Is Provisional Booking Order (PBO) considered a valid enforceable contract under the law?

RESEARCH CENTER, HIGH COURT OF BALOCHISTAN

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COURT: **HON'BLE MR. JUSTICE SARDAR AHMED HALEEMI**

SUBJECT: CIVIL LAW

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BY: **IZHAR AHMED LANGOVE, WASEEM AHMED RAEES MUHAMMAD ZAKRIA, SYED MUHAMMAD USMAN NOOR BAKHSH MENGAL RESEARCH OFFICERS**

QUERY: **Is Provisional Booking Order (PBO) considered a valid and enforceable contract under the law?**

This memorandum examines whether a Provisional Booking Order (PBO) for a car constitutes an enforceable contract under the Contract Act 1872. The analysis is based on the fundamental elements of a valid contract as per the Contract Act and relevant judicial decisions.

- **Law of contract and its valid Elements.**

The law of contract is the law of ***"deals"*** and ***"transaction"*** and is the legal framework within which all business activity are conducted. Surprisingly, the law does not provide any formal definition of what a contract is. The closest equivalent in ordinary business language is the word *deal* and ordinary definition of a contract is[1]:

"A contract is an agreement which the parties intend to be legally binding"

In order determine if an agreement, such as provisional booking order for a car, is an enforceable contract, it is essential to evaluate it against the fundamental elements of a valid contract as per **the Contract Act 1872**.

1. **Offer and Acceptance**: There must be a clear offer by one party and an unqualified acceptance by the other. This establishes the mutual consent of the parties to enter into the agreement.

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1. Commercial Contract. A Practical guide to deals, constracts, agreement and promises.

2. **Competency of Parties**: The parties entering into the contract must be competent, meaning they have the legal capacity to contract. This typically includes being of the age of majority, sound mind, and not disqualified from contracting by any law.
3. **Lawful Consideration**: The agreement must be supported by lawful consideration. Consideration refers to something of value that is given by both parties to support the agreement. It must be real and lawful.
4. **Lawful Object**: The purpose of the contract must be lawful. The object is unlawful if it is forbidden by law, defeats the provisions of any law, is fraudulent, involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy.
5. **Free Consent**: The consent of the parties must be free and not caused by coercion, undue influence, fraud, misrepresentation, or mistake.
6. **Intention to Create Legal Relations**: The parties must intend to create a legal relationship and have a mutual understanding of the agreement.
7. **Certainty and Possibility of Performance**: The terms of the agreement must be certain and not vague. Additionally, the agreement must be capable of being performed.
8. **Not Expressly Declared Void**: The agreement must not be one that has been expressly declared void by law.

- **Freedom of Contracts. Forms of agreements and requirement of law.**

Freedom of Contract is one of the few legal maxim which means exactly what it might be expected to mean. It is entirely up to the parties what to contract, to decide the subject matter and the terms of that contract and to decide whether and in what way those terms are to be recorded, unless for a particular nature of contract, it is required by law to be recorded in writing. The law which fundamentally governs with the agreements or contracts is the Contract Act 1872. In this legislation, there is no provision which requires that an agreement or contract ought to be in writing nor any formal form has been prescribed if the terms and condition of an agreement or contract are reduced into writing. It however has been expounded in a catena of judicial decisions that contract may be either in writing or oral. In a recent judgment, the Hon'ble Supreme Court of Pakistan, **in case Said Rasool vs Maqbool Ahmed and others (2023 SCMR 1390)** has eloquently elucidated validity and proof required by law for both oral and written contracts. In this context, it would be advantageous to delineate the principles articulated in the aforementioned case in a sequential manner as under.

Oral Agreements as explained in the case

Oral agreements are contracts that are not written down but are still enforceable under the law if they meet certain criteria. According to Section 2(h) of the Contract Act, 1871, an agreement enforceable by law is a contract, and Section 10 of the same Act states that all agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration with a lawful object, and not hereby expressly declared to be void The Supreme Court of Pakistan recognized that oral agreements can be valid and enforceable when the necessary ingredients for a valid contract are proved through cogent evidence by the party relying upon it.

Written Agreements discussed in the case.

A written agreement is a formal document that declares the consent of the parties to any act or thing to be done by some or all parties ***through the process of writing****. It is a tangible record of the terms and conditions agreed upon by the parties. For certain types of agreements, particularly those pertaining to financial or future obligations, attestation by witnesses is required under Article 17(2) of the Qanun-e-Shahadat Order, 1984, which is essential for the validity of the agreement. The written document should not be used as evidence until the attesting witnesses are called for the purpose of proving its execution as per Article 79 of the QSO, 1984.*

A pensive analysis of the above exposition of law, it can be understood that where the parties to an agreement intend not to be bound until their agreement is reduced to writing and signed, neither party is bound until the writing is executed, singed by witnesses as required under article 17 of the Qanoon-e-Shahadat Order 1984 as well as proved as contemplated under article 79 of the Order ibid. However, if the parties intend to bind themselves orally or by their conduct, with the further intention of reducing their agreement to a writing after the oral agreement is made, the written agreement of the completed oral contract remains unaffected even if it is not signed by either party, by the witnesses or proved as per the dictate of article 79 of the Order.

