THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 0269 OF 2022 (NSJ)

IN THE MATTER OF ORDER 29 OF THE GRAND COURT RULES

AND IN THE MATTER OF IGCF SPV 21 LIMITED

Before:	The Hon. Mr. Justice Segal
Appearances:	Graham Chapman KC instructed by Conal Keane of Dillon Eustace Cayman for the Applicant Peter Arden KC instructed by Laura Hatfield and Richard Parry of Bedell Cristin Cayman Partnership for Al Jomaih Power Limited and Denham Investment Limited
Heard:	17 January 2023
Decision notified:	20 January 2023
Draft judgment Circulated:	26 January 2023
Judgment Delivered:	1 February 2023

JUDGMENT

Introduction

1. I have before me an application issued on 24 November 2022 by IGCF SPV 21 Limited (the ***Applicant***) for injunctive and associated relief against Al Jomaih Power Limited (***AJPL***) and Denham Investment Limited (***DIL***) (together the ***Other Shareholders***). In summary, the Applicant seeks an anti-suit injunction to restrain the pursuit of proceedings

brought by the Other Shareholders in Pakistan (the ***Pakistan Proceedings***) in breach (according to the Applicant) of an exclusive jurisdiction clause that binds them.

2. The application was heard on 17 January 2023. Mr. Graham Chapman KC appeared for the Applicant and Mr. Peter Arden KC appeared for the Other Shareholders. At the end of the hearing I reserved judgment but indicated that I intended to hand down my decision rapidly and that I was likely to inform the parties of my decision and the orders I would make in advance of providing full written reasons.

3. On 20 January 2023 I wrote to the parties (in an email sent by my Personal Assistant Ms. David) in the following terms:

> *"I refer to last Tuesday's hearing in relation to the application, commenced by the ex parte originating summons issued on 24 November 2022 (the **Summons**), for an interlocutory injunction made by IGCF SPV 21 Limited (the **Applicant**).*
>
> *I have decided that, until the expedited trial of the Applicant's application for injunctive relief, Al Jomaih Power Limited (**AJPL**) and Denham Investment Limited (**DIL**) (AJPL and DIL together the **Other Shareholders**) should be prohibited from taking further steps in the proceedings (the **Pakistan Proceedings**) commenced by them in the Sindh High Court in Karachi, Pakistan (the **High Court**) by the Suit for Declaration and Permanent Injunction (the **Suit**) issued on 21 October 2022.*
>
> *I shall be handing down next week a judgment setting out my reasons for this decision. In the meantime, in view of the urgency of the matter and the impending public holiday in Cayman on Monday, I set out below a brief explanation and outline of the orders I propose to make. I shall give the parties a brief opportunity to review and to make suggested amendments to, and I would hope agree, the form of order (I am happy for the parties to propose adjustments to my suggested timetable provided that they will maintain the fast track nature of the process). I would ask counsel to prepare and file with the Court by 4pm next Wednesday (25 January) either a draft order in agreed form or the forms of order sought by the Applicant and the Other Shareholders, with brief submissions. I shall then settle the order no later than Thursday (26 January).*
>
> *This is an interlocutory injunction to hold the ring for the shortest practicable period, which does not order the termination of the Pakistan Proceedings and seeks to disrupt those proceedings to the minimum extent (having regard to this Court's wish to respect, and minimise any interference albeit indirect with the proceedings before, the High Court). I do not see that it is appropriate to seek to sever the Pakistan Proceedings, which appear in their entirety to arise out of and*

closely relate to the matters governed by the exclusive jurisdiction clause in the 2008 shareholders agreement, by ordering the Other Shareholders only to take no further steps against or in relation to the Applicant (and it seems to me that the other parties to the Pakistan Proceedings will suffer no material prejudice as a result).

I consider that the most appropriate way forward, having regard to the overriding objective, is to give directions for a rapid trial of the Applicant's application for a permanent injunction and to grant an interlocutory injunction until then rather than order a further inter partes hearing in respect of and to review the interlocutory injunction. It seems to me that adopting the latter approach would not achieve a material saving of time and would produce additional cost and unnecessary procedural complexity.

I therefore propose to make orders and give directions to the following effect:

1. *the Applicant shall on or before 27 January 2023 issue an originating summons (the* ***New Originating Summons)*** *to which the Other Shareholders are joined as defendants seeking the relief set out in paragraphs 1-3 and 6—8 and 10 of the Summons (the Summons contains a typo in relation to paragraph 4, which is in fact not a separate paragraph but a continuation of paragraph 3) and an interlocutory application (by summons or motion) in those proceedings (the* ***Interlocutory Application)*** *seeking the interlocutory (or interim) injunction referred to in paragraph 5 of the Summons (and any relief ancillary thereto).*

2. *the New Originating Summons and the Interlocutory Summons may be served on Bedell Cristin, the attorneys acting for the Other Shareholders.*

3. *the hearing on Tuesday shall be treated as a hearing of the Interlocutory Application and the evidence filed before the hearing by the Applicant and the Other Shareholders shall stand and be treated as evidence filed in support of and opposition to, as the case may be, the Interlocutory Application (and the relief sought in the New Originating Summons).*

4. *the Applicant shall file and serve any evidence in reply by 31 January 2023.*

5. *the Applicant and the Other Shareholders shall have leave to serve one expert report (one for the Applicant and one for the Other Shareholders) in relation to issues of Pakistan law (the issues to be agreed by 31 January 2023 or if not agreed by that date, as ordered by the Court following brief written submissions filed by the parties on or before 3 February 2023).*

6. *the expert reports shall be exchanged by 17 February and the experts shall meet by video conference on or before 24 February and prepare a joint memorandum by 3 March 2023 (or in each case on such later date as may be ordered by the Court).*

7. *If the expert reports cannot be agreed the parties shall be at liberty to call expert witnesses at trial limited to those experts whose reports have been exchanged in accordance with paragraph 6 above.*

8. *the New Originating Summons shall be listed for a two day hearing on dates to be fixed in the week commencing 13 or 20 March 2023 (the parties shall seek to agree and propose to the Court dates for the hearing).*

9. *save as varied above or by further order, the practice and procedure set out in the FSD Users Guide shall apply [I am unsure whether the parties will wish to cross-examine the factual witnesses].*

10. *until the hearing of the New Originating Summons (or further order), the Other Shareholders (whether by themselves or their agents) must not take any further steps in the Pakistan Proceedings (whether by applying for or seeking further orders or relief, or for amendments to or the enforcement of orders already made, or for the purpose of pursuing the claims made and relief sought in the Pakistan Proceedings) save for the purpose of informing the High Court (and the other parties to the Pakistan Proceedings) of this order and to seek consequential temporary stays in respect of, or adjournments of hearings in, the Pakistan Proceedings.*

11. *costs reserved.*

12. *liberty to apply."*

4. I now set out my reasons for this decision.

Background

5. The Applicant and the Other Shareholders are shareholders (holding Class O Shares) in a Cayman company, KES Power Limited (***KESP***). The Applicant holds 53.8%, AJPL holds 27.7% and DIL holds 18.5% of the shares in KESP. KESP in turn holds a majority (66.4%) interest in K-Electric Limited (***KEL***). KEL is a Pakistani-incorporated utility company whose shares are listed on the Pakistan Stock Exchange (***PSX***).

6. KEL was formerly in public ownership but was partially privatised in 2005. KESP acquired its shares in KEL from the Government of Pakistan pursuant to a share purchase and subscription agreement dated 14 November 2005 (the ***SPA 2005***).

7. The Applicant and the Other Shareholders are parties to a shareholders agreement dated 15 October 2008 (the ***SHA***) which, as subsequently amended, governs the relations between them as shareholders in KESP. The SHA was amended by the First Deed of Amendment dated 30 April 2009 and the Second Deed of Amendment dated 5 January 2021 (the ***Second Deed***). The SHA (as amended by the Second Deed) contains an exclusive jurisdiction clause providing for any dispute arising out of, or in connection with, the SHA to be determined by the courts of England or by this Court.

8. The Other Shareholders commenced proceedings in Pakistan before the High Court of Sindh on 21 October 2022 against the Applicant and other parties. The Applicant claims that those proceedings were commenced in breach of the exclusive jurisdiction clause in the SHA. On the same date, the Other Shareholders sought and obtained interlocutory injunctive relief (the ***Pakistan Interim Injunction***) from the High Court of Sindh prohibiting any changes to the board of KEL.

9. The Applicant was incorporated by members of the ABRAAJ group for the purpose of acquiring shares in KESP. The sole voting share in the Applicant was held by ABRAAJ Investment Management Limited (***AIML***). In addition, other shares in the Applicant are held by the Infrastructure and Growth Capital Fund LP (the ***Fund***). The Fund is a Cayman Island registered private investment fund with numerous institutional investors that is managed by IGCF General Partner Limited (the ***GP***).

10. On 3 August 2022, AIML (acting by its joint official liquidators (the ***JOLs***)) entered into a transaction (the ***Transaction***) pursuant to which it agreed to sell its share in the Applicant to a Cayman company called Sage Ventures Limited (***SVL***). SVL is a BVI company which the Other Shareholders say is ultimately owned and controlled by Mr. Sheheryar Chishty (***Mr. Chishty***). In addition, controlling interests in the GP and certain limited partnership interests in the Fund were acquired by SVL (or a company connected with SVL).

11. The JOLs had applied to this Court for an order sanctioning the exercise of their powers in connection with the Transaction and, by an order made by me dated 14 October 2022, sanction was granted subject to the JOLs satisfying themselves as to various matters set out

in the order (which included the need for the JOLs to satisfy themselves as to various matters concerning the impact of the Transaction on the Applicant, KESP and KEL). Both parties indicated that they were aware and accepted that I had received when hearing the JOLs' application certain information which was not currently available to them (some of which was confidential) but they did not consider that this, or my being the liquidation Judge for AIML, affected my ability to hear and fairly adjudicate this application (or that the matters disclosed on the JOLs' application were relevant to this application). It was accepted that I would, and would need only to, decide the Applicant's application by reference to the evidence adduced on the application.

