarily.

5 Maintainability of this appeal

As a post-script to this judgment, we hold that this appeal was maintainable, notwithstanding Mr. Khosa's arguments to the contrary on behalf of the Consultant. Mr. Khosa's objection to the maintainability of this appeal was premised on the judgment of the Supreme Court titled *Shahin Shah vs Government of Khyber Pakhtunkhwa* (2022 SCMR 1810), which held that an appeal from a decree making an award rule of court under section 17 of the Arbitration Act was not maintainable. *Shahin Shah* is, however, entirely distinguishable from the case before us, for, in the second round of appeal to the High Court which ended up in the Supreme Court, it was no longer a case of a 'composite order' whereby a civil Court disposes of two applications by a common order – one to make the award a rule of court and the other raising the objections to the award. In *Shahin Shah*, the objections application was filed by a delay of 4 months and was hence dismissed without any adjudication of the objections application on merits to conclude whether to 'set aside or refuse to set aside' the award in terms of section 39(vi) of the Arbitration Act. The dismissal of the objections application was not challenged in appeal and attained finality. This Supreme Court observed that "...if the High Court found that the order of the trial court had two distinct parts, then it had to examine whether the respondents had challenged both parts of the order independently by raising independent grounds in terms of section 17 and section 39." As the objections application was no longer in the picture after being dismissed and that order attaining finality in the first and the second rounds of appeal, by the time the matter went up to the High Court in the second round and from there to the Supreme Court, there really was no appeal outstanding against the part of the civil Court's order dismissing the objections application. In the case before us, the appellant has appealed

specifically under section 39(vi) from the order of the learned civil Court dismissing the objections on merits, and hence *Shahin Shah* does not apply. Rather, the apt citation in the case before us is that of the Lahore High Court in *Rashida Begum vs Ch. Muhammad Anwar* (PLD 2003 Lahore 522), paragraph 5 whereof reads as follows:

5. As regards the preliminary objection about the bar of the appeal in view of the provisions enacted by section 17 of the Arbitration Act is concerned, suffice it to say, that the learned counsel for the respondents appears to have lost sight of the legal impact of section 39 of the Arbitration Act, which provides an appeal against the order refusing to set aside the award. Both the provisions are independent in nature and cater for two distinct eventualities. Section 39 (vi) confers a right upon an aggrieved person to file appeal against an order where the Court has either set aside the award or passed a refusal order. It is well-established principle of law that if through a composite order, the Court has refused to set aside the award and in the same order/judgment makes the award rule of the Court followed by the decree, the refusal part of the order shall for all intents and purposes be considered as a separate and independent order and shall be appealable under section 39 of Arbitration Act. Whereas, against the other part of the order and the decree, the appeal shall only be maintainable if the condition laid down in section 17 of the Act *ibid* are met; these two provisions have neither any overlapping nor overriding effect on each other. It may be reiterated that section 17 in no way circumscribes, frustrates, forfeits or defeats the right of an aggrieved party to challenge in appeal the order mentioned in section 39 only for the reason that in the same order, the award has been made the rule of the Court, etc. In the light of above, the preliminary objection has no legal force and is disallowed; and the present appeal is held to be competent.

Rashida Begum then concluded by ‘setting the award aside’ and “...consequently the judgment and decree of even date making the award the rule of the Court has no legal value.”

To simplify, section 17 precludes an appeal from a decree, but when the very award on which that decree rests is revisited (by setting aside, modifying or remitting the award) by the appellate court under section 39(vi), then obviously the foundation for that decree, to the extent the award is set aside, modified or

remitted, goes and loses all legal value.

For the reasons aforesaid, we found this appeal to be maintainable and have proceeded on that basis.