- **What is a Provisional Booking Orders?**

Provisional Booking Orders (PBOs) are preliminary agreements or reservations made by a customer with a company for the purchase of a product, such as a vehicle, which is yet to be delivered. These orders typically include terms and conditions that outline the rights and obligations of both the buyer and the seller prior to the final sale and delivery of the product. Where it satisfies the elementary constituents of a contracts namely ***offer***, ***acceptance***, ***consideration*** etc. it qualifies to a binding and enforceable contract and so far as it the requirement of article 17 and 79 of the Order ibid are concerned, the test established in case of Said Rasool (*supra*) should be applied to safely reach to a conclusion.

- **Judicial Perspective**

A wade through the available precedents deciphers that the Courts not only have recognized provisional booking orders as valid concluded contracts but also have issued orders for their specific enforcements under the purview of the provisions of Sale of Goods Act 1930. To boot, in case reported as ***Agha Saifuddin Khan vs. Pak Suzuki Company Limited (1997 CLC 302) the Hon'ble High Court of Sind*** has recognized provisional booking order as a valid contract and issued interlocutory orders for directing the Company for delivery of the vehicle to the custody of the Court for its delivery to the plaintiff in the event of success of the case, subject to payment of price. The Court has also discussed the specific provisions of the Sales of Goods Act 1930 which provides for remedy to the purchaser for specially enforcing contracts for purchase of goods. Excerpts of the relevant paragraphs are reproduced for ease of reference: -

> ***"8. The word "provisional" has been defined in the Black's Law Dictionary (VIth Edition) as temporary, preliminary, tentative, taken or done by way of precaution or ad interim. In the Ballantine's Law Dictionary (IIIrd Edition) the word "provisional" is defined as that which is merely temporary, or for the time being, for the occasion and as excluding the idea of permanence. In Stroud's Judicial Dictionary, the word "provisional" agreement is defined which may not mean tentative but may mean something which is going to operate until something else happens. To some extent, the word "provisional" and "tentative" are synonymous. Both these words mean something which is temporary and not final. Whenever these words are used in any-contract, then these words have to be read with reference to the context to such agreement.***
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> ***9. Mr. Maqsood has relied upon section 57 of the Sale of Goods Act in support of his contention that in the present circumstance, as alleged in the plaint, the plaintiff is entitled for the suit for damages and not entitled to sue for the delivery of the non-delivered goods. I am not impressed by this argument. This is riot the spirit of Chapter VI of the Act 1930. In my view, under section 57 of the Sale of Goods Act, the buyer is entitled to sue the seller for the damages where the seller wrongfully neglects or refuses to deliver the goods. In the present case, the defendants have not denied or neglected to deliver the goods. On the contrary, it appears from their pleadings that they are willing to deliver the same but subject to the conditions as argued***

hereinabove. There is another provision available in the Act, 1930, which is section 58; and which is reproduced hereunder":--

"58. Specific performance.--Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise as the Court may deem just, and the application of the plaintiff may be made at any time before the decree."

The above-quoted provision of the Sale of Goods Act, 1930 empowers a Court in a suit for breach of contract on an application filed by the plaintiff, to deliver specific or ascertained goods and direct the performance of the contract subject to the provisions of Chapter II of the Specific Relief Act. Section 58 of the Act, 1930 further empowers the Court to pass a decree unconditional or upon such terms and conditions as to damages while passing order on the application of the plaintiff which can be made at any time before the decree. In my view, such order can be passed even prior to passing final decree. This provision of law-clearly provides a remedy to the buyer in cases of breach of contract where the goods to be delivered are specific and ascertainable. I am also mindful of provisions of Chapter II of the Specific Relief Act which provides specific relief to a plaintiff when monetary compensation is not an adequate relief.

10. In terms of section 9, subsection (1) of Sale of Goods Act, a party can fix price in the contract as in this case and as stated by the defendant No. l the said price is tentative or finally not agreed even then same can be determined under subsection (2) of section 9 of the Sale of Goods Act. It is not the case of the defendants that price cannot be determined. However, finding on this controversy can be reached after recording the evidence of the parties. In the case of Hoadly v. M'Laine (1834) RR 510(514), it was held that when the contract is silent as to the method by which price is to be determined an agreement to pay a reasonable price will be implied. Reasonable price is a question of fact to be determined according to the circumstances of each case, where goods are such that there is a market price for them, the market price will be evidence of what is a reasonable price between the parties, though not conclusive, as accidental circumstances may make the current price unreasonable in the particular transaction (Acebal v. Levy (1834) 38 RR 469).

In addition, in case Noor Jan and others vs Saleem Shahadat (2022 SCMR 918), the supreme Court while deciding an appeal in which the subject matter was token receipt which was considered as a valid and enforceable agreement by holding as under:-

"12. The document titled "token receipt" contains all the necessary ingredients essential for it to qualify as a valid and lawfully enforceable

contract. The document unambiguously contains the identity of the seller and the purchaser. The property to be sold has been described accurately in a well defined manner. It spells out the agreed sale consideration amount, and stipulates the manner of payment thereof. The parties who executed the document are at consensus ad idem. The document clearly manifests the intention of the appellants to sell and that of the respondent to purchase the subject property. Nothing crucial was left to be settled which could have adversely affected the validity of the contract. The specific performance of the document in the circumstances could not have been avoided on the pretext that it provided for executing a formal agreement. The "token receipt" was in itself a complete, and a lawfully enforceable agreement to sell. The judgment in the case of Sheikh Akhtar Aziz v. Mst. Shabnam Begum and others (2019 SCMR 524) may be referred to in this regard."

In this context, it is also important to note that in case ***Sheikh Akhtar Aziz vs. Mst. Shabnam Beguim and others (2019 SCMR 54)*** examined a token receipt which was relied on by the parties as valid contract and viewed that said token receipt did not fulfil the constituent element of a valid and concluded contract. Relevant portion of the judgment is reproduced for easy reference: -

"11. Even according to the receipt, the parties to such receipt had allegedly agreed that a formal and detailed agreement would follow. There is no denial of the fact that no such agreement followed nor was the balance consideration paid to the Respondents within the agreed time. The High Court has rightly observed that a decree for specific performance could not be passed in these circumstances for selling the property by way of specific performance.

12. It is settled law that a contract is an agreement having a lawful object, entered into voluntarily by two or more parties each of whom intends to create one or more legal obligations between them. The basic requirements of a valid and enforceable contract are offer, acceptance, exchange of consideration and mutuality of obligations. Further, a fundamentally important ingredient of a valid contract is that it should be between the parties who are competent to contract. The intention of the parties to a contract must be looked at to determine where a contract has come into existence. The essential elements for sale of immovable property are (a) payment of sale price of the property or promise to pay the same by the buyer to the seller, and (b) delivery of possession of the property. In case, these two essential terms of sale of immovable property can be determined on the basis of contents of the agreement between the parties, with certainty, it may constitute a valid agreement of sale between the parties which, subject to discretion of the Court, can be directed to be specifically performed. The basic test for resolving whether the parties had reached consensus ad idem for concluding a contract is to ascertain where the parties had consensus on all material points at the time the said agreement was executed between the parties."

In case Messrs Indus Motor Company, Limited in the matter of show cause No. 15 dated 13th March 2013 reported as **(2015 CLD 795) the issue before Security and Exchange Commission of Pakistan (S&ECP)** was whether the Provisional Booking Order ("PBO") issued by Indus Motors to its potential buyers for purchase of a new car included terms and conditions that amounted to abuse of a dominant position by Indus Motors by imposing unfair trading conditions on its customers in violation of section 3(3)(a) of the Act? While deciding the issue, S&ECP held the terms of the PBO binding on the parties and discussed the PBO as recognized and valid contract. It state as follows:

> 8. The Enquiry Committee submitted its Enquiry Report in February, 2013, wherein it noted that it appears that Indus Motor holds a substantial market share and enjoys economic power in the 1300cc segment of car market, which enables it to behave independent of its competitors and customers, thereby making it a dominant player in the relevant market of passenger cars of 1300cc. Under the circumstances, Indus Motor's buyer is apparently in a weaker bargaining position. PBO gives Indus Motor the sole right to (i) change the price, (ii) design/ specification, (iii) delivery schedule without any notice to the buyer, (iv) ***a conclusive right to interpret the terms of the contract*** and (v) to decide the dispute between a buyer and Indus Motor. ***Such terms create a significant imbalance to the disadvantage of buyer's rights and obligations arising under the contract.*** Thus, the terms of PBO, prima facie, being unfair to the buyers were in contravention of 3(3)(a) of the Act.
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> 9. In view of the recommendations of the Enquiry Report, the Commission decided to initiate proceedings under section 30 of the Act for a, prima facie, violation of section 3(3)(a) of the Act and the SCN was issued to Indus Motors. Pertinent parts of the SCN are being reproduced below for reference:
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> And Whereas in terms of the Enquiry Report in general and paras 32 to 51 in particular, terms and conditions of PBO appear to give the Undertaking Unilateral rights to change the final price, design and specification of car without any notice before delivery and also give the Undertaking conclusive right to interpret the terms and conditions of the contract. Such terms put unnecessary burden on customers and are, prima facie, unfair trading conditions for the following reasons:
>
> (i) Cause a significant imbalance in the parties' rights and obligations arising under the contract; and
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> (ii) Terms are not reasonably necessary to protect the legitimate interests of the undertaking; and
>
> (iii) Cause detriment (whether financial or otherwise) to customers.
>
> And Whereas in view of foregoing, it appears that the terms and conditions mentioned in the PBO issued for purchase of new

Toyota Corolla car from the Undertaking are unfair trading conditions imposed on the customers and therefore, prima facie, constitute violation of section 3(3)(a) read with section 3(1) of the Competition Act;

10. Indus Motors filed a written response explaining its position in respect of the competition concerns raised in the Enquiry Report as well as the Show Cause Notice. Subsequently Indus Motors appeared in a hearing held on April 9, 2013 before this Bench. During the course of hearing, legal representative of Indus Motor requested the Bench to allow another opportunity to revise the draft of PBO to rectify the concerns raised by the Commission.

11. Later on, the revised draft was submitted to the Bench on April 26, 2013, however, the said revised draft did not clarify the ambiguities in respect of the design and price of the car. Thus, another hearing in the matter was held on September l9, 2013. During the hearing, the Bench was apprised of the proposed amendments to address the concerns of the Bench on the revised draft submitted after the issuance of the Show Cause Notice. In pursuance of amendments proposed and agreed before the Bench during the hearing, Indus Motor submitted the final revised draft PBO on 26 October, 2013.

12. We have reviewed the original and the revised draft PBO. Terms raising concerns are discussed below:

Cancellation Rights

13. Regarding cancellation of booking, initially the Indus Motor had sole and absolute discretion to accept or reject the request of cancellation by the buyer. ***If for some reasons Indus Motors failed to delivered the vehicle as ordered or on time, the buyer could not cancel the contract.*** It was at the entire discretion of the Indus Motor and the buyer would be bound to take delivery of the vehicle on full payment for the same. Cancellation right is an important tool that creates balance among the parties. Indus Motors has rectified this imbalance not only by relinquishing its unilateral right to reject the request for cancellation by the buyer but also waving off any charges in case the application for cancellation is based on an unsatisfactory change in price or delivery schedule.

14. Such rectification made by Indus Motors has put the consumer at an equal footing with regard to the aspect of cancellation by leaving room for the customer to cancel the booking at no extra expense if the consumer is not satisfied with any changes made in the initial agreement pertaining to price or delivery schedule.

Right to the Alter Terms

15. **Under the original PBO, Indus Motor had the sole right to alter some or all terms and conditions of PBO and also the right to interpret them conclusively. Having such a clause in the contact can be used to force the buyer to accept increased costs, new requirements, or reduced benefits, and is therefore**

considered unfair whether or not it is meant to be used in that way. This clause has been completely removed from the revised draft PBO.

- **Cardinal principles governing suit for specific performance of contract**

It is significant to add here that it is cardinal principle of law governing suits for specific performance of contracts, be it related to moveable and immovable property, that the plaintiff has to demonstrate his intention that throughout the time from execution of the Contract till the filing of the suit. This principle has been established in a number of cases. In case

6. Admittedly, neither Matiullah nor his legal heirs (the petitioners herein) tendered the balance sale consideration to the sellers (respondent Nos. 4 to 10) nor deposited the same in court, if they had refused to receive it. Not paying the balance of the sale consideration constituted violation of an 'essential term of the contract that on his (buyer's] part remains to be performed' (clause (b) of section 24 of the Specific Relief Act). Therefore, for this reason too the specific performance of the purported contract could not be enforced. Matiullah and the petitioners also did not demonstrate that they were ready, able and willing to perform their obligation to make payment of the balance sale consideration. We also want to disabuse the oft repeated contention that a buyer is only required to tender sale consideration, or the balance thereof, if so ordered by the court. A buyer who seeks the specific performance of a contract must perform or demonstrate that he is ready to perform the essential terms thereof, which would include the payment of sale consideration.

- **Conclusion:**

In conclusion, the analysis of the legal framework and the judicial interpretations thereof, affirm that a Provisional Booking Order (PBO) can indeed be considered a valid and enforceable contract under Pakistani law, provided it encompasses all the essential elements of a valid contract, such as offer, acceptance, consideration, and the intention to create legal relations. However, its enforceability and the obligations it creates depend on the specific terms and conditions outlined within it. The courts in Pakistan have recognized the enforceability of PBOs, particularly when the terms are explicit and the parties have adhered to their contractual obligations. Such contracts may be specifically enforced through Courts in suits for specific performance of Contract but the Courts deciding such suits should be guided by the principles settled by the Superior Court.