12. Following completion of the Transaction, the Applicant sought to procure the appointment of two new directors to the board of KEL in accordance with and pursuant to clause 5.7 (as amended by the Second Deed) of the SHA. On 19 October 2022, two non-executive directors, and on 24 October 2022, one non-executive director, of KEL nominated by KESP had resigned (the ***Resignation***). Pursuant to section 155 of Pakistan's Companies Act 2017, any casual vacancy arising on the board of a public company has to be filled (by an appointment by the board) within ninety days.

13. Prior to those announcements, on 19 October 2022, the company secretary of KESP had written to the board of directors of KEL (the ***KESP Letter***) stating that "*We hereby appoint [Mr. Chishty] and Darin Baur to be the representatives of [KESP] on the Board of directors of [KEL]. The appointment shall take effect from the date of this nomination letter, being 19 October 2022*."

The evidence

14. The evidence filed in support of the application included the First Affidavit and the Second Affidavit (with the exhibits thereto) of Mr. Casey McDonald, the sole director of the Applicant and the First Affidavit of Mr. Conal Keane. The evidence filed in opposition to the application included the First Affidavit (with the exhibit thereto) of Mr. Shan-e-Abbas Ashary, a director of AJPL and the First Affirmation of Ms. Joanne Yarnall, a paralegal of

Bedell Cristin, the Other Shareholders' Cayman attorneys (which exhibited an opinion on the law of Pakistan prepared by Mr Mujtaba Sohail Raja).

The form of the application

15. The application was made by an *ex parte* originating summons dated 24 November 2022 (the ***Summons***). Notice of the Summons was given both to the Other Shareholders and to their then Cayman attorneys (Collas Crill).

16. The Other Shareholders submitted that an *ex parte* originating summons was not a proper method by which to apply for interlocutory or final injunctive relief. The Applicant needed to issue an appropriate form of originating process and a proper form of application for interlocutory relief. The Other Shareholders should be joined as defendants (the title to the *ex parte* originating summons, in accordance with the form of such an application, did not identify the Applicant or the Other Shareholders as plaintiff or defendants).

17. The Other Shareholders said that where there were existing proceedings before the injuncting court, there was no need to issue fresh proceedings for the purposes of obtaining injunctive relief, which could be sought within the existing proceedings by motion or summons pursuant to GCR O.29 r.1. Where there were no existing proceedings before the injuncting court, as here, an action must be commenced by an originating process. The process should be appropriate to the issues thought likely to arise and so, for example, where there were likely to be heavily contested issues of fact, for example where the injunction defendant was likely to contest the validity of the contract in which the jurisdiction clause resides, a writ may be appropriate; equally, in other cases the appropriate process will be by way of originating summons. In either case, the originating process will be governed by the general rules set out in the GCR (O.6 in the case of a writ, and O.7 and O.28 in the case of an originating summons), and O.10 *et seq.* for both.

18. The Applicant submitted that it had followed a proper and appropriate procedure:

(a). the application for injunctive relief was made urgently by way of the Summons in response to the commencement of the Pakistan Proceedings and the steps being taken to obtain and continue the Pakistan Interim Injunction (initially without any notice to the Applicant).

(b). the procedure complied with that required by GCR.O.29. provided that injunctive relief may be sought by way of originating summons and, where there is urgency, that such relief may be sought *ex parte* on affidavit, including before the issue of the writ or originating summons.

(c). the application had been issued *ex parte* but on notice to the Other Shareholders. Given the earlier correspondence with the former Cayman attorneys of the Other Shareholders (Collas Crill), the Applicant had anticipated that the Other Shareholders would wish to be heard and that, acting pragmatically and co-operatively, an *inter partes* hearing could take place in very early course.

(d). a materially identical procedure had been adopted in *Re BDO Cayman Limited* [2018 (1) CILR 114] (Parker J) and a challenge to the procedure had been rejected. In that case, the parties had agreed to proceed *inter partes* although Argyle was never joined as a defendant (or respondent). In these circumstances, Mr. Justice Parker rejected a challenge by Argyle to the procedure adopted by BDO. He said:

> "50. I *will first deal with Ms. Stanley, Q.C.'s submissions in relation to proper procedure. Ms. Stanley, Q.C. argued that since Argyle was not a defendant to the action it was not amenable to an injunction and that remained the position unless and until it was made a party. She went so far as to submit that the court cannot make injunctions against non-parties and unless the defect was cured that I should dismiss the application in limine. However, she fairly accepted that this was not an incurable defect and invited Mr. Chapman, Q.C. to make an application to join Argyle formally to the process.*
>
> *51. He did not do so and I do not believe he needed to do so. As I have said, this court has jurisdiction to grant the order in personam over Argyle. In any event, it is clear from reviewing the correspondence between the attorneys (particularly in August*

2017) when deadlines were looming in the New York proceedings, that the way in which the matter proceeded to a hearing had effectively been agreed. It was in my view a sensible way to proceed in the circumstances and has caused no prejudice to Argyle.

52. *Ogier acting for Argyle made it clear that they wished to be heard on the ex parte originating summons and agreed directions for such a hearing. Documents were not provided under GCR O.24, r.10 in relation to the affidavit evidence relied on by Campbells acting for BDO Cayman. A point was taken by Argyle that leave was needed under s.97(1) of the Companies Law (2016 Revision) to proceed in circumstances where Argyle was in official liquidation. Leave was sought and obtained effectively by consent from me on September 13th, 2017. Correspondence between the attorneys proceeded to seek the determination of the application on an inter partes basis, but Campbells made the point that if the New York proceedings were not stayed, or extensions for compliance with time limits were not agreed, it would have to proceed on an ex parte basis. In fact, such a stay of the New York proceedings was agreed and the summons proceeded on an inter partes basis. I do not detect any material non-compliance with the Grand Court Rules or unfairness which has resulted from that procedure being adopted in this case. Were it necessary to do so, under GCR O.2, r.1, I would, in any event, have allowed the defect to be cured by applying the overriding objective to deal with the matter justly and would have given a liberal interpretation to the Rules to secure the most expeditious and least expensive determination. I therefore reject the improper procedure argument."*

(e). on appeal, (*Argyle Funds SPC Incorporated (in official liquidation) v BDO Cayman Limited* [2018 (2) CILR 362] (***Argyle Funds***)) the only additional step that the Court of Appeal would have required was joinder of the respondent once the *inter partes* approach had been adopted. Field JA said as follows (at [15] and [64]):

"15. The proceedings below were commenced by an originating summons issued on August 8th, 2017 seeking an ex parte *order to restrain Argyle from continuing the New York proceedings. In accordance with local practice, since the summons contemplated an ex parte order, it did not name Argyle as a defendant. In the event, BDO's application was eventually made* inter partes *pursuant to an agreed timetable, but Argyle was never joined in to the proceedings as a defendant.*

……

> 64. *Since that part of the judge's order restraining the New York proceedings against the affiliates must be set aside and Argyle does not challenge the injunction restraining the continuation of the New York proceedings against BDO Cayman, it is unnecessary to deal with Ms. Stanley's submission that there was no jurisdiction to issue the injunction because Argyle was not made a party to the originating summons proceedings. Suffice it to say that I think that Argyle should have been made a party to the proceedings prior to the hearing before the judge and if the appeal had been unsuccessful, BDO Cayman would have had to join Argyle in as a party before the order of this court refusing the appeal was perfected."*

(f). even if there had been a procedural irregularity, it was capable of being remedied in a straight-forward way by amending the summons (and, if absolutely necessary, issuing a further summons). The Other Shareholders had not suggested that this was not possible or that doing so would cause any prejudice. Such a pragmatic approach would have been adopted pursuant to GCR Ord. 2, r.1, as the extract from Parker J's judgment above explains, had it been necessary to do so.

19. In my view, the use of an *ex parte* originating summons for the purpose of seeking an interlocutory and final injunction is to be discouraged and is not the appropriate procedure to be used. I note that in *Argyle Funds v BDO* in the Court of Appeal Field JA had referred (at [15]) to the use of an *ex parte* originating summons being "*In accordance with local practice*" but the Applicant was unable to refer me to any practice direction or guidance that set out such a practice. As the former Chief Chancery Master Edmund Heward pointed out in *Chancery Practice* (2nd ed. 1990) at page 59: "*[An ex parte originating summons is] only used on occasions where there are no opponents. The parties are not named in title and there is only one party, the applicant, e.g. an application to pay out of court money paid into court until the claimant attains the age of 18 years*."

20. GCR O.29, r.1 states as follows:

> ***Application for injunction (O.29, r.1)***
>
> *1. (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.*
>
> *(2) Where the applicant is the plaintiff and the case is one of urgency such application may be ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.*
>
> *(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."*

21. GCR O.29, r.1 clearly contemplates that an application seeking an injunction by way of final relief must, unsurprisingly, be commenced by a suitable form of originating process. GCR O.29, r.1 (1) makes this clear. *An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's [originating process] writ, originating summons, counterclaim or third party notice*. GCR O.29, r.1(2) stipulates, following on from GCR O.29, r.1(1), that where the plaintiff in the proceedings commenced by a suitable originating process wishes to apply for an (interlocutory) injunction in a case of urgency, he/she may do so *ex parte* by summons or motion in those proceedings. GCR O.29, r.1 (3) states that the general rule is that an application for an injunction can only be made after the originating process has been issued. But in cases of urgency, the application for an injunction can be made before the originating process has been issued but in such a case the Court may (and in practice will) make the order subject to receipt of an undertaking by the applicant to issue the originating process.

22. GCR O.29, r.1 (3) does not deal with the procedure to be followed when an application for an interlocutory injunction is made before the issue of the originating process. But there is a settled practice for the form of applications made in relation to intended proceedings. The application (and the order made if the application is granted) refers to the intended

plaintiff/claimant and the intended defendant/respondent and is treated as having been issued in the intended proceedings when formally issued. The form of application is that which would be used had the originating process been issued. The important point to my mind is that where an applicant seeks an interlocutory injunction against a person to be made party in the intended action, the form of the application should refer to that person as the intended defendant.

23. The practice in England and Wales relating to the procedure for applying for interim injunctions is instructive. This is set out in Practice Direction 25A. Paragraph 4.3 deals with applications made after and paragraph 4.4 deals with applications made before the issue of proceedings (underlining added):

> "*4.3 Applications dealt with at a court hearing after issue of a claim form:*
>
> *(1). the application notice, evidence in support and a draft order (as in 2.4 above) should be filed with the court two hours before the hearing wherever possible,*
>
> *(2). if an application is made before the application notice has been issued, a draft order (as in 2.4 above) should be provided at the hearing, and the application notice and evidence in support must be filed with the court on the same or next working day or as ordered by the court, and*
>
> *(3). except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application.*
>
> *4.4 Applications made before the issue of a claim form:*
>
> *(1). in addition to the provisions set out at 4.3 above, unless the court orders otherwise, either the applicant must undertake to the court to issue a claim form immediately or the court will give directions for the commencement of the claim,*
>
> *(2). where possible the claim form should be served with the order for the injunction,*
>
> *(3). an order made before the issue of a claim form should state in the title after the names of the applicant and respondent 'the Claimant and Defendant in an Intended Action'.*

24. An indication from this jurisdiction of the approach to be adopted is to be found in the case of applications for pre-action orders to preserve the confidentiality of documents to be filed at Court in connection with the commencement of proceedings. These cases involve a pre-action application for permission to place only anonymised versions of the Court documents on the Court file. The Court's order is treated as having been made in the action which is commenced subsequently.

25. In *In the matter of a settlement dated 16 December 2009* (unreported, 25 July 2018), Kawaley J was asked to provide guidance on the procedure to be followed when applying, before issuing proceedings, for a confidentiality order in respect of the documents to be filed in the contemplated proceedings. This decision was not cited to me by the parties but is in my view helpful (as is the form of order made by Kawaley J in granting permission to amend the *ex parte* originating summons).

26. In that case, a trustee wished to apply to the Court for directions seeking the Court's blessing for certain decisions and proposed actions. But since it was important that certain confidential information not be made public, he/she wished to ensure that anonymised versions of the originating process and redacted versions of other documents to be filed in support of the application be placed on the Court file. The trustee therefore sought a confidentiality order before issuing its application and did so by way of an *ex parte* originating summons. Kawaley J said as follows:

> *"23. The Trustee's counsel explicitly sought guidance on the correct procedure for the present application. The present application was made by Ex Parte Originating Summons before the substantive Originating Summons was filed. To do otherwise would have defeated the purposes of the interim relief. I was invited to direct that the Ex parte Originating Summons be treated as an interlocutory summons in the main action issued before the filing of the Originating Summons. I acceded to this aspect of the application. Paragraph 1 of the Confidentiality Order provided as follows:*
>
> > *"1. The Confidentiality Summons be treated as having been made by way of ex parte interlocutory summons in this proceeding."*

27. It is a case in which the pre-action application *was* made by way of an *ex parte* originating summons but it seems to me that an application for an interlocutory injunction justifies a different approach. The application for an order directing that only anonymised versions of the Court documents be placed on the Court file seeks only procedural relief and is not directed against the intended defendant/respondent nor does it impose onerous obligations on him/her that flow from an order granting injunctive relief. I can see that it might be said that there is no substantive distinction between the procedure I have outlined and the one involving the issue of an *ex parte* originating summons on notice to the intended defendant/respondent with an order that states that it is to be treated as having been made by way of *ex parte* interlocutory summons in the main proceedings. But it still seems to me that in the case of injunctive relief the *ex parte* originating summons is not appropriate.

28. Accordingly, the Summons in this case involved a procedural irregularity. But this was capable of being cured in the manner I have described. I note that in *In the matter of a settlement dated 16 December 2009* the order made by Kawaley J (set out at [2] of the judgment) the position was regularised by way of amendment to the original *ex parte* originating summons. That is one way of proceeding and would be a satisfactory way of giving effect to the order that I consider needs to be made in this case (as explained above). It would in effect insert the *inter partes* originating summons into (and substitute the content of the *inter partes* originating summons for) the *ex parte* originating summons (thereby retaining the original proceeding and date of issue). I have suggested an alternative approach under which a new *inter partes* originating summons is issued on terms that ensure that the procedural steps taken to date by the parties are treated as steps taken in the new originating summons and that directions are given for an appropriate procedural timetable. This seems to me to be the simplest approach (unless the parties can show good reason for proceeding by way of amendment).

29. In the circumstances, the Applicant's application at the hearing fell to be and was treated as an application for interlocutory relief in its intended claim for a final injunction and related relief to be made by *inter partes* originating summons.

The SHA

30. The SHA is governed by English law. The following terms are relevant (it should be noted that the Applicant is defined as "*Abraaj*" in the SHA so that references to Abraaj are to the Applicant):

> *"5.7 [The Applicant] and the [Other Shareholders] shall procure that the directors of [KEL] to be nominated or appointed by [KESP] shall comprise:*
>
> *a) Five persons nominated by [the Applicant] (the Abraaj Nominees)*
> *b) Four persons nominated jointly by the [Other Shareholders] (the Original Shareholders Nominees).*
>
> *9.2 [KESP] shall not register a transfer of a Class O Share and no party shall transfer any Class O Share except in accordance with this Agreement and unless the transferee, if not already a party to this agreement, first enters into a Deed of Adherence.*
>
> *9.3 Each [of the Other Shareholders] undertakes and agrees that until such time as [the Applicant] has completed a full Exit, it shall not permit nor take any action that would result in a change of Control of that [Other Shareholder].*
>
> *9.4 [The Applicant] undertakes and agrees that save for an Exit in accordance with clause 11 hereof, it shall not permit nor take any action that would result in a change of Control of [the Applicant] provided that [the Applicant] shall be deemed not to be in contravention of this clause in circumstances where (notwithstanding a change of Control of [the Applicant] [the Applicant] remains managed by a member of the Abraaj Group. [Abraaj Group is defined to mean the Applicant and any person Controlled and/or managed by AIML provided that the management has not arisen as a result of or in connection with a transfer of the shares in the Applicant to that person; and Exit is defined in clause 11.5]*
>
> *17.1 Each of the parties (other than [KESP] undertakes to the others that it will exercise all powers and rights available to it as a director, officer, employer or shareholder of [KESP] (or in any other Group Company) in order to give effect to the provisions of this agreement and to ensure that [KESP] complies with its obligations under this agreement."*

31. Clause 25.2 as amended by the Second Deed provides as follows

> *"Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be settled by the English courts or the Grand Court of the Cayman Islands and those courts alone shall have exclusive jurisdiction to settle any such dispute."*

The SPA 2005

32. This was the agreement that effected the privatisation of KEL by the Government of Pakistan. It is governed by the law of Pakistan and contains an exclusive jurisdiction clause stipulating that the courts of Pakistan shall have exclusive jurisdiction. The parties to the SPA 2005 are the Government of Pakistan as seller and KESP, Hassan Associates (Private) Limited and Premier Mercantile (Private) Limited as purchaser.

33. Article 3.2(d) contained a representation by the Purchaser (in particular KESP) regarding the "*ownership structure of [KESP]*" as at the closing date and that "*no changes shall be made to it for a period of three years from the*" closing date.

34. Article V contains transfer restrictions. Article 5.2 states that:

> *"Except as expressly permitted in this Article V, the Purchaser [KESP] shall not sell, transfer assign or pledge any of its Shares [in KEL] or permit such Shares to become subject to any Lien; and in no event may the Purchaser transfer any of its Shares to any Person that is specifically prohibited by the Laws of Pakistan. Any attempted sale, transfer, or assignment of the Shares, or the creation of a Lien thereon by the Purchaser of any or all of its Shares which is not in compliance with the provisions of this Article V will be void and of no force or effect."*

35. Article 3.10(a) also stated that until the third anniversary of the closing date, the Purchaser [KESP] "*shall not directly or indirectly sell transfer encumber or otherwise dispose of in any form or manner any of its legal or beneficial interest in"* shares constituting 51% or more of the shares in KEL.

36. Article 5.3 deals with permitted transfers and Article 5.3(a)(i) permits the Purchaser [KESP] to make a transfer of its Shares (in KEL) to an affiliate "*subject to the national security laws of Pakistan (as such interests shall be determined in the sole discretion of*"

the Government). Article 5.3(b) permits the Purchaser [KESP] "*directly or indirectly*" to sell, transfer, encumber or otherwise dispose of 51% or more of the shares in KEL after the third anniversary of the closing date provided that the Government has certified that the proposed transfer does not affect the national security interests of Pakistan, such certification not to be unreasonably withheld.

37. On 27 November 2008, the Government of Pakistan issued an Irrevocable Waiver and Consent (the ***Waiver***) to consent to the "*change of ownership of [KESP]*" resulting from the Applicant's acquisition of shares in KESP. The Waiver stated that it waived the representations and warranties set out in Article 3.2(d) and requirements of the undertaking and covenant set out in Article 3.10(a) of the SPA 2005.

The proceedings in Pakistan

38. On 21 October 2022, the Other Shareholders issued proceedings in the High Court of Sindh, in Karachi, Pakistan. There are eight defendants, including the Applicant. The other defendants are KESP; KEL; the Government of Pakistan (Privatisation Commission, Ministry of Privatisation and Investment) (the ***Privatisation Ministry***) (which was a party to the SPA 2005); the Government of Pakistan (Ministry of Energy, Power Division) (the ***Energy Ministry***) (being the relevant ministry in the Pakistani Government with responsibility for regulating the affairs of the energy and power sector; the National Electric Power Regulatory Authority (***NEPRA***) (being the regulator of all power generation, transmission and distribution companies in Pakistan) and the Securities and Exchange Commission of Pakistan (***SECP***).

39. In their Suit for Declaration and Permanent Injunction (the ***Suit***), the Other Shareholders aver that a "*transfer of beneficial ownership/change in board or management control of [KEL]*" is subject to the transfer restrictions in clauses 5.2 and 5.3 of the SHA 2005 (and change of control provisions in certain finance agreements to which KEL is a party) and that "*any reorganisation*" of KEL requires the approval of NEPRA under section 33 of the Regulation of Generation, Transmission and Distribution of Electric Power Act 1997 (***Section 33***). Reference is also made to regulation (referred to in Section 15 of the Suit,

apparently incorrectly, as section) 14 of the National Electric Power Regulatory Authority Licensing (Distribution) Regulations 2022 (***Regulation 14***) which requires a distribution licensee (such as KEL) to obtain prior authorisation before selling or disposing of in any manner whatsoever "*any tangible assets comprised in the distribution system or any intangible assets accruing or likely to accrue to*" it from its distribution business in a manner inconsistent with its approved investment programme.

40. The Other Shareholders assert (in [24] of the Suit) that the Applicant was "*in gross violation of Section 9.4 of the [SHA] attempting to transfer the beneficial ownership/effect a change in the board or management control of [KEL] … which is not permissible under [the SHA] in order to secure board and management rights in [KEL]*" They state (in [25] of the Suit) that "*in furtherance of their illegal acts, it has come to the knowledge of the [Other Shareholders] that [the Applicant had] sent to [KEL] board nominations on the basis of the [Transaction] in order to hijack [KEL] [thereby] bypassing the regulatory framework in Pakistan*." *They further state (in [26] of the Suit) that "[KEL had] made a material disclosures to [PSX] in relation to the transfer of beneficial ownership/change in board and management control at the behest of [the Applicant] … [who [is] unlawfully trying to gain control over the national asset*."

41. The relief claimed by the Other Shareholders in the Suit is as follows:

(a). a declaration that "*all acts*" of the Applicant "*in relation to the transfer of beneficial ownership/change in board or management control"* of KEL are *"null and void.*"

(b). a declaration that the nominations for the board of KEL made by the Applicant are "*illegal and without lawful authority.*"

(c). a declaration that the acts of the Applicant "*in relation to the change of beneficial ownership/change in board or management control"* of KEL are in "*gross violation of section 33 [of the Act] and [Regulation 14]."*

(d). a direction that the Applicant perform its obligations under the SHA (and certain unspecified finance agreements) "*as regards the change of control provisions*."

(e). a direction that the Privatisation Ministry, the Energy Ministry and NEPRA "*monitor and regulate the affairs of [KEL] in accordance with ... the laws of Pakistan*."

(f). an order restraining the Applicant from "*transferring the beneficial ownership or making any changes in the board/management control of [KEL] without the Security Clearance of the Government of Pakistan.*"

(g). an order restraining the Applicant "*from acting in violation of the restrictions on transfer prescribed under [the SPA 2005].*"

(h). an order restraining the Privatisation Ministry, the Energy Ministry and NEPRA from authorising *"any transfer of beneficial ownership or change in the board/management control without the Security Clearance or in violation of Section 5.2 of the SPA 2005".*

(i). a permanent injunction restraining the Applicant "*from interfering with or in any manner attempting administration of affairs of [KEL]"*

42. On 21 October 2022, the High Court of Sindh granted the Pakistan Interim Injunction which included an order that "*no change shall be effected in the present Board of Directors of [KEL].*" The Pakistan Interim Injunction is still in force.

43. In response to the Pakistan Proceedings the Applicant made two applications (the ***Applicant's Filings***):

(a). on 4 November 2022, the Applicant made an application under Order 39 Rule 4 of the Code of Civil Procedure 1908 (the ***O.39 Application***) seeking a recall and or

modification of the Pakistan Injunction and allowing nominations of directors on the board of KEL in proportion to the shareholding of KESP.

(b). on the same date, the Applicant made an application (the ***Section 4 Application***) under section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 seeking the stay of the proceedings, vacation of the Pakistan Injunction and a referral of the matter for adjudication under clause 25 of the SHA.

44. The Other Shareholders filed a counter affidavit to the O.39 Application (the ***Other Shareholders' Counter Affidavit***) which responds to that application and elaborates upon the basis of the Other Shareholders' claims in the Pakistan Proceedings. It includes (at [6] of the reply) the following statement:

> "*Notwithstanding the breaches of the [SHA] by [the Applicant and KESP] ... [the Other Shareholders'] primary contention is in respect of the violations of the provisions of the SPA 2005 particularly Section 5.2 and 5.3 which is governed by the law s of the Islamic Republic of Pakistan. It is respectfully submitted that until and unless [the Applicant and KESP] do not [sic] adhere to the provisions of SPA 2005 and observe the regulatory framework and the applicable laws of Pakistan in respect of the change of ownership/management control of [KEL], [the Applicant] cannot transact at its pleasure for the purpose of achieving a board concentration or beneficial ownership for which the rights of the [Other Shareholders] would otherwise gravely be prejudiced.*"

45. Various parties have filed counter affidavits in the Pakistan Proceedings (including in response to the Applicants Filings). In particular:

(a). on 25 November 2022, two of the minority shareholders in KEL applied to be permitted to be joined as defendants (which was resisted by the Original Shareholders).

(b). on 20 December 2022, a counter affidavit was filed on behalf of KEL. It was submitted that the relationship between the Original Shareholders and the Applicant was governed by the SHA. It was also noted that the SECP had on 8

November 2022 issued a direction (the ***Direction***) under section 125 of the Securities Act 2015 directing KEL not to make changes to its board until further order. It was further confirmed that there were three vacancies on KEL's board as a result of the resignations on 19 and 24 October 2022.

(c). on 20 December 2022, a counter affidavit was filed on behalf of the Privatisation Ministry. The Privatisation Ministry put forward various preliminary objections. They said that the Original Shareholders' cause of action had arisen out of the SHA and that "*apparently there does not exist a dispute inter se [between] the parties under [the SPA 2005]*." They also noted that it remained to be seen whether there was a cause which affected their rights.

(d). on 21 December 2022, a counter affidavit was filed on behalf of the SECP in response to the O.39 Application. It referred to various announcements made by KEL on the PSX regarding the Transaction to the effect that *"a large part of the controlling stake in [KEL] had been acquired by [SVL]*" and that "*changes had been consummated involving IGCF General Partner Limited (IGCF GP) being the fund manager of Infrastructure and Growth Capital Fund L.P. (Fund), being the owner of the Fund assets. In particular controlling interests in IGCF GP and certain limited partnership interests in the Fund had been acquired by [SVL]*." It was noted that the SECP had "*sought detailed information from [KEL] regarding the changes in ownership structure [by] letter dated 26 October 2022 to assess the compliance of Part X*" of the Securities Act 2015. It was further noted that KEL's failure to respond had resulted in the issuing of the Direction although KEL had subsequently informed the SECP that SVL "*was in the process of acquiring a 48% stake in IGCF Fund [and] thereby would be indirectly acquiring 12.1% stake in [KEL] … [and] that [SVL was] in the process of closing IGCF Limited Partner stakes in bi-lateral private transactions as governed by the IGCF Fund Limited Partnership Deed and that Form 44 will be filed when a reporting threshold [was] reached."* It was also said that the "*subject transaction [fell] under the purview of [the SECP] and [attracted] the following provisions of [Pakistan law]:*

(a). *Section 11(1) of the Securities Act 2015: Disclosure to the Securities Exchange, [the SECP] and [KEL] of acquisition of more than 10% voting shares of [KEL] within two working days of acquisition.*

(b). *Section 123(A) of the Companies Act 2017: Filing of Form 45 (compliance declaration of Ultimate Beneficial Owners (UBO) of the Companies).*

(c). *Regulation 19(A)(3) of the Companies (General Provisions and Forms) Regulations 2018: Reporting a change of UBO of the company on Form 44.*"

46. A hearing was scheduled for 8 November 2022 to consider further the continuation of the Pakistan Interim Injunction and the Applicant's O.39 Application and its Section 4 Application. That hearing did not take place and was relisted for 12 December 2022. The 12 December hearing was only part heard and adjourned to a date to be fixed after the court's winter vacation, which concluded on 9 January 2023. The further hearing has not yet taken place (in part because of local difficulties which have caused the court to close temporarily).

The law governing anti-suit injunctions based on a breach of an exclusive jurisdiction clause

47. There was no material dispute regarding the law applicable to anti-suit injunctions where reliance is placed upon an exclusive jurisdiction clause. The clause obliges the parties to litigate disputes falling within the scope of the clause before the chosen court and prohibits the parties from litigating in any other forum. Where foreign proceedings are brought in breach of the clause, the injuncting court may restrain their prosecution.

48. In *Argyle Funds*, Field JA in the Court of Appeal in this jurisdiction summarised (at [23]) the basis of the Court's jurisdiction to grant, and the core features of the approach to be adopted by the Court when considering an application for, an anti-suit injunction based on an asserted breach of an exclusive jurisdiction clause. He noted that:

> *"The judge correctly identified s.11 of the Grand Court Law (2015 Revision) and s.37(1) of the English Senior Courts Act 1981 as providing the jurisdiction of the Grand Court to grant the anti-suit injunction applied for. Citing the decision of Cresswell, J. in Origami Partners III LP v. Pursuit Capital Partners (Cayman) Ltd. (11), the Aggeliki Charis Cia. Maritima S.A. v. Pagnan S.p.A… and Donohue v. Armco Inc. he also correctly held that the jurisdiction was discretionary and would not be exercised in favour of an injunction as a matter of course but if proceedings were started in breach of a binding arbitration clause or exclusive jurisdiction clause the court would ordinarily enforce the contract between the parties unless there were strong reasons for not doing so."*

49. Accordingly, while in each case a discretion falls to be exercised, and the Court must be satisfied that it is in the interests of justice to grant the injunction, where there is an exclusive jurisdiction clause ordinarily the court will restrain foreign proceedings brought in breach of such a clause so as to give effect to and enforce the contract unless there are "*strong reasons*" not to do so. The burden of showing strong reasons falls on the respondent to the application.

50. The reference to "*strong reasons*" was established as the proper formulation of the test by the House of Lords in *Donohue* v. *Armco Inc.* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425 (and endorsed by the Supreme Court in *AES Ust Kamengorsk Hydropower LLC v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889 at [25). In *Donohue* v. *Armco* (at [24]) in the context of a contractual exclusive choice of court clause the House of Lords recognised that strong reasons are required to outweigh the *prima facie* entitlement to an injunction. In that case, a claim for fraud and conspiracy was brought against Mr. Donohue in New York in breach of an agreement providing for the exclusive jurisdiction of the English courts. Mr. Donohue was refused an anti-suit injunction because strong reasons (in the form of the alleged participation in the alleged fraud of other New York defendants not party to any exclusive jurisdiction agreement) existed why the New York proceedings should continue.

51. Field JA also referred to the important judgment of the Court of Appeal of England and Wales in *Aggeliki Charis Compania Maritima v Pagnan (**The Angelic Grace**)* [1995] 1 Lloyds Rep 87. In that case the Court of Appeal dismissed an appeal from a decision of Rix J (as he then was) in which he had held that the owners and charterers of the vessel were entitled and obliged to refer certain claims and cross-claims between them to arbitration

under a clause in a voyage charter and that the owners were entitled to an injunction restraining the charterers from pursuing against the owners in the Italian Courts the claims declared to be arbitrable. Millett LJ (as he then was) (in a judgment endorsed by Neill LJ) set out the approach to be adopted by the Court as follows (at 96) (underlining added):

> *"We should, it was submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the plaintiff's application to the Italian Court to stay those proceedings, and all on the ground that it can safely be left to the Italian Court to grant the plaintiff's application. I find that proposition unattractive. It is also somewhat lacking in logic, for if an injunction is granted, it is not granted for fear that the foreign Court may wrongly assume jurisdiction despite the plaintiffs, but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign Court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the plaintiff of its contractual rights altogether.*
>
> *In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in Continental Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."*

52. As Millett LJ pointed out the justification for the grant of the injunction is that without it, the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy.

53. The starting point is for the Court to decide whether or not the foreign proceedings constitute, in whole or in part, a breach of the exclusive jurisdiction clause. It is for the

injunction applicant to establish that it is entitled to enforce the clause, that the injunction defendant is a party or in substance bound by the clause, that the clause is binding, and that the foreign proceedings fall within the terms of the clause. Whether a foreign claim is covered by a jurisdiction clause involves two stages. The first requires an analysis of the nature of the foreign claim; the second requires an answer to the question "*does the clause, on its proper construction, extend to the foreign claim, characterised in accordance with the analysis conducted at the first stage?*"

54. Where the injunction applicant seeks, as in this case, an interlocutory injunction, a question arises as to what level of proof of a breach of contract is required.

(a) Mr. Chapman KC accepted, citing the judgment of Teare J in *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] 2 Lloyds Rep 41, that the injunction applicant must establish that there was a high degree of probability that there was a binding exclusive jurisdiction clause which was applicable to the claims in question where the injunction applied for sought to terminate or would have the effect of terminating the foreign proceedings and so would be practically determinative of the question of forum. However, in reliance on the discussion in Raphael, *The Anti-Suit Injunction*, 2nd ed., 2019 (***Raphael***) at [13.48] (citing *CAN Insurance v Office Depot International (UK)* [2005] Lloyds Rep IR 658), he argued that where an interlocutory injunction was sought only to hold the ring for a short period of time pending a further or final hearing at the return date or trial of the claim for an injunction, then, as Raphael said, "*reasoning akin to [American] Cyanamid is more appropriate. It may then be appropriate to grant relief on the basis of there being a sufficient probability of success, pending that further hearing or trial. In such a case, a trial of the [application for the] final injunction may be accelerated*." Mr. Chapman KC said that in this case the Court did not need to decide which approach was right since the Applicant satisfied both tests.

(b) Mr. Arden KC argued that the *American Cyanamid* principles were not applicable even where the injunction was sought for a short period and that in some cases a higher threshold than "*a high degree of probability*" applied. He submitted that the

standard of proof depended on whether or not the question of whether the injunction defendant was in breach of contract could be satisfactorily resolved at the interim stage. Where there was a dispute as to whether there had been a breach which raised a simple question of construction then the injunction applicant had to convince the Court that there had been a breach. But where the dispute was more complex and raised real factual disputes and a meaningful trial of the claim to the anti-suit injunction was anticipated, the injunction applicant must establish that there was a high degree of probability that there was a binding exclusive jurisdiction clause which was applicable to the claims in question. Mr. Arden KC said that this case fell into the first category.

The Applicant's case

55. The Applicant submitted that the key point was that the Pakistan Proceedings had been (or should be treated as having been) brought in breach of the exclusive jurisdiction clause and it followed that an interlocutory injunction would be granted save in exceptional circumstances (where there were strong reasons justifying a refusal to grant an injunction). There were no exceptional circumstances (strong reasons) in the present case. The Applicant only sought an interlocutory injunction to hold the ring pending a further *inter partes* hearing on the return date (or, in the alternative until the trial of its claim on the basis that the Court should order an expedited trial) with the result that the prejudice suffered by the Other Shareholders would be minimal. The Applicant was entitled not to be forced to face and have imposed on it the expense and difficulties of litigating in Pakistan.

56. The Applicant argued that there could be no doubt that the Pakistan Proceedings fell within clause 25.2 of the SHA (as amended). That clause was in clear and in wide terms, applying to "*any dispute arising out of or in connection with*" the SHA and provided in terms for this Court, together with the English courts, to have exclusive jurisdiction to resolve those disputes.

57. The Pakistan Proceedings had at their heart an impermissible attempt by the Other Shareholders to prevent the Applicant from exercising its contractual rights under the SHA

as regards the nomination and appointment of directors to the board of KEL. That was in itself a breach of the SHA by the Other Shareholders who were contractually required to procure such appointment in accordance with the contractual machinery under the SHA.

58. Accordingly, the Court could be satisfied to the requisite "*high degree of probability*" that the relevant clause was binding on the Other Shareholders and applied to the Pakistan Proceedings.

59. It was equally clear that "*strong reasons*" could not be shown as to why the Court should not grant injunctive relief to give effect to the exclusive jurisdiction clause.

60. There was no basis for concluding that any provision of the SHA, let alone clause 25.2 and the exclusive jurisdiction clause, had been ousted or disapplied by anything that may have happened in Pakistan. While KESP acquired its interest in KEL under the 2005 SPA, that agreement did not regulate the position as between the shareholders in KESP itself (i.e. the Applicant and the Other Shareholders) which was governed by the SHA.

61. Furthermore, the risk of a multiplicity of proceedings did not constitute strong reasons not to grant injunctive relief. The Applicant submitted, in reliance on the discussion in Raphael, that even where there was a risk of multiple proceedings, the exclusive jurisdiction clause will have considerable force and will tend to be enforced. This was particularly so where any such risk arises from the voluntary acts of the contract breaker itself. Further, here the contracting parties must be taken to have known about and taken into account the connections with Pakistan (including the 2005 SPA and any relevant regulatory backdrop) when negotiating and agreeing the SHA and the exclusive jurisdiction clause. It was also relevant to note that the other parties to the Pakistan Proceedings had made common cause with the Applicant by either challenging the basis of the Suit or making it clear that it was unnecessary and irrelevant to the exercise of their regulatory powers. The Privatisation Ministry, the Energy Ministry, NEPRA and SECP could each take such action as they considered appropriate as regulators of, or to protect the public interest with respect to, KEL (as the SECP had done by issuing the Direction) and the Pakistan Proceedings did not

involve claims made by or action taken by them (nor would the interlocutory injunction sought by the Applicant interfere with or affect their right to take action in relation to KEL).

62. The Applicant submitted that the Pakistan Proceedings were on the face of the Suit, vexatious and oppressive. They were clearly weak and the appropriate inference to be drawn was that they were being used as a device in an attempt to seek to avoid the requirements of the exclusive jurisdiction clause. The Pakistan Proceedings made very serious allegations that were completely without foundation and were not only brought in breach of contract but sought to restrain the exercise of rights under that contract. That was a particularly serious and egregious breach.

63. The Applicant argued that there was no proper basis for the Other Shareholders' claim that the Applicant had submitted to the jurisdiction of the High Court of Sindh. The O.39 Application and the Section 4 Application both relied and were based on clause 25 of the SHA. The overarching contention made by the Applicant was that the dispute relating to the exercise of the Applicant's rights as a shareholder in KESP was not one that the Other Shareholders were permitted to refer to the High Court of Sindh. The Applicant's Filings had only been made, and their sole purpose was, to protect the position of the Applicant and to ensure that the exclusive jurisdiction clause in the SHA was respected. It was therefore entirely reasonable that the Applicant had applied for an expedited hearing. As a matter of Cayman law, it could not be said that the Applicant had submitted to the jurisdiction of the Pakistan court. While the Other Shareholders had filed an affidavit to which an opinion on Pakistan law had been exhibited, permission to adduce expert evidence had not yet been granted and there was no evidence that the Applicant would be treated under Pakistan law as having submitted. The Applicant accepted (as the Other Shareholders had pointed out) that the Applicant's Filings had erroneously referred to and relied on the earlier version of clause 25 of the SHA, which gave any party the right to require that disputes be submitted to arbitration. This was an error which the Applicant would correct and in future references would be made to clause 25 as amended (and the references to the right to arbitrate removed).

64. The Applicant also submitted that it had acted promptly and had not delayed in issuing proceedings in this jurisdiction. The Applicant had issued the Summons on 24 November 2022, only just over one month after the commencement of the Pakistan Proceedings. The Applicant had immediately responded to those proceedings (on 4 November 2022) by making the Applicant's Filings in order immediately to contest the Other Shareholders' right to commence proceedings in Pakistan and then within a short time thereafter had applied to this Court for injunctive relief and sought a hearing as soon as practicable.