6 Conclusion

6.1 We therefore remit this award under section 26(A) of the Arbitration Act (mirrored in exception (c) in the improvised Hodgkinson principle) to the learned arbitrator only to the extent of the Consultant's right to invoice, and the Employer's obligation to pay, for phase d(iii) of Schedule 4, in the absence of the Employer's approval of final detailed drawings. The time frame for the learned arbitrator to give sufficient reasons in respect of the aforesaid question is 30 days from the receipt of a certified copy of this order. If the learned arbitrator gives the reasons in the aforesaid timeframe, he may file an addendum to his award with the learned civil Court within limitation, and the learned Court will then proceed by issuing notices to the parties to submit their objections, if any, to the addendum.

6.2 This appeal is partially allowed to the extent stated in paragraph 5.1. Applying the improvised Hodgkinson principle (supra), we do not find that any of the exceptions (a) to (c) therein are demonstrated for the rest of the grounds of appeal, and, accordingly, the rest of the award is not disturbed, and this appeal is dismissed in respect of all the other grounds.

6.3 There is no order as to costs because the parties did not file their statements of costs.

(Mohsin Akhtar Kayani)
Judge

(Sardar Ejaz Ishaq Khan)
Judge

Announced in open Court on _____.

Judge

Judge

Rana.M. Ift

Approved for Reporting.

For read only

Annex
Gerry's 30 Principles

Paragraph 8 of *Gerry's International (Private) Limited vs Aeroflot Russian International Airlines*²¹

8. The principles which emerge from the analysis of above case-law can be summarized as under:-

- (1) When a claim or matters in dispute are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact.
- (2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.
- (3) The very incorporation of section 26-A of the Arbitration Act requiring the arbitrator to furnish reasons for his finding was to enable the Court to examine that the reasons are not inconsistent and contradictory to the material on the record. Although mere brevity of reasons shall not be ground for interference in the award by the Court.
- (4) A dispute, the determination of which turns on the true construction of the contract, would be a dispute, under or arising out of or concerning the contract. Such dispute would fall within the arbitration clause.
- (5) The test is whether recourse to the contract, by which the parties are bound, is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction.
- (6) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract.
- (7) The authority of an arbitrator is derived from the contract and is governed by the Arbitration Act. A deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part but it may tantamount to mala fide action and vitiate the award.
- (8) If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally.
- (9) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. An arbitrator acting beyond his jurisdiction is a different ground from an error apparent on the face of the award.
- (10) The Court cannot review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise.
- (11) It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong.
- (12) Where two views are possible, the Court cannot interfere with the award by adopting its own interpretation.

²¹ 2018 SCMR 662

- (13) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd.
- (14) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.
- (15) The only exceptions to the above rule are those cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award, which one can say is erroneous.
- (16) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.
- (17) It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.
- (18) The Court does not sit in appeal over the award and should not try to fish or dig out the latent errors in the proceedings or the award. It can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is incorrect.
- (19) The Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record.
- (20) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not do so he can be set right by the Court provided the error committed by him appears on the face of the award.
- (21) There are two different and distinct grounds; one is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the Courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.
- (22) An error in law on the face of the award means that one can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous.
- (23) A contract is not frustrated merely because the circumstances in which the contract was made are altered.
- (24) Even in the absence of objections, the Award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record. The adjudicatory process is limited to the aforesaid extent only.
- (25) While making an award rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like a post office but must subject the award to its judicial scrutiny.
- (26) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not misconduct on the part of the arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence.
- (27) Misconduct is of two types: "legal misconduct" and "moral misconduct". Legal misconduct means misconduct in the judicial sense of the word, for example,

some honest, though erroneous, breach of duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any irregularity of action which is not consistent with general principles of equity and good conscience. Regarding moral misconduct; it is essential that there must be lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice.

(28) The arbitrator is said to have misconducted himself in not deciding a specific objection raised by a party regarding the legality of extra claim of the other party.

(29) Some of the examples of the term "misconduct" are:

- (i) if the arbitrator or umpire fails to decide all the matters which were referred to him;
- (ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference;
- (iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt; and
- (iv) if there has been irregularity in the proceedings.

(30) Misconduct is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator.