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 Simon Birt KC instructed by Laura Hatfield and Richard Parry of Bedell Cristin Cayman Partnership for Al Jomaih Power Limited and Denham Investment Ltd.
Heard:	31 March and 3 April 2023
Draft judgment Circulated:	17 July 2023
Judgment Delivered:	20 July 2023

HEADNOTE

Exclusive jurisdiction clause in a shareholders agreement governed by English law with respect to a Cayman company (A) stipulating that disputes arising out of or in connection with the agreement be litigated in Cayman or London – X, Y and Z own the shares in A - A owns a majority stake in a company incorporated in Pakistan (B) – B is a regulated utility company in Pakistan and the other shares in B are owned by the Government of Pakistan – the shareholders of B are subject to the terms of a sale and purchase agreement governed by Pakistan law - the sole voting share in X and interests in other shareholders of X were transferred and X sought to exercise its rights under the shareholders agreement to require A to appoint new directors to the board of B – Y and Z opposed such an appointment and commenced proceedings in Pakistan against X, A and B and the Government of Pakistan and the Pakistan regulatory authorities seeking orders against X and the Pakistan authorities – Y and Z also obtained an interim injunction against X – X claimed that the commencement of the proceedings in Pakistan were in breach of the exclusive jurisdiction clause and applied for a permanent injunction restraining X and Y from continuing with those proceedings

JUDGMENT

Introduction

1. This is my judgment following the trial of the originating summons dated 25 January 2023 (the ***Summons***) issued by IGCF SPV 21 Limited (the ***Applicant***) in which it claims permanent injunctive and associated relief against Al Jomaih Power Limited (***AJP***) and Denham Investment Ltd. (***Denham***) (together the ***Respondents***). The Applicant seeks a permanent anti-suit injunction to restrain the pursuit of proceedings (the ***Pakistan Proceedings***) brought by the Respondents before the High Court of Sindh at Karachi, Pakistan (the ***Pakistan Court***) which the Applicant claims were in breach of an exclusive jurisdiction clause that binds them (clause 25.2 of the SHA).

2. The background to and the basis of the Applicant's claim is set out in detail in my judgment dated 1 February 2023 (the ***Judgment***) which explained my reasons for granting the Applicant's application (heard on 17 January 2023 – the ***Interim Hearing***) for interlocutory (interim) injunctive relief restraining the further pursuit of the Pakistan Proceedings. I shall use the same definitions in this judgment as those set out in the Judgment (save for the definitions of the parties) and I shall not repeat the summary of the background to the dispute, the evidence, the SHA, the SPA 2005 and the proceedings in Pakistan which is set out therein.

3. Following the handing down of the Judgment an order was made on 30 January 2023 setting out the terms of the interim injunction and giving directions consequential on the Judgment, including for the filing and listing of the Summons and for the service of evidence in reply by the Applicant and of expert evidence in relation to relevant issues of Pakistan law (one expert for the Applicant and one for the Respondents). The Applicant filed evidence in reply by way of the Third Affidavit of Casey McDonald (***McDonald 3***). The Applicant's expert is Mr Bilal Shaukat (a licenced advocate and managing partner of RIAA Barker Gillette, a law firm in Karachi) (***Mr Shaukat***). The Respondents' expert is Justice Syed Zahid Hussain (a former Judge of the Supreme Court of Pakistan, and former Chief Justice of the Lahore High Court) (I shall refer to him as ***Justice Hussain*** even though he has now retired). Each expert has served a report (which I shall refer to as the ***Shaukat Report*** and the ***Hussain Report*** respectively) and the two experts have also completed and filed a joint memorandum (the ***Joint Memorandum***), summarising the points on which they agree and disagree. However, there have been no reply reports. Both experts were cross-examined at the trial. While not having permission to do so, the Respondents also

filed further evidence in response to McDonald 3 by way of a further affidavit, his second, sworn by Mr. Shan-e-Abbas Ashary (***Mr Ashary***), a director of AJPL (***Ashary 2***). The Applicant did not object to the Court giving such weight as it considered to be appropriate to Ashary 2 (subject to a properly sworn copy of Ashary 2 being filed and served after the hearing, which it was).

4. At the hearing, Mr Chapman KC again appeared for the Applicant while on this occasion Mr Birt KC appeared on behalf of the Respondents.

5. In summary, I have decided as follows:

(a). the Applicant has established that the Respondents are in breach of clause 25.2 of the SHA as a result of having commenced and continued the Pakistan Proceedings against the Applicant, Alvarez and Marsal, KESP and KEL.

(b). the Applicant has not established that the Respondents are in breach of clause 25.2 of the SHA as a result of having commenced and continued the Pakistan Proceedings against the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP *if and to the extent* that the Respondents only apply for relief that requires those parties to exercise their duties, rights or powers in relation to KEL (or KESP) without challenging the steps taken by the Applicant as a KESP shareholder. The proceedings in Pakistan *commenced by the Respondents* must not seek to challenge or seek relief that will interfere with the actions taken by the Applicant *as a KESP shareholder*. Of course, the Pakistan authorities in exercising their rights and powers with respect to KEL (and possibly KESP), may impact on the ability of KESP to put into effect the instructions and decisions made by its shareholders (and thereby indirectly affect the exercise of the Applicant's rights as a KESP shareholder). That is unobjectionable because the Applicant's rights under the SHA are against the Respondents and KESP and do not override KESP's obligations under the SPA and Pakistan law. But the Respondents cannot be permitted indirectly to do that which they are not permitted to do directly and so cannot formulate their claim against the Pakistan authorities in a way that seeks to put in issue matters covered by, and the validity of, the exercise by the Applicant of rights granted by the SHA. Paragraph 5 of the prayer in the Plaint is unobjectionable. Paragraph 8 should be clarified to make it quite clear that the Respondents only seek an order that the Privatisation Ministry exercises such rights as it has under the SPA and the other Pakistan authorities exercise the powers they have under applicable Pakistan law in relation to KEL (and if appropriate KESP). It remains to be seen whether the Privatisation Ministry and the other Pakistan authorities will permit these

claims to continue or challenge the Respondents' standing (in circumstances where the Respondents are not permitted to bring claims against the Applicant, KESP or KEL based on the SHA or a breach of the SPA which is said to arise because of the exercise of rights under or steps taken which are regulated by the SHA).

(c). the Respondents have not established that there are strong reasons for refusing to grant an injunction.

(d). in particular, they have not shown (a) that the Applicant has submitted to the jurisdiction of the Pakistan Court by taking a step in those proceedings going beyond a challenge to that court's jurisdiction or that the Applicant has conducted itself in a manner that is inconsistent with the contractual agreement for the Courts of either the Cayman Islands or England & Wales being the sole fora for the resolution of the dispute between the Respondents and the Applicant; (b) that in the event that the injunction is granted, there would be a material risk of a multiplicity of proceedings and of inconsistent findings such that it would be in the interests of justice to refrain from granting an injunction in order to allow the dispute between the Applicant and the Respondents to be litigated in one place (or that there are material benefits of one-stop shopping by having all disputes litigated before the Pakistan Court which would override the Applicant's prima facie right to enforce its contractual exclusive jurisdiction clause); (c) that the connections with Pakistan require or justify the refusal of an injunction to restrain the continuation of the Pakistan Proceedings (or that the interests of the Pakistan authorities require or justify a refusal of injunctive relief) or (d) that the Applicant impermissibly delayed its application for injunctive relief in this jurisdiction.

(e). the Applicant is not entitled to an anti-suit injunction against the Respondents in respect of the proceedings against the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP on the ground that such proceedings are vexatious or oppressive.

The shares in KESP, the Applicant's shareholders and the Transaction

6. At [5] of the Judgment, I noted that the Applicant and the Defendants are shareholders in KESP with the Applicant holding 53.8%, AJPL holding 27.7% and DIL holding 18.5% of the KESP shares and that KESP in turn holds a majority (66.4%) interest in KEL, an important Pakistani-incorporated utility company whose shares are listed on the PSX.

7. At [9] of the Judgment, I also noted that the Applicant had been incorporated by members of the Abraaj group for the purpose of acquiring shares in KESP and that the sole voting share in the Applicant was held by AIML with other non-voting shares in the Applicant being held (directly or indirectly) by the Infrastructure and Growth Capital Fund LP (the ***Fund***). The Fund is a Cayman Island registered exempted limited partnership (which is a form of private investment fund) managed by IGCF General Partner Limited (the ***GP***) with approximately one hundred institutional and high net-worth investors who are the limited partners in the Fund. Mr Mark Skelton of Alvarez and Marsal Europe LLP (***Mr Skelton***) is a director of the GP. The shares in the GP were owned as to 75.5% by AIML and as to 24.5% by Ithmaar Holdings BSC (***Ithmaar***).

8. At [10] of the Judgment, I noted that on 3 August 2022, AIML (acting by its JOLs) entered into the Transaction pursuant to which it agreed to sell its share in the Applicant to SVL, a BVI company. It is owned by AsiaPak Investments Limited (***AsiaPak***). The ultimate beneficial owner of SVL and AsiaPak is Mr Chishty, a national of Pakistan. SVL completed the purchase on 17 October 2022. SVL has also agreed to acquire AIML and Ithmaar's shares in the GP and certain limited partnership interests in the Fund from some of the LPs.

Clause 25.2 of the SHA

9. The exclusive jurisdiction clause relied on by the Applicant is, as I have said, clause 25.2 of the SHA. For convenience, I set this out below:

> *"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 expert evidence

10. I summarise below the expert evidence given by Mr Shaukat and Justice Hussain. That evidence was set out in their written reports and in the Joint Memorandum and was also subjected to cross-examination. I have identified and provided extracts from the main parts of the reports and the Joint Memorandum that relate to the issues that I have decide. I have also set out below extracts from the evidence given by Judge Hussain in cross-examination since he elaborated on his analysis and further explained his position in response to questions from Mr Chapman. I have

referred to the relevant parts of Mr Shaukat's cross-examination when summarising the parties' submissions.

11. The experts were asked to consider the following four issues (and various sub-issues):

(a). how do the Pakistan proceedings fall to be characterised?

(i). what causes of action, recognisable as a matter of Pakistan law, are pleaded in the Suit?

(ii). identify and explain the principles of Pakistan law, whether statutory or otherwise, which govern or are applicable to those causes of action.

(iii). without limit to the above, do the plaintiffs in the Pakistan Proceedings have standing to pursue those causes of action or any of them and, if so, which and on what basis or bases?

(iv). (i) do the Other Shareholders have any right to make a claim under the SPA 2005?

(ii) would the Applicant or KESP be acting in breach of Pakistan law or the terms of the 2005 Agreement by seeking to give effect to a direction by the Applicant under the SHA relating to the board of directors of KEL? If so, what right, if any, would the plaintiffs in the Pakistan Proceedings have to bring a claim in respect of the same?

(b). has the Applicant submitted to the jurisdiction of the High Court of Sindh in Karachi, Pakistan and, if so, on what ground(s) has it done so and what is the effect of any such submission to the jurisdiction?

(c). what are the laws and principles applicable to the two applications brought by the Applicant in the Pakistan Proceedings and what is the likely outcome of those applications?

(d). (i). when is a decision on the two applications brought by the Applicant likely to be rendered by the High Court of Sindh?

(ii). what are the routes of appeal following any such decision and the likely timing(s) if those routes are pursued?

12. The Joint Memorandum noted that as regards:

(a). the experts had partially agreed on this issue.

(a)(i). the experts partially agreed on this issue save for various disagreements which they set out in the commentary to the Joint Memorandum.

(a)(ii). the experts were unable to reach agreement on this issue.

(a)(iii). save that Justice Hussain agreed with paragraphs 50 and 51 of the Shaukat Report dealing with the standing of the Respondents to pursue a claim for breach of the SHA, the experts were unable to reach agreement.

(a)(iv). the experts were unable to reach agreement.

(b). the experts were unable to reach agreement.

(c). the experts agreed that the Referral Application (in its current form) was likely to be dismissed. However, the Pakistan Court had the power to treat the application differently and order a stay of proceedings. The experts were unable to agree on other issues.

(d)(i). the experts agreed that it was possible that the Pakistan Court may decide the two applications within 6 months to a year.

(d)(ii). the experts agreed that an appeal will lie to a Divisional Bench of the High Court following which an appeal will lie to the Supreme Court of Pakistan.

The Shaukat Report

13. In relation to the characterisation of the Pakistan Proceedings, Mr Shaukat said this:

16. I am of the view that the character of the Pakistan Proceedings is inter alia of a civil claim seeking declaratory and injunctive relief after final determination on merits on the

questions of: whether the Applicant and other defendants have breached the terms of the SHA; whether the Applicant and other defendants have breached the terms of the SPA 2005; whether the Applicant and other defendants have breached the Companies Act, 2017: and whether the Applicant and other defendants have breached the Electricity Laws.

…….

18. The Plaint for the purposes of the Pakistan Proceedings is the primary pleading filed by the Other Shareholders containing the facts pleaded and prayers sought at pages 1 to 35 of the court file of the Suit. Based on a careful review of the Plaint I have distilled that the Other Shareholders are seeking to claim under the following causes of action:

18.1. The transfer of beneficial ownership / change in board or management control of the KEL as contemplated by the Transaction is unlawful. The same allegation has been further developed to identify the following illegalities:

18.1.1. The Transaction is in violation of Section 9.4 of the SHA5 ("Breach of the SHA").

18.1.2. The Transaction is in violation of Section 5.2 of the SPA ("Breach of the SPA").

18.1.3. The Transaction is in violation of the Electric Power Act read with the Regulations ("Breach of Electricity Law")

18.2. The notice of the Annual General Meeting of KEL held 26 October 2022 was required to include matters relating to the transfer of beneficial ownership/change in control or management control of KEL.

18.3. The manner in which the Transaction is being implemented is in violation of Section 159 of the Companies Act, 20179 (the above two causes of action are collectively referred to as "Breach of Company Law")."

14. In relation to the question of whether the Respondents have standing to sue under the SPA, Mr Shaukat said as follows (underlining added):

53. The SPA is admittedly an agreement entered into between the Government of Pakistan as the seller and KESP, Hassan Associates (Private) Limited and Premier Mercantile Services (Private) Limited, as the purchasers. In order to opine on whether the Other Shareholders having standing to make a claim under the SPA, we must consider to what extent the laws of Pakistan allow a non-party to make a claim under a contract in derogation of the doctrine of privity of contract as discussed above as read with the terms of the SPA.

54. The SPA is a contract by way of which the shares of KEL were sold to private sector purchasers. In the Pakistan Proceedings, the [Respondents] have sought to rely on Section 5.2 and 5.3 of the SPA. Section 5.2 restricts the purchasers from disposing or encumbering the 'shares', as defined in the SPA, in any manner. Further, 5.3 provides for the circumstances in which the 'shares', as defined in the SPA, can be transferred or encumbered.

55. *Applying the law to the facts, the two generally accepted exceptions of the doctrine of privity of contract discussed above can be discounted as Section 5.2 and 5.3 of the SPA do not create a trust or a quasi-trust and is not in the nature of a family settlement agreement. Thereafter, we apply the test laid down by the High Court in the case of the Karachi Water and Sewerage Board case discussed above. All the limbs of the test laid down by the High Court necessitate that the contractual provision sought to be enforced by the third party must actually confer the benefit claimed by the third party. As such we must interpret the provisions of the SPA to determine whether the SPA confers a benefit or right upon the Other Shareholder in relation to the transfer of the shares of the Applicant.*

56. *In our case the SPA does not mention, let alone contemplate, any rights of the [Respondents] or even the direct or indirect shareholders of KESP in general. Section 5.2 and 5.3 of the SPA applies to that transfer of 'Shares' which have been defined in the SPA as the shares of KEL. There is no material before me on the basis of which I could say that the parties had intended for the [Respondents]her Shareholders to enjoy rights under the SPA.*

57. *On this basis I have concluded that the [Respondents] do not have a right under the SPA and therefore do not have standing to make a claim for breach of the SPA before the courts in Pakistan."*

15. In relation to the question of whether the Respondents have standing to sue under the electricity laws, Mr Shaukat states as follows (underlining added):

"58. *Section 39 of the Electric Power Act provides "Any interested person may file a written complaint with the Authority against the licensee for contravention of any provision of" the Electric Power Act and the Electric Power Regulations. To the extent there is a breach of the Electric Power Act and the Electric Power Regulations that effects KEL, the [Respondents] can claim to be interested being beneficial owners of some of the shares of KEL. Based on this the [Respondents] do have standing to make complaints against the contraventions the Electric Power Act and the Electric Power Regulations. However, it is to be noted that such standing extends to the ability to make a claim to NEPRA against the licensee, being KEL, and not the [Respondents [should this be the Applicant?] who are not licensees of NEPRA.*

59. *Given that the [Respondents] have chosen to file the Suit in respect of the Breach of Electricity Laws rather than a complaint under the Electric Power Act, we must consider whether they have standing to claim for declaratory and injunctive relief sought in the Suit. As discussed above in paragraphs 38 to 43, both Section 42 as regards declarations and Section 53 as regards permanent injunctions requires the person claiming the relief to have a pre-existing right that is sought to be protected or enforced. The only specific allegation made in this regard in the Suit as regards the Breach of Electricity Laws are the alleged breaches of Section 33 of the Electric Power Act and Regulation 14 of the Electric Power Regulations. As such we must see whether these provisions confer any rights upon the Respondents.*

60. *Section 33 of the Electric Power Act provides as follows: "33. Organizational matters.— Subject to the procedures established by the Authority under this Act, the*

Authority may, in the public interest, with or without modifications, approve the following activities by a licensee for generation, transmission and distribution, namely :— (a) the undertaking of a merger or a major acquisition or sale of facilities; (b) the expansion of the licensee's business activities; and (c) the undertaking of a re-organization of the licensee's business structure."

61. *A plain reading of Section 33 of the Electric Power Act as quoted above reveals that the Authority, i.e., NEPRA, is empowered to approve, subject to certain conditions, certain activities by a licensee including mergers, expansions and reorganization. The term 'licensee' has been defined in Section 2(xvii) read with Section 2(xvi) of the Electric Power Act as a holder of a license issued under the Electric Power Act. There is nothing in the Section quoted above that would in any way appear to confer any rights upon the indirect shareholders of the Licensee, being KEL, and therefore it does not confer any rights on the [Respondents].*

62. *Regulation 14 of the Electric Power Regulations provides as follows: "14. Investment programme, acquisition, and disposal of assets.— (1) A distribution licensee shall, no later than thirty days following the grant of licence, submit its five year investment programme to the Authority for approval: Provided that the status on implementation and any changes in the approved five-year investment programme shall be submitted to the Authority on annual basis for its consideration and approval. (2) A distribution licensee's investment programme shall be drawn up consistently with the provisions of the applicable documents and to achieve the distribution performance standards. (3) A distribution licensee shall not, except under a prior authorization, acquire, whether on ownership basis, lease, hire-purchase, or any other mode of possession or use, any tangible or intangible asset of a nature or value inconsistent with or which is not expressly or by necessary implication stated in the licensee's investment programme approved by the Authority in accordance with the applicable documents, provided however that, until such time the licensee's investment programme is approved by the Authority in terms of sub-regulation (1), the licensee may acquire assets required for the operation and maintenance of the distribution system or assets of a value not exceeding the value specified for the purpose by the Authority in the distribution licence. (4) A distribution licensee shall not, except under a prior authorization by the Authority, sell or dispose of in any manner any tangible assets comprised in the distribution system or any intangible assets accruing or likely to accrue to the licensee from the distribution business in a manner inconsistent with or which is not expressly stated in the licensee's investment programme approved by the Authority in accordance with the applicable documents, provided that until such time the licensee's investment programme is approved by the Authority in terms of sub-regulation-(1), the licensee may dispose or sell assets of a value not exceeding the value specified for the purpose by the Authority in the distribution licence; (5) The Authority may impose additional conditions in the License or it may specify the procedure in respect of the manner of acquisition or disposition of or the creation or permitting the subsistence of any encumbrance over the assets comprised in the distribution system or accruing or likely to accrue from the distribution business."*

63. *A plain reading of the Regulation 14 quoted above reveals that it only imposes obligations on the licensee, being KEL, and does not confer any rights upon the [Respondents].*

64. *Given that Section 33 of the Electric Power Act and Regulation 14 of the Electric Power Regulation do not confer any rights upon the [Respondents], the*

[Respondents] do not have standing to bring a claim for declaratory or injunctive relief in regards thereto."

16. In relation to the Breach of the Companies Law issue, Mr Shaukat stated as follows (underlining added):

> *"65. In order to consider the standing of a person to bring a claim for breach of the Companies Act we must consider the provisions of the Companies Act that are alleged to have been breached and the mechanism available under the Companies Act for a person to take action against such a breach. As discussed above in paragraph 26 to 31 the Other Shareholders have alleged two separate breaches of the Companies Act relating to the requirements of the notice of the Annual General Meeting of KEL held 26 October 2022 and a breach related to Section 159 of the Companies Act which provides for the procedure by way of which directors can be elected at a general meeting The redressal mechanisms for such breaches can be found in Sections 136 and 160 of the Companies Act which state as follows:*
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> *"136. Power of the Court to declare the proceedings of a general meeting invalid.—The Court may, on a petition, by members having not less than ten percent of the voting power in the company, that the proceedings of a general meeting be declared invalid by reason of a material defect or omission in the notice or irregularity in the proceedings of the meeting, which prevented members from using effectively their rights, declare such proceedings or part thereof invalid and direct holding of a fresh general meeting: Provided that the petition shall be made within thirty days of the impugned meeting.*
>
> *160. Powers of the Court to declare election of directors invalid.—The Court may, on the application of members holding ten percent of the voting power in the company, made within thirty days of the date of election, declare election of all directors or any one or more of them invalid if it is satisfied that there has been material irregularity in the holding of the elections and matters incidental or relating thereto." (Emphases Added)*
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> *66. The provisions quoted above provide a redressal mechanism in respect of a breach in the nature of the Breach of Company Law and require the person invoking the mechanism to be a 'member' holding at least 10% of the voting power in the relevant company. The Companies Act does not specifically define the term 'member' however Section 118 of the Companies Act provides as follows: 118. Members of a company.—The subscribers to the memorandum of association are deemed to have agreed to become members of the company and become members on its registration and every other person- (a) to whom is allotted, or who becomes the holder of any class or kind of shares; or (b) in relation to a company not having a share capital, any person who has agreed to become a member of the company; and whose names are entered; in the register of members, are members of the company.*
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> *67. Based on this, a member of a company is a person whose name has been entered into the register of members of the Company. Pertinently, this excludes any indirect shareholders of a company as their names are not entered on the register of members. Accordingly, the Other Shareholders, not being direct shareholders of KEL, do not have any standing to invoke the jurisdiction of the 'Court' as defined in the Companies Act, in respect of the Breach of Company Law. Given that the Other*

Shareholders have chosen to file the Suit in respect of the Breach of Company Law rather than adopt the redressal mechanism in the Companies Act, we must consider whether they have standing to claim for declaratory and injunctive relief sought in the Suit. As discussed above in paragraph 38 to 43, both Section 42 as regards declarations and Section 53 as regards permanent injunctions require the person claiming the relief to have a pre-existing right that is sought to be protected or enforced. The Other Shareholders have alleged two separate breaches of the Companies Act relating to the requirements of the notice of the Annual General Meeting of KEL held 26 October 2022 and a breach related to Section 159 of the Companies Act 2017 which provides for the procedure by way of which directors can be elected at a general meeting. Both the requirement for a notice of an annual general meeting prescribed in the Companies Act and the procedure for election in Section 159 relate to the manner in which notices are given to 'members' and how elections are conducted at meetings of 'members'. The Other Shareholders, not being members of KEL, do not have any rights under these sections and therefore have no right to claim declaratory or injunctive relief in respect of a breach of Company law."

17. In relation to the question of whether the Applicant or KESP could be said to be in breach of the SPA Respondents, Mr Shaukat states as follows (underlining added):

"70. <u>As regards the possibility of the Applicant having breached the SPA</u>, we note that the Applicant is not a party to the SPA and therefore we must consider the possibility of a breach of the SPA in light of the doctrine of privity of contract discussed in paragraphs 47 to 49 above. The doctrine has two limbs, one which prevents the imposition of obligations on a non-party and the second which prevents the exercise of rights by a non-party. In paragraphs 47 to 49 above we have discussed possible exceptions to the second limb which apply to empower a non-party to enforce rights granted by a contract. However, this test does not apply in respect of the first limb which prevents obligations being imposed on a non-party, such as the obligation under the SPA being imposed on the Applicant. The generally accepted exceptions to the doctrine of privity of contract could still apply. However, as I have noted in my discussion in paragraph 48 above, I have discounted the application of these exceptions to Section 5.2 and 5.3 of the SPA as they do not create a trust or a quasi-trust and are not in the nature of a family settlement agreement and the same is true for the SPA in general. I am not aware of any judgment of the Superior Court of Pakistan which has chosen to depart from the first limb of the doctrine of privity in respect of a commercial contract in the nature of the SPA 2005 and impose obligations on a non-party. <u>As such, I would opine that the Applicant cannot be said to have an obligation under the SPA which is capable of being breached</u>.

71. <u>As regards the possibility of KESP having breached the SPA, I reiterate my discussion in paragraph 56 above whereby I have concluded that the SPA does not contemplate any rights or obligations in respect of the transfer of the shares of the Applicant</u>. <u>My review of the SPA has not revealed any provision which would inhibit KESP from giving effect to the directions of the Applicant in respect of the appointment to the board of directors of KEL nor have any such restriction been specifically alleged in the Pakistan Proceedings. As such, I do not see how KESP would be acting in breach of the SPA by making the nominations as instructed by the Applicant</u>. I do note that Section 3.2(d) of the SPA records a representation that the ownership structure of KESP shall not be changed for a period of 3 years from

the 'Closing Date' as defined in the SPA 2005. However, I understand that this timeline has long since expired."

18. In relation to the question of whether the Applicant or KESP could be said to be in breach of the laws of Pakistan, Mr Shaukat opined that (underlining added):

> "*72.* As regards the possibility that the Applicant or KESP may be in breach of the laws of Pakistan, I note that only specific allegation made in this regard in the Pakistan Proceedings are alleged breaches of Section 33 of the Electric Power Act, Regulation 14 of the Electric Power Regulations and Section 159 of the Companies Act, 2017. In addition to the foregoing, some unparticularized allegations have been made in the Pakistan Proceedings contending that the Transaction breaches the laws of Pakistan, however, these have not been addressed as they do not identify the laws alleged to have been breached.
>
> *73. In this regard Section 33 of the Electric Power Act and Regulation 14 of the Electric Power Regulations, please refer to these sections as quoted in paragraphs 58 and 64 above. Both provisions deal with the obligations of KEL being the licensee and do not seek to impose any obligation upon the Applicant or KESP and therefore neither the Applicant nor KESP can be said to be in breach of these provisions.*
>
> *74. As regards Section 159 of the Companies Act, I have already explained above that this relates to the procedure by way of which directors are to be elected. Given that the impugned appointment of directors to the board of KEL was not by way of election, there cannot be said to be a violation of Section 159 of the Companies Act."*

19. In relation to the question of whether the Applicant had submitted to the jurisdiction of the Pakistan Court (underlining added):

> *"92. In order to apply the principles discussed above to our present case we must first consider the actions of the Applicant with respect to the Pakistan Proceedings.*
>
> *93. The Plaint in the Pakistan Proceedings was presented before the High Court of Sindh on 21 October 2022 along with an application for the grant of an interim injunction. As discussed in paragraph 18 above, the Plaint is the document which sets out all facts relating to the causes of action taken and relief claimed. Upon filing of the suit by the plaintiff, the court issues a summons to the defendants requiring the defendant(s) to file their response to the plaint which is known as the written statement. Based on our review of the record of the Pakistan Proceedings no summons appears to have been issued to any of the defendants. Had such summons been issued we would have had to consider if the Applicant had perhaps sought time to file its written statement, thereby indirectly accepting that they would be contesting the Suit on merits. However, in this case no written statement has been filed by the Applicant nor has any time been sought for filing of the same. The High Court has not even issued Summons for this purpose as yet. Based on this, the Applicant does not appear to have taken any steps to challenge the substantive case put forward by the [Respondents].*

94. *The first formal activity recorded on the part of the Applicant was on 3 November 2022 on which date the Applicant filed the Injunction Removal Application, the Referral Application and its authorization documents. Thereafter, the aforementioned applications were fixed in Court on 4 November 2022 on which date counsel for the Applicant first appeared. Both applications filed by the Applicant expressly seek to enforce Clause 25 of the SHA by seeking resolution of the dispute in accordance with such provision. While the Applicant has incorrectly quoted and relied on the unamended version of Clause 25 and the arbitration clause which it embodied, I feel the intention of the Applicant to avoid adjudication of the underlying dispute by the High Court of Sindh is evident. I understand that the Applicant intends to rely on the correct version of Clause 25 in respect of further proceedings in the Suit.*

95. *Applying the principles identified in the Mitsui case, there does not appear to be any reason why the exclusive jurisdiction clause should not be respected by the High Court of Sindh. Recent judgments of the Superior Courts discussed above demonstrate that the court is willing to stay proceedings in light of an exclusive jurisdiction clause. The Applicant does not appear to have taken steps which are inconsistent with the Applicant's desire to seek a resolution of its dispute with the [Respondents]. in terms of Clause 25 of the SHA. Nor has the Applicant taken any 'steps in the proceedings' as contemplated under Section 34 of the Arbitration Act. Therefore, I do not see any conduct on the part of the Applicant which would disentitle it to rely on Clause 25 of the SHA."*

96. *The Applicant has filed two applications in the Suit, namely the Injunction Removal Application and the Referral Application. The prayer clauses of both applications read as below:*

Injunction Removal Application It is prayed that this Hon'ble Court may be pleased to grant this application and recall/ modify the ad-interim order dated 21.10.2022 and allow nominations of Directors on the board of Defendant No.4 in proportion to the shareholding of the Defendant No.3.

Referral Application It is prayed that this Hon'ble Court may be pleased to grant this application and vacate the interim order and stay proceedings in the title suit and refer the matter for adjudication in accordance with Clause No.25 of the Shareholders Agreement dated 15.10.2008 executed between the Plaintiffs and the Defendant No.1 and 3. 97.

97. *The premise of both applications is the same, i.e., the subject matter of the Pakistan Proceedings ought to have been referred to foreign arbitration in accordance with Clause 25 of the SHA and that the [Respondents] have misled the High Court in obtaining the injunctive order. We understand that these applications were made in terms of the original dispute resolution clause of the unamended SHA though the SHA was later amended to provide for the exclusive jurisdiction of the English courts and the Grand Court in respect of disputes arising out of or in connection with the SHA. We have been instructed that the Applicant will be seeking to continue these applications, however, we are not aware whether the Applicant will be seeking to formally amend the pleadings made in this application or whether the Applicant's counsel will be orally requesting the High Court to be treating these applications as seeking relief on the basis of the revised Clause 25 of the SHA. Further, 1 have also noted that the [Respondents] have filed counter affidavits resisting these*

applications on inter alia the ground that the Applicant has relied on the incorrect unamended version of Clause 25 of the SHA. As such, in the event the Applicant formally or orally amends the existing applications or files new applications the Other Shareholders will also be given an opportunity to respond to the new pleadings. Given that the applications have been filed on an erroneous premise, we do not know the manner in which the erroneous premise of the applications will be corrected, what pleadings will be adopted in the course of such correction, and what response will be filed by the [Respondents] to such correction. As such it is very difficult to opine on the likely outcome of these applications. Based on the current premise of these applications, whereby they seek to rely on an arbitration clause as it existed prior to amendments made in the SHA, these applications are liable to be dismissed. However, the High Court has the discretion to allow the premise of these application to be amended or may even, on the basis of oral submission, treat these applications as corrected.