65. The Applicant would be seriously prejudiced if the Other Shareholders were permitted to take further steps in and it was required to engage further with the Pakistan Proceedings. Damages were manifestly an inadequate remedy. It should not be required to make and maintain its challenge to the Pakistan Proceedings in Pakistan and in these proceedings. Not only would it incur costs and have to devote material resources to do so, but there was a real risk of further delays (there would be a risk of appeals and further delays) so that it was at least likely that it would be some time before the Applicant's efforts to extricate itself from the Pakistan Proceedings could reach a conclusion. By contrast, the Other Shareholders would, if they were successful in resisting the application for an injunction, suffer only a short delay in the Pakistan Proceedings as a result of the temporary and limited relief sought by the Applicant.

66. This Court should not hesitate to grant the interlocutory injunction sought by the Applicant because of comity concerns. The Applicant submitted that the Court should follow the approach set out by Millett LJ in *The Angelic Grace* (quoted above). The interference with the proceedings before the High Court of Sindh would be limited and entirely understandable. Millett LJ had said that a court need feel no diffidence in granting an injunction provided that it had been sought promptly and before the foreign proceedings were too far advanced. The Pakistan Proceedings were still at an early stage and, as I have already noted, the Applicant argued that a final decision on its applications to prevent the continuation of those proceedings was likely to be some time away. Mr. Chapman KC noted that the Other Shareholders relied on the discussion of the role of comity in the judgment of the Court of Appeal of England and Wales in *Ecobank Transactional Inc. v Tanoh* [2016] 1 WLR 2231 (***Ecobank***). But that was a very different case which was not

concerned, as we are here, with an early application for an anti-suit injunction. Where the foreign proceedings had been allowed to run to judgment different considerations applied to the assessment of the weight to be given to comity.

The Other Shareholders' submissions

The Other Shareholders' position at this hearing

67. Mr. Arden KC accepted for the purpose of this hearing that it was likely that the Applicant was able to satisfy the "*relatively low threshold*" that applied to the issue of whether there had been a breach of the exclusive jurisdiction clause when the injunction applicant sought an early return date for the interlocutory injunction (or an expedited trial of the claim for a final injunction) so that the Court would be able to undertake a more in-depth review of the Applicant's claim within a short time.

68. The Other Shareholders submitted, however, that there were strong reasons why the anti-suit injunction sought by the Applicant should not be granted. At the hearing, Mr. Arden KC relied in particular on three main grounds:

(a). the Applicant had without adequate justification delayed making an application for injunctive relief in this jurisdiction so that the Pakistan Proceedings were now well advanced and it would cause the Original Shareholders substantial prejudice if those proceedings were delayed and put on hold (the ***Delay Point***).

(b). the Applicant would suffer no prejudice, or no material prejudice, if the injunction were refused and the Pakistan Proceedings were allowed to progress in the period up to the trial of the Applicant's claim for a final injunction (the ***No Prejudice Point***).

(c). granting the anti-suit injunction would result in an unjustifiable interference with the Pakistan Proceedings and would fail adequately to respect the principle of comity (the ***Comity Point***).

69. The Other Shareholders argued that the Court should exercise its discretion so as to permit the Sindh High Court to hear and dispose of the applications which are due to be heard by it imminently (the O.39 Application, the Section 4 Application and the return date of the Other Shareholders' application for an interim injunction). This would achieve a proper balance between the various factors that the Court was required to take into account.

70. The Other Shareholders also submitted that:

(a). the granting of the interlocutory injunction sought by the Applicant would give rise to a real risk of a multiplicity of proceedings and an attendant real risk of inconsistent findings such that it was in the interests of justice to allow the whole dispute between the various parties joined to the Pakistan Proceedings to be determined by the Sindh High Court.

(b). the Applicant had taken an active role in the Pakistan Proceedings before issuing the Summons, making three applications of its own in those proceedings, as well as submitting evidence and responding to applications of other parties (including the Other Shareholders), which was inconsistent with the relief which it now sought from this Court. That conduct was sufficient to warrant this Court refusing to grant that relief at this stage.

71. The Other Shareholders argued that it was clear that, even if the relief sought by the Applicant was granted, the Pakistan Proceedings would continue. Accordingly, should either the Applicant or the Other Shareholders subsequently commence proceedings in relation to the SHA (clause 9.4) either in the Cayman Islands or in England, there would be a multiplicity of proceedings and an attendant real risk of inconsistent findings. The Other Shareholders submitted that the interests of justice were best served by the submission of the whole dispute to a single tribunal which was best fitted to make a reliable, comprehensive judgment on all the matters in issue. It would be contrary to the interests of justice to allow or encourage a procedure which permitted the possibility of different conclusions by different tribunals, perhaps on different evidence. The Other Shareholders submitted that the tribunal best suited to the task was the High Court of Sindh, being the

only tribunal capable of being seised of the Pakistani statutory, regulatory and public interest aspects of the dispute, which were in reality the most fundamental aspects of the dispute. The fundamental issue in the Pakistan Proceedings concerned the control and ownership of KEL, which is a public limited company in Pakistan, subject to Pakistani statutes and regulations. It was also subject to the control of the SECP. Although the parties (i.e. the Applicant and the Other Shareholders) were incorporated in the Cayman Islands, the dispute had very little to do with this jurisdiction. Moreover, four parties were directly connected with Pakistan because they were Pakistani Government departments or Pakistani regulatory authorities.

72. Furthermore, the Applicant had actively taken steps in the Pakistan Proceedings, had voluntarily submitted to the jurisdiction of the Sindh High Court and, importantly, had invited and now was pressing the Sindh High Court to decide whether it had jurisdiction. The Other Shareholders argued that it was useful to have in mind the chronology. The Pakistan Proceedings had been commenced on 21 October 2022 and the Pakistan Interim Injunction was granted on the same day; the Originating Summons was dated 24 November 2022; on 4 November 2022, the O.39 Application was made under Order 39 Rule 4 of the Code of Civil Procedure 1908 seeking a recall and or modification of the Pakistan Interim Injunction and allowing nominations of directors on the board of KEL in proportion to the shareholding of KESP; on the same date, the Section 4 Application was made under section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 seeking the stay of the proceedings, vacation of the Pakistan Interim Injunction and a referral of the matter for adjudication under clause 25 of the SHA; a hearing was listed on 8 November 2022 for these two applications, together with the return date of the Other Shareholders' application for an interim injunction, but the applications were unheard and re-listed for hearing on 12 December 2022; they were part-heard on that day and adjourned to a date to be fixed after the winter vacation of the High Court ended on 9 January 2023; most recently, on 10 January 2023, the Applicant had filed an urgent application for a hearing to resume the part-heard hearing of 12 December 2022, and this urgent application had been listed for 16 January 2023 but had not taken place because the court, as a mark of respect following the killing of a senior member of the Pakistan Bar, was closed. The Other Shareholders submitted that the Applicant's active and continuing

role in the Pakistan Proceedings was inconsistent with its position before this Court. The Other Shareholders contended that the Applicant's active role in the Pakistan Proceedings was inconsistent with Cayman or England (the contractual forum) being the sole forum for the resolution of their dispute with the Other Shareholders.

The Delay Point

73. The Other Shareholders argued that the Applicant should have applied to this Court (or the Court in England) before allowing the Pakistan Proceedings to progress as far as they now have and that it would now be unjust for the Court to restrain the Other Shareholders from continuing those proceedings. The Applicant's delay also demonstrated that there was no real urgency and need for relief from this Court. Had the need for injunctive relief really been urgent the Applicant would have sought an immediate hearing of the Originating Summons, which it had not done.

74. Mr. Arden KC submitted that the law was clearly set out in the judgment of Christopher Clarke LJ in *Ecobank* at [122], [123] and [133]. This was a case involving an application for an injunction to restrain enforcement of a foreign judgment in circumstances where the parties were subject to an agreement to arbitrate. The injunction applicant had been successful at the *ex parte* (without notice) hearing but the injunction had been discharged at the *inter partes* hearing (primarily because of the injunction applicant's delay). That decision was upheld on appeal. Christopher Clarke LJ said this:

> *"122. I do not accept that delay was wholly irrelevant because (i) Mr Tanoh was aware from an early stage that Ecobank claimed that the disputes should be submitted to arbitration and (ii) Ecobank objected to the jurisdiction of the Togolese and Ivorian courts on that ground. An injunction is an equitable remedy. Before granting it the court must consider whether it is appropriate to do so having regard to all relevant considerations, which will include the extent to which the respondent has incurred expense prior to any application being made, the interests of third parties, including, in particular, the foreign court, and the effect of making such an order in relation to what has happened before it was made.*
>
> *123. A relevant consideration, particularly in relation to interlocutory relief, as was sought in the present case, is whether the party seeking an injunction*

> *has acted with appropriate speed. The longer a respondent continues doing that which the applicant seeks to prevent him from doing, the greater the amount of labour and cost that he will have expended which could have been avoided ….*
>
> .....
>
> *133. Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not per se a bar to an anti-suit injunction: see the AES case. But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force."*

The No Prejudice Point

75. In addition, the Applicant had failed to show that it would suffer any material prejudice if an injunction was not granted. The granting of the injunction sought by the Applicant would not allow it to exercise its asserted rights under clause 5.7 of the SHA. The Direction would remain in force (as it would even if the Pakistan Interim Injunction were discharged) and there was no evidence to indicate that the Direction would be withdrawn in the foreseeable future. The Applicant had relied on the fact that the KEL board only had a limited time to fill the three casual vacancies arising following the Resignation. KEL's counter-affidavit dated 12 December 2022 in the Pakistan Proceedings had noted that pursuant to section 155 of the Companies Act 2017 a casual vacancy arising on the board of a listed company had to be filled within ninety days. The ninety-day period would expire in relation two of the vacancies on 19 January and in respect of one of them on 24 January. But the interlocutory injunction sought from this Court would not allow the KEL board to fill the casual vacancies before the expiry of the ninety day period both because the Applicant was not seeking a mandatory order requiring the Other Shareholders to discharge the Pakistan Interim Injunction and because the Direction remained in force. In any event, there was no real risk of prejudice since the vacancies could be filled by other means, presumably by

shareholder resolution, in due course. The Applicant had also relied on it having to incur and being exposed to further costs in respect of the Pakistan Proceedings but if those proceedings were allowed to continue so as to allow the Sindh High Court to hear and dispose of the applications which are due to be heard by it imminently (the O.39 Application, the Section 4 Application and the return date of the Other Shareholders' application for an interim injunction) the further costs would not be significant. In any event, most of the anticipated expense in the near-term related to the Applicant's Filings.

The Comity Point

76. The Other Shareholders submitted that considerations of comity also justified a refusal to grant injunctive relief. The Sindh High Court might justifiably take the view that an injunction granted by this Court represented an unwarranted interference with its process in circumstances where that injunction was granted at the behest of a party which was asking the Sindh High Court to hear on an expedited basis an application seeking the same result.

77. Mr. Arden KC relied in particular on the judgment of Christopher Clarke LJ in *Ecobank* at [132], [134] and [137] and noted how considerations of comity were closely linked to the impact and significance of delay. Christopher Clarke LJ had said this:

> *"132. Comity has a warm ring. It is important to analyse what it means. We are not here concerned with judicial amour propre but with the operation of systems of law. Courts around the free world endeavour to do justice between citizens in accordance with applicable laws as expeditiously as they can with the resources available to them. This is an exercise in the fulfilment of which judges ought to be comrades in arms. The burdens imposed on courts are well known: long lists, size of cases, shortages of judges, expanding waiting times, and competing demands on resources. The administration of justice and the interests of litigants and of courts is usually prejudiced by late attempts to change course or to terminate the voyage. If successful they often mean that time, effort, and expense, often considerable, will have been wasted both by the parties and the courts and others. Comity between courts, and indeed considerations of public policy, require, where possible, the avoidance of such waste.*
>
> ……

> *134. Whilst a desire to avoid offence to a foreign court, or to appear to interfere with it, is no longer as powerful a consideration as it may previously have been, it is not a consideration without relevance. A foreign court may justifiably take objection to an approach under which an injunction, which will (if obeyed) frustrate all that has gone before, may be granted however late an application is made (provided the person enjoined knew from an early stage that objection was taken to the proceedings). Such an objection is not based on the need to avoid offence to individual judges (who are made of sterner stuff) but on the sound basis that to allow such an approach is not a sensible method of conducting curial business.*
>
> ……
>
> *137. In short, both general discretionary considerations and the need for comity mean that an applicant for anti-suit relief needs to act with appropriate despatch. In the Transfield Shipping case [2009] EWHC 3629 (QB) at [78] I observed that "comity, which involves respect for the operation of different legal systems, calls for challenges … to be made promptly in whatever is the appropriate court." Whilst recognising that delay is not necessarily a bar to relief, and the importance of upholding the rights of those who are the beneficiaries of exclusive jurisdiction agreements, I do not regard the cases subsequently decided by this court as rendering that statement inaccurate."*

78. Mr. Arden KC said that if the interlocutory injunction sought by the Applicant was granted the part-heard applications in the Pakistan Proceedings would come to a halt and result in the wasting of considerable judicial time (in addition to wasting the time and expense incurred by the parties to date). The weight to be given to comity in this type of case depended on context but it was an important factor in this case. While *Ecobank* was a case involving an anti-enforcement injunction which gave rise to some different considerations, the principle had been clearly set out in Christopher Clarke LJ's judgment. The Pakistan Proceedings should be allowed to run their course, at least for the time being and until the trial of the Applicant's claim.

Discussion and decision

Has a breach of clause 25.2 of the SHA been established to the requisite standard of proof?

79. I found the Applicant's submissions to be persuasive and am satisfied that, in the exercise of my discretion, and having regard to all the relevant circumstances, this is a case in which,

to use Millett LJ's phrase in *The Angelic Grace*, in the absence of an interlocutory injunction the Applicant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy.

80. This is a case in which there is a high probability that the Pakistan Proceedings were commenced and continued in breach of the exclusive jurisdiction clause in the SHA and in which there are no strong reasons justifying the refusal of the interlocutory injunction sought by the Applicant. An interlocutory injunction to hold the ring until the expedited trial of the Applicant's claim for a permanent injunction is held will ensure that the Applicant has a proper opportunity to establish and enforce its contractual rights without, in the event that the Applicant is unsuccessful, substantially or permanently interfering with the Other Shareholders' ability to progress the Pakistan Proceedings.

81. As the authorities make clear, in a case where the applicant can show to the requisite standard that there has been a breach of contract, the Court will, as Jacobs J pointed out in *Catlin Syndicate Limited and others v Amec Foster Wheeler USA and another* [2020] EWHC 2530 (Comm) at [36], act to protect the integrity of the contractual bargain:

> *".. the starting point is that the court will ordinarily act to protect the integrity of a contractual bargain reached between the parties. This is, in my view, one reason why "strong reasons" are and should be required once the court is satisfied, to a high degree of probability, that there is a valid English jurisdiction clause to which the parties have agreed. Another reason is that where proceedings are started, in breach of contract, in a different jurisdiction to that which the parties have agreed, this will almost inevitably cause irremediable prejudice to the opposing party which cannot be satisfactorily compensated by damages. That party will be put to the expense, which can be considerable, of litigating a case, often over a lengthy period of time, in the different jurisdiction. There is always a serious risk that the result of the litigation will be different from that which would have resulted if the proceedings had been started in the correct forum, particularly so when – as is often the case and is the case here – the other forum is invited to apply a different law to that which would have been applied in the agreed forum. Even if the "incorrect" forum were to be invited to apply correct law, it will often nevertheless be prejudicial to a party for this to happen in a case where the contractually agreed law and forum are the same. This is because it can reasonably be expected that the contractually agreed forum (i.e. England in the present case) will apply the contractually agreed law (English law in the present case) more reliably than the incorrect forum."*

82. I am satisfied that the Applicant has established a high probability that the Pakistan Proceedings were commenced in breach of clause 25.2 of the SHA. I am not in a position, nor do I consider that I need to, decide definitively the construction issue at this interim stage. That can and should be done at the trial of the Applicant's application. It is possible that the further evidence to be filed may have a bearing on the issue. For example, the characterisation of the Pakistan Proceedings may be affected by expert evidence of Pakistan law to be adduced at the trial. I can see that it is arguable that a lower standard should be applied where what is sought is an interlocutory injunction which only restrains the injunction respondent from taking further steps in the foreign proceedings for a relatively short period and which will not finally determine the forum dispute because the injunction respondent will (if successful here) retain the ability to continue the foreign proceedings without serious prejudice. But I do not consider that I should or need to decide this issue on this application, when there has only been a limited opportunity to review the authorities. Having said that I note that in *Ecobank* it was submitted (see [90]) that the rationale for the high probability test was that if an injunction were granted it was likely to be final and dispositive of the forum issue but Christopher Clarke LJ still considered (see [91]) that the high probability test was appropriate, giving considerable weight to the fact that the injunction involved the court interfering (albeit indirectly) with the working or output of the foreign court and the ability to continue the foreign proceedings of itself did not justify a lower standard.

83. However, with that caveat, it seems to me that the Suit relates to and involves a "*dispute arising out of or in connection with*" the SHA. I have sought to analyse and assess the claims made in the Suit (as elaborated on in the Other Shareholders' Counter Affidavit and having regard to the other documents filed in the Pakistan Proceedings) as best I can, taking into account the fact that different pleading styles and procedural rules appear to apply and without the benefit of expert evidence on Pakistan law and procedure.

84. The Other Shareholders complaint relates to, and the relief they have sought seeks to prevent, the exercise by the Applicant of rights under the SHA to cause KESP to appoint directors to the KEL board. The Suit centrally concerns the action of the Applicant and is based on an asserted breach of the SHA. The claim made in the Suit relates to and is directed

against the action taken by the Applicant under the SHA. It includes an express plea of a breach of the SHA. In [24] of the Suit, as noted above, it is averred that the Applicant was "*in gross violation of Section 9.4 of the [SHA] attempting to transfer the beneficial ownership/effect a change in the board or management control of [KEL] … which is not permissible under [the SHA] in order to secure board and management rights in [KEL]*" Furthermore, it is the Applicant's action in sending the KESP Letter in furtherance of its "*illegal acts*" (the reference to illegality coming immediately after the alleged breach of the SHA is presumably a reference to that breach) that is complained of.

85. The primary relief sought in the Suit is directed to and against the Applicant. The Other Shareholders seek a declaration that "*all acts*" of the Applicant "*in relation to the transfer of beneficial ownership/change in board or management control"* of KEL are *"null and void*" and that the nominations for the board of KEL made by the Applicant are "*illegal and without lawful authority.*" They also seek an order that the Applicant be directed to perform its obligations under the SHA.

86. Accordingly, the cause of action relied on by the Other Shareholders is (or at least includes) a breach by the Applicant of the SHA. There are references to breaches of the SPA 2005 (including the rather expansive statements made in the Other Shareholders' Counter Affidavit) but the Applicant is not a party to the SPA 2005 nor is there any allegation that the Applicant is bound by that agreement. There is no stated or pleaded basis on which the Applicant could be liable for a breach of the SPA 2005.

87. Furthermore, even though there are allegations of breaches of the SPA 2005, there is no application for any relief against KESP, as the party to that agreement. Nor is there any application for relief against KEL. There are references to the laws and regulatory rules of Pakistan but these laws and regulations are said to relate to and regulate KEL. There is an application for a declaration that the Applicant "*in relation to the change of beneficial ownership/change in board or management control"* of KEL is in breach of Pakistan law (Section 33 and Regulation 14) but the Suit does not set out the basis on which the Applicant is said to be subject to these laws of Pakistan or the basis of a cause of action based on these laws.