98. *In order to facilitate the Grand Court, I have set out the principles which would be relevant for the grant of these applications if they are to be properly amended.*

99. *The Injunction Removal application perhaps can be dealt with most simply. Interim injunctions during the pendency of a suit are granted by a civil court in accordance with Rules 1 and 2 of Order 39 of the Civil Code. It is in accordance with these provisions that the [Respondents] have filed an application for an interim injunction in the Suit before the High Court and obtained the Pakistan Order. It is to be noted that such an injunctive order is ad-interim in nature, i.e., it must be extended on each date of hearing and is meant to operate during the pendency of the interim injunction application. This order is meant to operate in a period during which the respondents will file replies to the interim injunction application and submissions will be heard and considered by the High Court. In the event that the injunction application of the [Respondents] is granted, the Court would essentially grant an injunction till the Suit is decreed (after recording of evidence). Rule 4 of Order 39 of the Civil Code permits a court to "discharge, vary or set aside" an injunctive order and an application under this rule essentially allows the applicant an opportunity to approach the court and make submissions against an injunction already granted. In the case where only an ad-interim injunction has been granted the aggrieved party is in any case given the opportunity to file a reply and be heard by the court. Rule 4 of Order 39 of the Civil Code is ordinarily meant to apply to a situation where the aggrieved party does not have the opportunity to make such submissions. This is consistent with the caselaw on this provision which sees Rule 4 of Order 39 of the Civil Code as a means of apprising the court of altered circumstances after the grant of an injunction which merits the vacation or variation of the injunction. In the circumstances where the interim injunction application of the [Respondents] is pending in the Suit, the High Court will not be making any separate order on the Injunction Removal Application and will simply proceed to decide the interim injunction application. That being said, applications under Rule 4 of Order 39 of the Civil Code are often filed for strategic reasons in order to expedite the hearing of an interim injunction application. They allow litigants an opportunity to obtain a preliminary order on the application and create pressure on the party seeking the injunction. To this extent the Injunction Removal Application appears to have served its purpose.*

100. *The Referral Application is an application under Section 4 of the Foreign Arbitration Act, which Act was enacted in Pakistan in order to give effect to the New York Convention. This provision allows a party to an arbitration agreement against*

whom legal proceedings have been brought in respect of matters covered under the agreement to obtain a stay of proceedings. In the present circumstances it is admitted by the Applicant that the Referral Application was made on the unamended Clause 25 of the SHA and Clause 25 of the SHA as amended does not contain a binding arbitration clause. As such there can be no case for asking the High Court to make an order under Section 4 of the Foreign Arbitration Act in the absence of a binding arbitration agreement and therefore the Referral Application in its current form cannot be granted."

20. On the question of the time it will take for the Pakistan Proceedings to be concluded, Mr Shaukat said that:

> *"101. Proceedings before the High Court of Sindh, particularly civil proceedings of original nature, are plagued with systemic delays. Judges are overburdened and often do not have time to hear cases, adjournments are leniently granted and there is an immense back log of cases with older cases being given more priority. Due to these reasons, it is very difficult to provide any reliable timeline in respect of the applications. In order for these applications to proceed in the near future, one of the parties will have to be able to make out a case before the High Court for why these applications are more urgent than other cases before the Court. This is highly subjective matter and will differ from judge to judge. If such a ground can be established a decision on both applications can be expected before the summer vacations of the Court in June 2023. However, in our experience applications of this nature can remain pending for over one or more years. It is to be noted that the applications are of an interim nature and will not necessarily bring the proceedings to a close. For instance, if the High Court does not stay the proceedings, and proceeds to trial, there is unlikely to be a Judgment by the High Court for five or more years."*

Mr Shaukat's summary of his opinion in the Joint Memorandum

21. In his commentary in the Joint Memorandum, Mr Shaukat cross-referred to the opinions set out in the Shaukat Report and commented on Justice Hussain's opinion as set out in the Hussain Report. I extract below those comments that I consider to be most relevant to the issues that I have to decide:

22. In relation to issue (a), Mr Shaukat said this (underlining added):

> *"Following the exchange of reports, Justice Hussain has partly supplanted his earlier views and in respect of which I have the following comments:*
>
> *• Justice Hussain has identified the breach of the SPA 2005 as the 'principal' cause of action and claims that the other causes of action emanate from this 'principal' cause of action. However, any view that Justice Hussain may hold as to which cause of action ought to be identified as the 'principal' cause of action is not relevant to the questions addressed*

to the experts. The Civil Code does not contain any concept of principal cause of action and therefore nothing turns on this finding."

23. as regards issue (a)(i):

"Paragraphs 18 to 21 of my report identify 4 causes of action in the Suit and finds that such causes of action are recognizable in Pakistan law and it is my understanding that Justice Hussain agrees with such paragraphs. However, he appears to place greater importance on the breach of the SPA 2005 as opposed to the other causes of action. He has not provided any legal basis for elevating one cause of action in the Suit above the rest."

24. as regards issue (a)(ii), the following passages are relevant:

"My comments in respect of Justice Hussain's report are as follows:

• Justice Hussain's report identifies various provisions of the Civil Code as the principles appliable to the cause of action. However, in my view the Civil Code does not determine whether or not a cause of action is founded in law or not. The Civil Code only prescribes the procedure by way of which relief can be sought in respect of a cause of action. In my understanding, this section ought to have discussed the principles relevant to determining the substantive rights of the parties and perhaps principles relevant to determining whether the jurisdiction of the High Court was barred."

25. as regards issue (a)(iii):

"My specific comments on this section of Justice Hussain's report are as follows:

• I do not believe that Justice Hussain has answered the question of whether the [Respondents] have standing to bring the Pakistan Proceedings. Any finding on a party's standing to bring a claim necessarily requires a discussion on the substantive rights of the parties that are sought to be enforced by way of the proceedings.

• In paragraphs 6.1 to 6.2 it has been claimed that the issue of standing has already been discussed, however, the discussion in the earlier parts does not address the question of the standing of the plaintiffs to bring a claim. Thus, a conclusion appears to have been drawn on standing without any discussion on how such conclusion has been reached.

• In paragraph 6.3 the expert has placed reliance on the terms of a waiver issued by the Government of Pakistan to say that the certain transfer restrictions apply to our case. However, I am not familiar with such document nor am I able to see any discussion on how such conclusion has been reached."

26. as regards issue (a)(iv):

"My specific comments on this section of Justice Hussain's report are as follows:

• Justice Hussain has stated that the question on standing has been answered in the affirmative, however, I am unable to find any analysis which forms the basis of this conclusion.

• At paragraph 7.1 Justice Hussain suggests that the SPA overrides the SHA without providing any authority or analysis for the same. It is stated that the rights under the SHA are inter se thus implying that the rights under the SPA are not inter se. However, no basis has been provided for such a finding."

27. as regards issue (b):

"My specific comments on this section of Justice Hussain's report are as follows:

• In paragraph 9.5, Justice Hussain claims that that seeking an adjournment has been held to be a 'step in the proceedings', however fails to consider the finding in the PIA case cited by Justice Hussain in paragraph 10.9 where the court held that "In my opinion, the true tests for determining whether an act is a step in the proceedings is not so much the question as to whether the party sought an adjournment for filing the written statement although of course that would be a satisfactory test in many cases but whether taking into consideration the contents of the application as well as all the surrounding circumstances that led the party to make the application display an unequivocal intention to proceed with the suit, and to give up the right to' have the matter disposed of by arbitration".

• In paragraph 9.5 Justice Hussain gives a categorical finding that the Applicant has submitted to the jurisdiction of the High Court without properly discussing his basis for the same or applying any of the caselaw on the matter such as the extract from the PIA case quoted above."

28. as regards issue (c):

"My position on this question remains as discussed in my report. However, I would like to clarify that I agree with the following:

• I agree with paragraph 10.4 of Justice Hussain's report to the extent it suggests that the Applicant has the option to file a fresh application for stay of proceedings and the High Court is bestowed with the inherent power to treat the arbitration application or as an application seeking stay of proceedings.

• I agree with Justice Hussain's report that an exclusive jurisdiction clause cannot have the effect of ousting the jurisdiction of a Pakistani court that it may otherwise enjoy.

• I agree with paragraph 10.13 of Justice Hussain's report to the extent it finds that the High Court may stay the proceedings and refer the dispute for adjudication in terms of the exclusive jurisdiction clause."

The Hussain Report

29. I set out below the key passages in the Hussain Report (underlining and bold added).

*"4.5 In [the] Pakistan Proceedings, prima facie, there is a single recognizable cause of action accrued to the [Respondents] i.e., **the transaction between the Applicant in respect of its sale of majority shareholding in KESP with a third party** and the steps taken to take over the ultimate management control of KEL through KESP. The cause of action accrued when, the [Respondents] became aware of the same through various newspaper articles and the letters of explanation issued by the Pakistan Stock Exchange and the SECP to KEL in this regard.*

4.6 The effect/consequence of the same gave rise to the accrual of cause of action to the [Respondents] for filing the Suit thereby impleading multiple Defendants including the Applicant; the KESP; the Government of Pakistan; and other Regulators of KEL.

4.7 In other words, this cause of action prompted the [Respondents] to seek multiple and different relief(s) against each of the Defendants in the Pakistan Proceeding i.e., against Applicant and Defendant No.2, to be restrained to appoint their nominee directors on the Board of KESP and ultimately in KEL and to effect any change in the management control of KEL; against the Government of Pakistan and other Regulators to take cognizance of such hostile takeover of KEL in breach of, the provisions on transfer restrictions under the SPA, as well as regulatory framework in Pakistan.

5. IDENTIFY AND EXPLAIN THE PRINCIPLES OF PAKISTAN LAW, WHETHER STATUTORY OR OTHERWISE, WHICH GOVERN OR ARE APPLICABLE TO THOSE CAUSES OF ACTION?

5.5 The dispute primarily revolves around the ultimate management control of KEL, which is a target entity having its place of business at Karachi to which the Other Shareholders are indirect minority shareholders. And whereas, KEL was served notices by the apex regulators at Karachi and news articles had significant readership in Karachi, therefore, in terms of Section 20 (c), clearly the cause of action has arisen in Karachi, be it wholly or partly. Thus, the Pakistan Proceedings fulfil the prerequisites as prescribed under Section 20 (c) of CPC. As a result, in terms of Section 9 of CPC, the Pakistan Court, at the time of presentation of plaint and institution of the Suit, had assumed jurisdiction to adjudicate upon the Pakistan Proceedings.

……

5.7 ….. While the [Respondents] have primarily sought relief against the Applicant …, at the same time, relief has also been sought over the same cause of action, against the Government of Pakistan and apex regulators of KEL to manage the affairs of KEL as reflected in the prayer clauses of the Plaint in Pakistan Proceedings.

……

6. WITHOUT LIMIT TO THE ABOVE, DO THE PLAINTIFFS IN THE PAKISTAN PROCEEDINGS HAVE STANDING TO PURSUE THOSE CAUSES OF ACTION OR ANY OF THEM AND, IF SO, WHICH AND ON WHAT BASIS OR BASES

6.2 I am of the view that the [Respondents] have competent standing to pursue the cause of action accrued to them.

6.3 The [Respondents] were the original 100% shareholders of KESP when KEL was privatized by the Government of Pakistan. Whereafter, post execution of SHA, the shareholding of [Respondents] was diluted when, Abraaj/Applicant acquired majority shareholding of KESP. Accordingly, Waiver and Consent was provided by the Government of Pakistan whereby application of certain conditions under the provisions of SPA 2005 were removed and waived in their entirety. However, in terms of clause 7 of the Waiver and Consent, the provisions of transfer restrictions are still intact.

6.4 It is inter alia, on such basis, whereby the [Respondents] consider to have accrued a cause of action against the Applicant since, the provisions of SPA particularly Articles 5.2 and 5.3, and ultimately the regulatory framework in Pakistan in relation to the affairs of KEL have been alleged to have been violated by the Applicant through sale of its majority shareholding in KESP to a third party i.e., Sage Ventures Limited.

……

7. TO THE EXTENT NOT ADDRESSED IN THE ANSWERS TO THE QUESTIONS ABOVE, DO THE PLAINTIFFS IN THE PAKISTAN PROCEEDINGS HAVE STANDING TO MAKE A CLAIM AGAINST THE APPLICANT UNDER THE [SPA]?

7.1 From the perusal of the pleadings and the provisions of SPA and SHA, I am of the view that for the purposes of the affairs of KEL, the SPA is a fountain document and the SHA is secondary to it whereby only the shareholders have rights and obligations inter se. To the extent that the Pakistan Proceedings are concerned, the primary cause of action that has accrued is in respect of the ultimate management control of KEL which is subject to regulatory control and transfer restriction provisions under the SPA. Therefore, in case of any change in the management control of KESP and ultimately KEL, the same would have to sail through the waters of the provisions of SPA, as this document continues to govern the subsequent matters.

9 HAS THE APPLICANT SUBMITTED TO THE JURISDICTION OF THE HIGH COURT OF SINDH IN KARACHI, PAKISTAN AND, IF SO, ON WHAT GROUND(S) HAS IT DONE SO AND WHAT IS THE EFFECT OF ANY SUCH SUBMISSION TO THE JURISDICTION?

9.6 .....for the purposes of foreign jurisdiction clause, the prayer clause of the Applicant in its Applications under Section 4 of the Act of 2011 as well as Application under Order XXXIX Rule 4 CPC, to modify the Pakistan Interim Injunction and to allow the nominations of the Applicant to the board of KEL, does reflect that the Applicant has categorically submitted to the jurisdiction of Pakistan Court by seeking relief from the Pakistan Court. It is beyond controversy that the Applicant has submitted

to the jurisdiction of Pakistan Court by making applications and seeking modification of injunctive order.

10. WHAT ARE THE LAWS AND PRINCIPLES APPLICABLE TO THE TWO APPLICATIONS BROUGHT BY THE APPLICANT IN THE PAKISTAN PROCEEDINGS AND WHAT IS THE LIKELY OUTCOME OF THOSE APPLICATIONS?

10.13 Considering the principle in Mitsui case above, in case the Pakistan Court considers the provisions of SHA to be applicable, it might, at most, in view of Mitsui principle, stay the lis while referring the dispute in terms of foreign jurisdiction clause without ousting its jurisdiction.

10.14 However, prima facie, the Pakistan Court is more likely to give preference to the applicability of the provisions of SPA on ground of public policy. Moreso, the Pakistan Proceeding involves other Defendants against whom certain reliefs have been prayed for in relation to the affairs of KEL. Since, the other Defendants are not privy to the SHA, thus, SPA would more likely be considered to have an overriding effect to that of SHA.

10.15 Furthermore, my observation in this respect is in view of the fact that, the ultimate effect of the obligations of the Parties, be it under SHA or SPA, is in respect of the management of the affairs of KEL, which is a utility company and has its place of business in Karachi, Pakistan. Therefore, the Pakistan Court, on ground of public policy would not consider the provisions of SHA and to have the affairs of KEL to be decided by a foreign jurisdiction.

11 WHEN IS A DECISION ON THE TWO APPLICATIONS BROUGHT BY THE APPLICANT LIKELY TO BE RENDERED BY THE HIGH COURT OF SINDH

11.1 Since, the matter is partly heard by the Pakistan Court and the counsel for the Applicant has argued the arbitration application under section 4 of the Act of 2011 and made his submissions on the Stay application filed by the Other Shareholders. It is likely that the Pakistan Court would expedite the hearing of these applications in case the parties move an urgent application for early fixation of the hearing.

11.2 While, sometimes, the urgencies are allowed by the Pakistan Courts however, there are situations whereby the Court is busy with some other urgent matters, the hearing of the applications may be adjourned. In any case, the applications (two applications of the Applicant and [the Respondents'] stay application) may be disposed of within four (4) to eight (8) weeks provided urgent Applications are regularly moved by either of the Parties.

Justice Hussain's summary of his opinion in the Joint Memorandum

30. In relation to the characterisation of the Pakistan Proceedings Justice Hussain said as follows (underlining and bold added):

> *"I partially agree with the view expressed in Mr. Shaukat's report and add that the principal breach alleged in the plaint is of SPA relating to the change of control and all the other breaches of the SHA, Companies Act, 2017 and Electricity Laws as listed in the plaint, are a direct consequence of and emanate from such breach of the SPA 2005. Pakistan law therefore remains relevant in respect of the change of control as evidenced by the SPA 2005 and the regulatory requirements."*

31. As regards the causes of action recognised under Pakistan law in the Plaint, Justice Hussain said this (underlining and bold added)::

> *There is a substantial cause of action that has accrued to the [Respondents]i.e., the Transaction involving the* ***sale of the majority shareholding of KESP*** *by the Applicant to a third party and the ultimate change in the board and management control of KEL as claimed in the Plaint. The rest of the claims and breaches as mentioned in the Plaint emanate from the Transaction. The identified causes of action (or, rather, separate claims) mentioned in Mr. Shaukat's report all stem from breaches under the SPA and/or violations of Pakistan electricity laws.*
>
> *……*
>
> *While sections 159, 155 and 161 lay down the process of re-election/co-option of directors, the [Respondents] are not seeking relief under Section 136 or 160 (i.e. to declare proceedings at a general meeting invalid as a result of an omission or irregularity in the notice or proceedings or to declare the election of directors invalid). Instead, the relief sought is for the [Respondents]* ***to retain their lawful and legitimate substantive rights which were given to them after they complied with Section 5.2 and 5.3 of [the] SPA and more particularly to [the Applicant] by way of Waiver and Consent dated November 27, 2008, and accordingly in order to maintain their standing in KESP and hence KEL, SAGE cannot acquire [the Applicant] in a manner that breaches [the] SPA and hence the substantive rights of [the Respondents].***
>
> *……*
>
> *In the present suit [****the Respondents] are seeking a declaration on their legal character as shareholders of KESP and indirectly KEL on the grounds that the incoming purchaser (SAGE / SVL) is not legally eligible (hence lacks legal character as shareholder of KESP and indirectly KEL) to nominate directors on the board of KEL*** *in absence of: (i) obtaining National Security Clearance as prescribed by 5.2 and 5.3 of the SPA 2005 (which apply in circumstances where the ultimate beneficial interest in KEL is indirectly being sold, as is the case here); and (ii) by evading approvals triggered under Pakistan utilities statues and Competition laws in relation to change of control.*
>
> *……*
>
> *In this case, the cause of action, which has accrued in favour of the Applicant namely the breach of SPA 2005, and the consequential breaches, are clearly recognized in Pakistan law. The High Court therefore has the jurisdiction to determine the dispute arising out of these causes of actions in view of Section 20(c) of the CPC for the following reasons:*

1. *KEL is a listed company having its registered office and principal place of business at Karachi.*

2. *KEL itself is making material disclosures to the Pakistan Stock Exchange in relation to the change of control of KESP and hence KEL, without consulting its shareholders i.e. AJP and Denham.*

3. *The Pakistan Court has ordered for the Securities and Exchange Commission of Pakistan to become a party to the Pakistan Proceedings vide order dated October 21, 2022.*

4. *KEL has filed Form 44 in regard to a change of control with the Securities and Exchange Commission of Pakistan.*

It is inferred on this basis that the cause of action has wholly or partially accrued in Karachi and accordingly, the civil jurisdiction of the High Court of Sindh has been correctly invoked by the Other Shareholders under Section 20 of CPC."

32. In relation to the Respondents' standing to bring the Pakistan Proceedings, Justice Hussain stated the following (underlining and emphasis added):

(a) *As shareholders in KESP, under Pakistan law, the [Respondents] have rights over the transfer of control through the SPA, which rights are enforceable in the Pakistan courts. This means that [the Respondents] may seek declarations in the Pakistan courts, as to legal rights because they are shareholders in KESP, and therefore indirectly shareholders in KEL.* ***In other words, their capacity as (indirect) shareholders in KEL gives them standing in the Pakistan courts to seek declaratory relief.*** *The same applies in relation to the other relief sought in the Pakistan proceedings (including injunctive and ancillary relief.*

(b) *Under Exhibit IV (Form of Guarantee and Undertaking) of the SPA, Al-Jomaih Holding Company, the owner and controller of AJP is a guarantor to the Government of Pakistan acting through the President for the duties and obligations of KESP under the SPA 2005. This apprehension clearly gives the [Respondents] locus standi to approach the Pakistan Courts and seek appropriate legal recourse. Under Pakistan law, this interest still exists although Al Jomaih Holding Company is a different entity than the [Respondents]. Under Exhibit IV of SPA 2005 (Form of Guarantee), AJH is liable in respect of the Guaranteed Obligations to the Government in case of any breach. If [the Applicant] does not follow the national security clearance procedure as prescribed under 5.3 (which has not been waived by the Government) in respect of the incoming SAGE, then under SPA, AJH and hence AJP shall be responsible to the Government for a breach. The guarantee has continuing effect and there is no termination date for the Guarantee nor SPA 2005.*

(c) *The principle of Privity of Contract does not come into play as the provisions of Waiver and Consent (being continuation of SPA) are fully applicable to the shareholders of KESP, i.e. the Applicant and [the Respondents] and the same may be enforced by either of the Parties i.e., KESP or its shareholders.*

(d) *Because of the Waiver and Consent, clause 3.2 of Article III of [the] SPA is still applicable, the relevant excerpt of which reads as follows: "……Each entity*

comprising the Purchaser hereby represents and warrants that it has full corporate power and authority to execute, deliver and perform its obligations under this Agreement and in doing so will not violate any provision of law or contravene any provision of its memorandum and articles of association or other constitutional document or any other law, rule or other Authorisations, instructions, orders or agreement by which it is bound" The representation under clause 3.2 clearly binds KESP, to perform its obligations under the SPA 2005, strictly in non-contravention of any provisions of its memorandum and articles of association, or other constitutional document or agreement.

(e) Further, in terms of Schedule 4 of the SHA, there is a covenant between the Company (i.e., KESP), the [Respondents] (Al-Jomaih and Denham) and Abraaj ([the Applicant]) that the issues relating to Reserved Matters shall be undertaken subject to mutual consent of the Parties. Pursuant to Clause 16 of the Amended SHA dated January 5, 2021, schedule 4 (Reserved Matters) of the SHA the same was amended as below: Any merger or acquisition of/by the Company or its Subsidiary (including transfers, Sales or purchases of shares in the Subsidiary by the Company). Given that a change of control is subject to the approval of the [the Respondents] under the SHA, this means that any such action shall trigger consequent breaches under Sections 3.2, 5.2 and 5.3 of the SPA.

(f) Hence, the Transaction of [the Applicant] with SVL appears to be in violation of the provisions of SHA amongst the shareholders inter se; it is therefore primarily and ultimately in contravention of SPA.

(g) I therefore consider that the Other Shareholders have a standing to continue to pursue the cause of action relating to the breach of SPA and all consequential and connected reliefs.
In addition, as far as AJP and Denham are concerned they are also aggrieved insofar that at the time of acquisition of KEL they were subjected to a level of scrutiny by Government and regulators which SAGE has clearly managed to evade.

The Supreme Court of Pakistan in Uzma Mazoor versus Vice Chancellor Khushal Khan Khattak University reported as 2022 SCMR 694 held that:

"A person may have a reasonable expectation of being treated in a certain way by administrative authorities owing to some uniform practice or an explicit promise made by the concerned authority. When such legitimate expectation was obliterated, it afforded locus standi to challenge the administrative action and even in the absenteeism of a substantive right, a legitimate expectation may allow an individual to seek judicial review of a wrongdoing".

AJP and Denham have impleaded the Government of Pakistan and NEPRA and the Court has ordered SECP to be made party as per injunction dated October 21, 2022.

Whether or not AJP and Denham's rights are substantive, there is a legitimate expectation for the incoming purchaser, SAGE, to be treated on par and not be afforded preferential treatment.

The arbitrary nature of the transaction and the directions sought in the suit are for the government defendants and regulators to be estopped and from IGCF to be restrained from effecting any change of control."

33. In relation to the question of whether the Respondents had the right to make a claim for breach of the SPA, Justice Hussain said this (underlining and bold added):

> *"The Government of Pakistan currently has shareholding in KEL. The purpose of incorporating KESP was simply to create a special purpose vehicle for the [Respondents] and [the Applicant] to coexist to invest in KEL.* ***The [Respondents] and [the Applicant] vis a vis KESP are joint shareholders with the Government of Pakistan.*** *By prioritizing the SHA, the rights and obligations of the Government of Pakistan in KEL as per the SPA are compromised.* ***While the SHA governs the relationship between the KESP shareholders, the entire constitution, functioning and working of KEL is under the SPA in which the Government of Pakistan is a party, and accordingly the same cannot be ignored; further, I consider that it would not be ignored by the Pakistan courts****."*

34. In relation to the issue of whether the Applicant had submitted to the jurisdiction of the Pakistan Court, Justice Hussain said this:

> *"The Applicant has submitted to the jurisdiction of the Pakistan Court by seeking relief to "modify" the injunctive order as well as a prayer to allow the Applicant to nominate directors on the board of KEL. I have no doubt that by doing so the Applicant has submitted to the jurisdiction of the Pakistan Court because by praying for a modification of the injunctive order, the Applicant has sought relief from the Pakistan Court."*

35. As regards the likely outcome of the Pakistan Proceedings Justice Hussain stated:

> *"The Pakistan Court is likely to give preference to the applicability of the provisions of SPA 2005 on ground of public policy as: (a) the same involves other Defendants against whom certain reliefs have been prayed for in relation to the affairs of KEL. (b) The Government of Pakistan has great interest in the functioning of KEL and public policy may require that any question relating to control of KEL be adjudicated and adjudged in Pakistan. The Courts of Pakistan have in fact taken cognizance of the affairs of KEL in various matters on the basis that the affairs of KEL involve issues of public importance and relate to enforcement of fundamental rights of the people of Pakistan."*

Justice Hussain's evidence given in his cross-examination

36. In relation to [4.5] of the Hussain Report (see the transcript for day 1 at pages 175-181), the following exchange between Mr Chapman and Justice Hussain took place (underlining added):

> "*Q. Now, when you refer in that paragraph [4.5 of the Hussain Report]to the transaction being a sale by [the Applicant] of a majority shareholding in KESP and steps taken over the ultimate management control of KEL, are they statements drawn from your own review of the documents or are they matters which you have been asked to assume for the purposes of giving your evidence?*

……

You say in your report, and you've just told us that this comes from the record in the Pakistan Proceedings, there has been a sale by SPV21, who you call the Applicant, of a majority shareholding in KESP, and I'm suggesting to you that there has not been any such sale, there has been no sale of any shares in KESP and I'm inviting you to either agree or disagree with that proposition.

A. In the materials that was placed before me, I have come to this -- I made this observation on the basis of the materials that were produced before me.

Q. So your assessment is that there has been a sale by [the Applicant] of a majority shareholding in KESP?

A. Yes. It appears so.

Q. And would I be right to assume that your other opinions insofar as they deal with, for example, the standing of the [Respondents] to bring the claims that they do in Pakistan and the causes of action in Pakistan are based on your assessment, that that is the transaction that has taken place?

……..

A. Yes. Yes.

Q. And if you are wrong about that and that was not the transaction that took place, then that would undermine your opinions in your reports?

A. No, it will not, because I have proceeded on the basis of the materials placed before me and examined it in light of the law that's applicable in Pakistan.

Q. Yes; but, with all due respect, if that assessment was wrong and the transaction in fact does not concern a sale of the majority shareholding in KESP, it would follow, would it not, that your opinions based on that erroneous assessment would fall away, would they not?

A. Of course it is for the Honourable Judge to assess, make assessment of respectable opinions. It is also of the pleadings of the parties and the law applicable thereto….The Court can come to its own independent opinion despite the opinions given by the experts, the experts of the other side or this side, the Court is not bound by that.

Q. I understand. And am I right to understand that when you also refer to there having been steps taken to take over the ultimate management control of KEL through KESP, that again is a reference primarily to steps taken as a result of what you think is a sale of a majority shareholding in KESP?

A. My position remains the same, which is what formed my opinion."

37. As regards the characterisation and analysis under Pakistan law of the causes of action asserted and relied on in the Plaint, Judge Hussain said as follows (see the transcript for day 1 at 188) (underlining added):

"Q. He [Mr Shaukat] identifies effectively four causes of action which he goes on to consider in detail, one is whether there has been a breach of the [SHA], the second is whether there has been a breach of the SPA, the third is whether there has been a breach of the Companies Act and the fourth is whether there's been a breach of the Electricity Laws……Do you agree with Mr. Shaukat that there are four causes of action pleaded in the suit in Pakistan …..

A. Maybe so. Maybe so. When the case proceeds for the -- and the trial begins, maybe so the judge comes to such a conclusion.

Q. Well, forgive me, we're not asking about what the judge might decide in due course, we are simply trying to identify what causes of action are asserted by the [Respondents] in the Pakistan Proceedings, and they are the four identified by Mr. Shaukat, aren't they?

A. I don't dispute that statement and that's why I partially agreed with him on this aspect of the matter.

Q. And can I suggest, with respect, that the reasons you don't address these four causes of action separately and in detail in your report is because as soon as you start to consider those causes of action, it is clear that the [Respondents] do not have standing to bring any of them other than a breach of the [SHA]?

A. You see, in [the] Pakistan Proceedings, there are other parties, the Government of Pakistan is also one of the parties who was an essential party for the reason that [the SPA] was executed by the President of Pakistan who presented to the Government of Pakistan. The whole scenario was subject to conservation by the court when the trial position comes.

Q. But, again, with respect, that's not an answer to my question. The reason you haven't addressed the four separate causes of action separately in your report, I suggest, is because as soon as you investigate each cause of action separately, as Mr. Shaukat has, it's clear that the only cause of action that the {Respondents] have standing to bring is the cause of action for breach of the [SHA], and that's right, isn't it?

A. It is and it isn't. Even if one single cause of action can give rise to many other causes of action, and it is for the court when the evidence is produced by the parties whether the cause of action is established by the plaintiff or whether it is denied by the defendant and what is the court's opinion about that.

……

Q. The principal relief being sought is to stop the first defendant, [the Applicant], from exercising its rights under the [SHA] to nominate members of the board of KEL through KESP. That's what the relief is trying to stop.

A. If it is in violation of the [SHA] or in violation of some law, such a relief can be claimed from the Court.

Q. Well, and it is the relief that is being claimed from the Court?

A. Yes.

Q. …. And the only agreement referred to in the prayer is the [SHA] at paragraph 4 of the prayer, is it not?

A. The [SPA], you mean?

Q. No. The [SHA]….

A. Well, that's the subsequent agreement, see, the plaintiff's focus has been in the suit on [the SPA], that is the basic and fundamental agreement and [the SHA] subsequent to that is [the] outcome of that, it's not [an] independent agreement, it's an offshoot of the basic agreement.

Q. Sorry. Just pause there, let me understand that. Your professional opinion is that the [SHA] is not a separate agreement from the [SPA]?

A. It sets out the agreement, but in continuity of the [SPA].

Q. Well, what do you mean by in continuity of the [SPA]?

A. Because the basic agreement is [the SHA] where the Government of Pakistan is also a party and in the [SHA], the Government of Pakistan is not a party.

38. Justice Hussain was cross-examined on the issue of whether and how the Applicant could be bound by and liable under the SPA (see the transcript for day 1, pages 201- 211) (underlining added):

"Q. No. And looked at the other way around, neither the [Respondents] nor SPV21 are parties to the [SPA], are they?

A. It makes no difference, it makes no difference because the [SPA] continues to go on not only the parties who were submitted to that [agreement], but its successors and assigns as well.

Q. Successors and assigns, did you say? Sorry.

A. Yes.

Q. Okay. Identify for me, please, first of all, where there has been a succession to the [SPA] by either SPV21 or the [Respondents]…… Do you say that there was a succession agreement pursuant to which SPV21 or the [Respondents] became parties to the SPA?

A. Yes. So [the SHA] article 1, then it has a definition of Company. May I read it?

Q. Well, let us all have the relevant paragraph in front of us,…….looking at the definition section …..

A. It's Company means Karachi Electric Supply Corporation Limited, a limited company incorporated under the laws of Pakistan and its permitted successors and assigns.

Q. Right.

A. KEL, the Company, KEL is the Company, for whosoever assumes its management or control or as a shareholder, that is [a successor].

Q. So let me understand your evidence. You are saying through that definition of the company, SPV21 and the [Respondents] became parties to the SPA? Have I got that right?

A. Maybe, maybe, maybe like that, but I said they are bound by [the SPA].

Q. How? That's what I'm exploring with you. How are SPV21 and the [Respondents] bound by [the SHA]? You have taken us to this definition, so please explain to us how the definition binds those other parties to this agreement.

A. See, I have cited Black's Law Dictionary to define who are the successors and who are the assigns of the company, in my report I have given quotation of Black's Law Dictionary that will be [relevant] to, but I will –

Q. We'll turn to Black's Law Dictionary in a moment. I just want to understand the propositions that you're making first….. So the propositions is that you say that [the Applicant] and the [Respondents] are successors to KEL; is that right?

A. They become successor, they become successor, whosoever succeeds, whosoever gets any right or interest in the company [KEL], he may be a successor in accordance with this definition of the company.

Q. So you say that the [Respondents] and SPV21 are bound by the terms of the SPA because they are successors to KEL?

A. Yes.

Q. Right. Right. That is not an explanation I think you've given in the joint statement or in your first report as to how they become bound?

A. It has been, I think.

Q. Well, you refer to the section in Black's Dictionary, the section in Black's Dictionary that I have been provided with is the definition of comity, which is –

A. It's Black's Law Dictionary which defines this successor in the context of company, whosoever assumes the control, management or gets shares in the company, he becomes a successor.

Q. That's your professional opinion as to how SPV21 and the {Respondents] come to be bound and parties to the SPA?

A. …… What I said is that whosoever assumes control, management or designee interest or right in the company is bound by the [SPA].

Q. I don't believe that's in your report or the joint statement either.

A. You see, that's my position. That's my view. Somebody could take a different view as well…….. My view is that whosoever, whosoever becomes a shareholder assumes

management or controls the company by subsequent events or the [unclear] of shares, he is bound by the [SPA].

Q. I understand that's the opinion you're now giving to his Lordship. My question is why does that opinion not appear in either your report or the joint statement, please.

A. This is my view and this is my opinion, and if it has escaped my notice while recording that opinion, yeah, I may -- it may have escaped my notice, but that is the legal position.

…….

JUDGE: So your proposition is if somebody becomes a shareholder in KEL and assumes the management and control of management of KEL, they are bound by the terms of the SPA.

A. Absolutely. Exactly. That's what I am saying.

Q. The suit in Pakistan pleads breaches of two contracts, the [SHA] and the [SPA]? Do you agree with that? …

A. Yes. Yes.

Q. Now, taking those in turn, the [SHA] is an agreement between the [Respondents] and SPV21.

A. Yes.

Q. And that governs the relationship between them as shareholders in KESP?

A. Subject to the provisions of the [SPA].

Q. You say that the [SHA] is subject to the [SPA]. Why so?

A. Because the principal agreement and the primary agreement is the [SPA] which continues to exist which has [not] been rescinded, which has not been declared void by any of the Court or by the parties. [It is] still in existence and … continue[s] to apply to the parties [and] to its successors.

Q. So we're back to the successor point, they are bound as successors, but only bound as successors if they have become shareholders in KEL?

A. Yes. Yes.

Q. And so if they have not become shareholders in KEL, they are not bound or parties to the SPA?

A. That's quite obvious."

[page 220]

A. … my position throughout has been that, number one, [the SPA] is the primary and principal agreement, whosoever comes as a shareholder or assume control or management of the KEL, which is a Pakistan-based company, is liable to be bound by the terms and conditions of the 2005 Agreement."

39. Justice Hussain was also asked about the impact of the privity of contract doctrine and he said this (see pages 219-221 of the transcript for day 1) (underlining added):

"Q. Now, let me ask you about privity of contract. You see what Mr. Shaukat says about that. Let's just explore it for a moment. The general rule is that only parties to a contract may sue on it and be sued upon it?

A. Yes.

Q. And there are some recognised exceptions as a matter of Pakistan Law to that rule; correct?

A. Yes.

Q. And I think from what you've said now you do not suggest that any of those exceptions are engaged here?

A. The definition KEL Company is one of the exceptions.

Q. Or, rather, it's not an exception, it's that you say that by becoming shareholders in KEL and thereby successors to KEL … SPV21 and the [Respondents] have become parties to the SPA?

A. That's not necessary to become parties. It's a question of applicability of the conditions of that argument. They are bound by the conditions of the agreement, the [SPA]. They may not be necessarily party to that, but by operation of law or by impression of this definition of company, KEL, they are bound by the conditions in terms of their agreement.

Q. …… Then let me just ask you this. Could you turn to paragraph 6.3 of your report….Because there you give a somewhat different explanation, I think, as to the position. There you say the [Respondents] were the original 100% shareholders of KSP when KEL was privatised, then they were deleted when ABRAAJ acquired the majority shareholding of KESP and then you rely on the waiver and consent provided by the Government of Pakistan. How, please, does that fit with the explanation you've just given about the [Respondents]and SPV21 becoming bound by the SPA by reason of becoming shareholders in KEL?

A. You see the definition of the company in the agreement itself is self-speaking. It includes the successors and the assigns."

40. On the issue of whether the Respondents had standing to sue the Applicant, Justice Hussain's evidence was as follows (see page 222 of the transcript for day 1):

> *"Q. Well, when you say any person who is affected by a breach of contract can bring a suit, you must mean, must you not, any person who is a party to the contract who can sue on that contract?*
>
> *A. It is my position that it means the same. There may be parties to the contract who are signatories to the [SPA], there may have been persons who later on joined the company as shareholder and become successor and assigns of the company or take part in the management or control of the company and they become liable to the terms and conditions contained in that agreement."*

41. Justice Hussain was also asked about his reliance on the legitimate expectations principle as a ground for standing and he said this (see pages 236-239 of the transcript for day 1):

> *"Q. Now, you then raise a new point that you don't raise in your report, and that's the point that in addition you say the [Respondents] you say are concerned, but they are also aggrieved, insofar as at the time of the acquisition of KEL, they were subject to a level of scrutiny by governments and regulators which Sage has clearly managed to evade, and you then refer to the case of Uzma Manzoor… Now, that is a judicial review case …..*
>
> *A. Yes. It is.*
>
> *Q. And the concept of legitimate expectations is a concept that arises in judicial review cases against governmental bodies?*
>
> *A. You see, I have little experience in the concept of legitimate expectation even in contractual matters is applicable.*
>
> *Q. So let me understand that. You say that the concept of legitimate expectation gives the [Respondents] rights under the SPA?*
>
> *A. Yes.*
>
> ……
>
> *Q. I thought what you were saying was not the legitimate -- the concept of legitimate expectation gives the [Respondents] rights under the SPA 2005, but that the concept of legitimate expectation gives rise to a cause of action against the Government of Pakistan, NEPRA and, I don't know, possibly SECP. Which is it?*
>
> *A. You see, whatever I thought on the basis of material before me I have written on and I have given my opinion. It is now ultimately for the Court to accept or reject that. I can't say anything over and above that.*
>
> *Q. But what -- forgive me – you have -- because in writing you have said that the concept of legitimate expectation –*
> *A. I said the concept of legitimate expectation can be pressed into service by a party concerned.*
>
> *Q. Yes. But it would appear for the purpose of the claims against the Government of Pakistan and NEPRA?*

A. Maybe so. Maybe so.

Q. You don't say here, as you have just now to His Lordship, that the concept of legitimate expectation can be used to acquire rights under the SPA.

A. Against not only the Government or government agencies, but against the individuals.

Q. Well, I suggest that that's wrong, the concept of legitimate expectations cannot give rise to contractual rights and you don't say so in this joint statement and I also suggest to you that the claim that's been brought by the [Respondents] in Pakistan is not a claim for judicial review, is it?

A. It may be your position or your knowledge of the law, but what I have written here, I stand by it."

The Applicant's submissions

Overview

42. The Applicant's position is that it is entitled to the relief claimed on a permanent basis because first there is no doubt that there has been a breach and a continuing breach of the SHA by the Respondents in commencing and continuing the Pakistan Proceedings and secondly there is no reason for declining to order the relief sought. The Applicant supported the reasoning set out in the Judgment and submitted that the provisional views I had formed as to the merits of the Applicant's case and claims could now be confirmed as justified after trial.

43. The only material development since the Interim Hearing had been the exchange of expert evidence on Pakistan law which did not, on the balance of that evidence, alter the fundamentals of the analysis as set out in the Judgment (and, if anything, provided further support for it). In terms of the issues, the Applicant said that the core issues remained as they were in the interim stage. First, whether the Pakistan Proceedings or elements of them fell within clause 25.2 of the SHA (as amended by the Second Deed). Second, on the basis that they did, whether the Court should grant the permanent injunctive relief sought. Third, the form of that relief in consequential orders.

44. The Applicant said that the propositions of Cayman law applicable to the application were not in dispute and had been correctly set out and summarised at [47] – [54] of the Judgment. The Applicant maintained its case that all of the claims against all of the parties in the Pakistan Proceedings fell within clause 25.2 and that it was entitled to injunctive relief as a result to

prohibit the Respondents from continuing the Pakistan Proceedings against all the parties currently joined to them.

45. The Applicant also argued that the Pakistan Proceedings were vexatious and oppressive. In its skeleton argument the Applicant relied on this argument only for the purpose of rebutting the Respondents' claim that there were strong reasons for refusing to grant the injunction sought by reason of the breach of the exclusive jurisdiction clause in the SHA (see [36](4)] of the Applicant's written submissions). However, during his oral submissions, Mr Chapman said (see page 84 of the transcript of the hearing on 3 April) that the Applicant maintained, as it had done in its written and oral submissions for the Interim hearing, its claim for an injunction on the basis of the alternative jurisdiction under which anti-suit injunctions may be granted even where there has been no breach of an exclusive jurisdiction clause. The Applicant argued that it was entitled to the same injunctive relief on the ground that the Pakistan Proceedings were vexatious in the sense described by Lawrence Collins LJ in *Elektrim v Vivendi Holdings* [2009] 22 Lloyd's Reports at [120]-[122].

46. In that case, Vivendi had a joint venture with Elektrim in relation to a company called Telco. Vivendi owned 51% and Elektrim owned 49% of Telco. Elektrim also owned a 48% interest in another company PTC in which Deutsche Telekom also had a substantial interest. Elektrim transferred its shares in PTC to Telco which Deutsche Telekom challenged. An arbitral tribunal held that Deutsche Telekom had validly exercised an option over Elektrim's shareholding in PTC. Vivendi commenced arbitration proceedings in London against Elektrim claiming that Telco still owned or was entitled to the PTC shares. The tribunal held in favour of Vivendi and that Elektrim had been in breach of the joint venture agreement. Separately, a subsidiary of Elektrim called Elektrim Finance had issued bonds to a trustee, Law Debenture, guaranteed by Elektrim. For the purpose of pursuing Vivendi's battle with Elektrim by indirect means a subsidiary of Vivendi (VH1) acquired a substantial holding of the bonds and commenced proceedings in Florida against Elektrim and the trustee alleging fraud against them (the claim against Elektrim being that it had secretly agreed to transfer the PTC shares to Deutsche Telekom for a fraction of its true value and had ignored the orders made by the London arbitrators). Elektrim (and the trustee) applied for an anti-suit injunction arguing *inter alia* that the Florida proceedings were oppressive. Lewison J (as he then was) agreed holding that the causal link between the alleged fraud and the claimed loss was fanciful, that the claim was bound to fail and that VH1 would not be prejudiced by the making of an injunction because there was no juridical advantage to it in bringing the Florida proceedings of which it would be unjustly deprived. On appeal, the Court of Appeal dismissed the appeal and Lawrence Collins LJ said this:

"82. Nor was there any substantial dispute on the principles to be applied on the alternative ground for an injunction in favour of Elektrim, or on the ground for an injunction in favour of the trustee. An injunction could be granted if the applicant could show that the pursuit of foreign proceedings was vexatious or oppressive. This presupposed that, as a general rule, the English court must conclude that it provided the natural forum for the trial of the action; and since the court was concerned with the ends of justice, account must be taken not only of injustice to the defendant in the foreign proceedings if the plaintiff was allowed to pursue the foreign proceedings, but also of injustice to the plaintiff in the foreign proceedings if he was not allowed to do so. So the court would not grant an injunction if, by doing so, it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him: see SNI Aérospatiale v Lee Kui Jak [1987] 3 All ER 510, [1987] AC 871.