88. Relief is also sought against the Privatisation Ministry, the Energy Ministry and NEPRA. The Other Shareholders seek an order directing them to "*monitor and regulate the affairs of*" KEL in accordance with the law of Pakistan and to "*restrain them "from authorising any transfer of beneficial ownership or change in the board/management control of [KEL] without the [security clearance referred to Article 5.3 of [the SPA 2005] or in violation of Section 5.2 of the [SPA 2005]*." It will be recalled that Article (or Section) 5.2 contains transfer restrictions with respect to shares in KEL while Article (or Section) 5.3 deals with permitted and additional transfers of those shares. This relief appears therefore to be based exclusively on the provisions in the SPA 2005 but it is wholly unclear how the Other Shareholders can, and the Suit does not explain the basis on which the Other Shareholders are entitled to, make a claim under the SPA 2005 to which they are not a party or seek to enforce the regulatory obligations of the authorities tasked with regulating KEL (I also note that paragraph 13 of the Suit refers to Section 5.3 of the SPA 2005 as stating that "*any change of control*" is conditional on national security clearance being obtained but that Section does not refer to change of control and only relates to shares in KEL).

89. Accordingly, the Suit appears to be designed to challenge and invalidate action which it is said was taken by the Applicant as a shareholder in KESP to have new directors appointed to the KEL board. It is said that the nominations to the board of KEL was done by the Applicant. This allegation must be that the KESP Letter was written pursuant to the Applicant's direction and the exercise of its rights under the SHA (in the KESP Letter the company secretary of KESP sought and purported to appoint, or perhaps to direct *qua* shareholder, the KEL board to fill the casual vacancies on the board by appointing, Mr. Chishty and Mr. Baur as directors of KEL). The complaint is (only) directed against the action of the Applicant. There is, as I have said, no relief sought against KESP and no application against KESP to withdraw the KESP Letter (even though the Other Shareholders' Counter Affidavit makes reference to KESP).

90. It may be that the Other Shareholders can show that the Suit includes proper claims against the Privatisation Ministry, the Energy Ministry and NEPRA that are independent of and can continue even if the Other Shareholders are restrained from continuing the Suit as it relates to the Applicant. But based on my current understanding of the Suit, it appears that

those claims are derivative of and dependent on the claims against the Applicant and is hard to see that the Other Shareholders have standing to bring them or that any claim to standing has been pleaded.

91. Of course, KEL is an important public limited company incorporated in Pakistan which is part owned by the Government of Pakistan and subject to statutory and regulatory control in Pakistan. A change of control of a listed company appears to trigger disclosure obligations imposed on the listed company (including disclosure to the SECP relating to the ultimate beneficial ownership of the company). It also appears that mergers and reorganisations (see Section 33) are regulated and require NEPRA approval. I say appears since at this stage no expert evidence of the applicable law in Pakistan has been adduced. On the basis of the materials I have so far seen, it appears that any such obligations are imposed on KEL and it is wholly unclear that the Applicant is or could be subject to these obligations or whether the Other Shareholders assert that the Applicant is so bound and has acted in breach of such obligations (the Suit alleges that the Applicant is seeking "*to hijack [KEL] [thereby] bypassing the regulatory framework in Pakistan*"). Claims against the Applicant connected with these regulatory statutes are conceivable, for example of the basis of accessory liability. But no such claim is made in the Suit. Nor is a basis set out justifying a claim made by the Other Shareholders in respect of such statutory and regulatory obligations. To the extent that the Transaction has resulted in disclosure obligations and the need for regulatory and other approvals being triggered this is a matter for the relevant authority to be taken up with KEL. Compliance with such requirements is clearly a serious matter (and it is concerning that information requests from the regulatory authorities may not have been fully or promptly answered) but the existence of regulatory and statutory rules governing KEL do not justify proceedings being brought by one set of shareholders in KESP (a shareholder of KEL) against another shareholder in KESP, when the relationship between such shareholders is governed by the SHA and the exclusive jurisdiction clause therein.

92. It may also be that the obligations imposed on KEL relate to the transfers of shares by, or the change of control in, companies or entities which hold shares in KEL or KESP. It is possible that these obligations are also imposed on KESP as a shareholder in KEL (the need

for the Waiver suggests that a change of control of KESP may require a waiver from or the consent of the Government although the representations set out in Article 3.2(d) of the SPA 2005 appear to have expired). The position under Pakistan law has, as I have said, yet to be addressed in the evidence (and the interpretation of the SPA 2005 is a matter of Pakistan law). Since the right to appoint directors to the KEL board can only be exercised by KESP, to the extent that KESP would be acting in breach of Pakistan law or the SPA 2005 by seeking to give effect to a direction by the Applicant under the SHA, it may be unable to give effect to such a direction. If it did act in breach of applicable Pakistan legislation or the SPA 2005 it could be subject to proceedings by those to whom such obligations are owed (the Government of Pakistan and the regulators) independent of the SHA. But this is not the case before me.

Have the Other Shareholders established that there are strong reasons justifying a refusal to grant the injunction sought?

93. I accept the Applicant's submissions with respect to this issue.

94. As regards the Delay Point, I do not consider that the Applicant has acted in a way that would disentitle it or seriously weaken its claim to injunctive relief. It did not wait too long before seeking injunctive relief in this jurisdiction. The Summons was issued while the Pakistan Proceedings remained at an early stage and they remain at a relatively early stage. Save for the Pakistan Interim Injunction, no substantive relief has been granted and no decisions on substantive points in issue in the proceedings have been taken. No application has been (fully) heard or decision been made on the Applicant's Filings and challenge to the Other Shareholders' right to bring the Pakistan Proceedings.

95. Nor do I consider that the steps taken by the Applicant in the Pakistan Proceedings disentitle it to injunctive relief. Those steps do not go beyond a challenge to the jurisdiction of the Pakistan court. They do not, from the perspective of Cayman Islands law, constitute a submission to the jurisdiction of the High Court of Sindh (although the position in Pakistan law remains to be established). The Applicant cannot be said to have waived its right to insist on being sued only in the contractual forum or to be estopped from doing so. The Applicant has been doing what it can to resist the High Court of Sindh's assumption of

jurisdiction. It has not conducted itself in a manner that it inconsistent with the contractual forum being the sole forum for the resolution of the parties' dispute.

96. As regards the No Prejudice Point, I do not accept that the Other Shareholders have shown that the Applicant will suffer no prejudice if the injunction it seeks is not granted. I accept the Applicant's submissions on this point. It seems to me that the fact that the Applicant will be unable to procure the appointment of new directors to the KEL board, while the Direction continues, is of limited relevance and weight. The Applicant is entitled to have the dispute with the Other Shareholders litigated in accordance with the terms of the SHA.

97. Nor do I consider that comity establishes a strong reason for refusing the injunction sought. Once again, I accept the Applicant's submissions on this point. I have carefully considered the impact of the interlocutory injunction on the Pakistan Proceedings and on the High Court of Sindh. I certainly intend no disrespect to the High Court of Sindh. Of course, the interlocutory injunction is an *in personam* order made against the Other Shareholders and is not directed to or against the High Court of Sindh. Nonetheless, I appreciate that the order I make will have an impact, and would wish to minimise its impact, on the Pakistan Proceedings. However, as I have explained, the interlocutory injunction holds the ring but does not require the discontinuance or withdrawal of the Pakistan Proceedings. It should impact the Pakistan Proceedings for a short period by way of delaying the hearing of various applications (the hearing of which has already been delayed by procedural difficulties in Pakistan). At this stage, the interlocutory injunction is directed at the continuation of all the Other Shareholders' claim including those made against the Privatisation Ministry, the Energy Ministry and NEPRA (and the SECP to the extent that relief is sought against it). This is because it (at least at present) appears to me that these claims depend on the continuation of the claims against the Applicant so (or are otherwise so closely connected with those claims such) that it is not possible or practicable for them to be continued while the claims against the Applicant are in effect stayed. Nor am I satisfied, at least at this stage, that the object of the injunctive relief will be achieved if the Other Shareholders were permitted to continue to prosecute their claims against these other parties. It may be that the Other Shareholders can amend the Suit and demonstrate that they can properly bring and prosecute the claims against these other parties without breaching

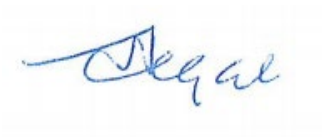
clause 25.2 of the SHA but this is a matter for further evidence, submissions and review at the further hearing. This is also not a case where the Pakistan Proceedings involve claims by non-parties to the exclusive jurisdiction agreement which would be restrained by an injunction which prohibits any further steps in the proceedings.

98. The Other Shareholders have not established that the interlocutory injunction will prejudice their position in the Pakistan Proceedings. They may be prejudiced by the delay in holding hearings, by some costs already incurred being wasted and by the need to incur further costs if the Pakistan Proceedings proceed. But these adverse consequences are not material and do no establish that the granting of the injunction will result in material injustice to the Other Shareholders.

Procedural directions

99. It seems to me that the appropriate way to proceed is to give directions for an expedited trial of the Applicant's claims for a permanent injunction and other relief (including damages). I see no reason why the trial cannot be brought on rapidly. The parties accepted that the only further evidence that needs to be adduced is the Applicant's evidence in reply and expert evidence on relevant issues of the law of Pakistan (I am not convinced that the parties have yet properly identified those and have therefore given them an opportunity to reflect further on and to seek to agree what issues of Pakistan law the experts should address). I see no substantial benefit to be achieved by ordering and listing a further interim hearing. It is in the interests of all parties to obtain an early decision on the Applicant's application. If it were to be the case that substantial evidence needs to be filed with respect to the Applicant's damages claim and that material factual issues and disputes arise in relation to that claim, the trial could be split so that the Applicant's claim to injunctive and declaratory relief are dealt with first and separately from the damages claim.

100. I have invited the attorneys for the parties to prepare and file a suitable form of order to achieve the effects and reflect the directions set out in the 20 January email and this judgment.



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The Hon. Mr. Justice Segal

Judge of the Grand Court, Cayman Islands

1 February 2023