83. The categories of factors which indicate vexation or oppression are not closed, but they include the institution of proceedings which are bound to fail, or bringing proceedings which interfere with or undermine the control of the English court of its own process, or proceedings which could and should have formed part of an English action brought earlier: see Dicey, Morris and Collins on the Conflict of Laws (14th edn, 2006) vol 1, pp 504–505 (para 12–073).

84. But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed: see British Airways Board v Laker Airways Ltd [1984] 3 All ER 39 at 50, [1985] AC 58 at 86 and Midland Bank plc v Laker Airways Ltd [1986]1 All ER 526 at 534, [1986] QB 689 at 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on the merits may be a further compelling factor.

85. In particular, an injunction may be granted to protect the process of the English court, and in particular to prevent the re-litigation abroad of issues which have been (or should have been) the subject of decision in England: see Masri v Consolidated Contractors International (UK) Ltd (No 3) [2008] EWCA Civ 625 at [83]–[88], [2008] 2 All ER (Comm) 1146 at [83]–[88].

……

"120. I accept that, in considering whether a cause of action in a foreign country is vexatious or oppressive on the ground that it is bound to fail, the English judge should not conduct a summary determination under English law principles without regard to the fact that the foreign system of pleadings may be more liberal, or that the foreign system of discovery may yield sufficient material to support allegations which in England should not be made without existing evidence. I also accept that an error or omission in a foreign pleading should not be considered fatal if it can be cured by amendment.

> 121. *But the inherent weakness of a claim, taken together with other matters, may be an important factor in the consideration of whether foreign proceedings are vexatious or oppressive. The English court is not exercising a summary jurisdiction. It is entitled to take a view in the round, and it is entitled to be sceptical about attempts to cure by potential amendment claims which on their face are hopeless (and, in this case, in some respects bogus). In my judgment, the judge was entitled to take the view that reliance on the press releases was plainly a cynical device to establish an independent cause of action in Florida, and that it was inherently incredible that Everest could have relied on a press release rather than on the awards themselves or on the advice of the bondholders' lawyers, Bingham McCutchen. The judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of the discretion."*

47. The Applicant submitted that this is a case where the Court could be satisfied that not only were the Pakistan Proceedings brought in breach of clause 25.2 but also that they were vexatious and oppressive. The object of the Pakistan Proceedings was to stymie the Applicant's contractual rights under clause 5.7 of the SHA. The Pakistan Proceedings were clearly weak (on the balance of the expert evidence, other than a claim under the SHA as a matter of Pakistan law the Respondents did not have standing to bring any of the claims made) 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. Aggravating features of the proceedings were the fact that they made very serious allegations that were completely without foundation and that they sought to restrain the exercise of the Applicant's contractual rights.

The expert evidence

48. The Applicant submitted that Mr Shaukat's evidence should be preferred on all issues. Justice Hussain was an unsatisfactory witness. The Applicant relied on a number of points to support that latter view.

49. First, Justice Hussain gave his evidence from the offices of Mandviwalla & Zafar and in attendance with him, inappropriately and impermissibly, seeking to assist him with his evidence, was Mr Hasan Mandviwalla. Mandviwalla & Zafar is the law firm acting for the Respondents in the Pakistan Proceedings.

50. Secondly, Justice Hussain had based his evidence and opinions on a number of fundamental factual errors. In particular, he had failed to understand the relevant transaction which formed the basis of his opinion. At [4.5] of the Hussain Report he had described the Transaction as the sale of the majority interest in KESP, which was obviously incorrect, and had confirmed that that was

his understanding in his oral evidence. He had also thought that KESP had been incorporated to enable the Applicant to invest in KEL.

51. Thirdly, his legal analysis supporting his opinions was at least in parts incredible and became increasingly so as his evidence emerged and changed in his oral testimony. This was particularly so in relation to his entirely new view that the basis upon which the Respondents had standing to sue the Applicant under and the reason why the Applicant was bound by the SPA was because the Applicant was to be treated as a successor to KEL within the meaning of the definition of company in the SPA. Justice Hussain had during his cross-examination confirmed that it was now his view that whoever became a shareholder in KEL would be bound by the SPA. Not only was this a new view which Justice Hussain had not put forward in the Hussain Report, not only was it inconsistent with the opinion of Mr Shaukat but it was unsupported by the relevant Pakistan law authority relied on and was ultimately incredible. Justice Hussain's flawed and confused approach also put his general credibility and reliability as a witness in doubt. But critically neither the Applicant nor the Respondents were shareholders in KEL. There had been no transaction in the shares of KEL. In fairness to Justice Hussain, the Applicant said, when pressed he did accept that if the Applicant and the Respondents were not shareholders in KEL then they would not be bound by the SPA. Furthermore, Justice Hussain's evidence was also clearly incorrect when he had said that the SHA was not a separate agreement from the SPA and his suggestion in his oral evidence that the judicial review concept of legitimate expectations could ground standing for a breach of contract claim was wholly unconvincing. Another example of the unsatisfactory nature of Justice Hussain's evidence was his evasiveness on the test for the submission to jurisdiction in Pakistan.

52. In contrast, the Applicant submitted, Mr Shaukat was a measured and persuasive witness who clearly knew his material and the law well. He was, the Applicant argued, subject to an unsuccessful attempt to attack his expertise but as he had made clear, he is a senior practitioner who although no longer engaged in litigation before the local courts as an advocate still supervises teams responsible for dispute resolution and undertook arbitration work himself. It was to his credit that he had drawn to the Court's attention (see the discussion of this point below) an issue concerning the drafting of the prayer in the Applicant's application to recall or modify the injunction order made in the Pakistan Proceedings (see [89] – [[91] of the Shaukat Report) but had cogently concluded that ultimately there had not been a submission when the application was read as a whole.

53. When he came to be asked about the key issues, about the nature of the action pleaded in the Suit and whether the Respondents had standing to bring them, he remained absolutely consistent to the views expressed in the Shaukat Report in the Joint Memorandum.

Are the Pakistan Proceedings caught by clause 25.2?

54. The Applicant noted that, in deciding to grant the interlocutory injunction, I had not sought finally to determine the issue of whether there had been a breach of clause 25.2 of the SHA by reason of the commencement of the Pakistan Proceedings and had indicated that such a final determination would need to await the trial of the Summons and a review of the evidence adduced at trial, in particular the expert evidence of Pakistan law. In the Judgment, I had found that there was a high degree of probability that the Pakistan Proceedings were commenced and continued in breach of that clause and, the Applicant submitted, the Court could now be satisfied that this was the case on the balance of the evidence adduced at the trial.

55. The Applicant argued that a proper analysis of the expert evidence of Pakistan law filed by the parties served only to underscore the provisional view taken at the interim stage that the Pakistan Proceedings did fall within the scope of the exclusive jurisdiction clause. In particular, the Applicant argued, the expert evidence supported the analysis set out in the Judgment to the effect that the complaint and relief sought in the Suit was directed towards seeking to prevent the Applicant from exercising its rights under the SHA to cause KESP to appoint directors to the KEL board. The expert evidence had confirmed that, as I had found in the Judgment (at [84] and [85]) "*The Suit centrally concerns the action of the Applicant and is based on an asserted breach of the SHA*" and "*The primary relief sought in the Suit is directed to and against the Applicant*."

56. The expert evidence had also established that the claims made in the Pakistan Proceedings other than those against the Applicant (and Alvarez and Marsal) based on the SHA were without a proper foundation. Mr Shaukat's evidence had confirmed that (a) as non-parties to the SPA the Defendants did not have standing to bring a claim against the Applicant under, and that the Applicant was not bound by, the terms of the SPA; (b) given that section 33 of the Electric Power Act and regulation 14 of the Electric Power Regulation did not confer any rights upon the Respondents, they did not have standing to bring a claim for declaratory or injunctive relief under those provisions; (c) KESP had not acted in breach of the SPA and (d) there had been no violation of the Companies Act. It was noteworthy, the Applicant submitted, that the Privatisation Ministry and NEPRA had been joined as proper and necessary parties. Accordingly, they had not been joined because a claim *per se* was made against them and no relief was being sought against any

of them independent of the relief being sought in relation to the Applicant. Accordingly, it was clear that everything in the Pakistan Proceedings hinged on the claim against the Applicant. The Suit essentially concerned the actions of the Applicant and was based on an asserted breach of the SHA. The primary relief sought was directed to and against the Applicant and even included a direction that it comply with the SHA at prayer 4. All the claims in the Pakistan Proceedings depended on factual allegations regarding the conduct of the Applicant. No relief had been sought against either KESP or KEL.

57. The claims in the Pakistan Proceedings which assert a breach of, and seek relief in relation to, the SHA plainly clearly relate to a "*dispute arising out of or in connection with [the SHA]*". Furthermore, so are the claims in the Plaint which seek to prevent the exercise by the Applicant of its rights under the SHA (in particular the right to cause KESP to appoint directors to the KEL board). Accordingly, all the claims in the Pakistan Proceedings were covered by clause 25.2, even the claims for relief against parties other than the Applicant (and Alvarez and Marsal). There was no justification for construing clause 25.2 as excluding such claims where the subject matter of the claim related to a dispute arising out of or connected with the SHA because the relief sought affected and would prevent the exercise of rights under the SHA by the Applicant.

58. The Applicant submitted that it would make no difference to this analysis or its entitlement to an injunction even if there were to be an arguable basis for saying that the Transaction relied on by the Respondents had resulted in a breach by KESP of its obligations under the SPA. It would be a matter for the other parties to the SPA as to whether to bring a claim in respect of that breach. One would think, the Applicant said, that it was principally a matter for the Government of Pakistan being a counterparty to the SPA. The Applicant argued that the Respondents had sought to rely on a bootstrap argument to support their case that the Pakistan Proceedings were justified despite the terms of clause 25.2 by pointing to an alleged breach of another agreement (the SPA) to which neither they or the Applicant were parties (as an excuse or justification for bringing proceedings in flagrant breach of clause 25.2 of the SHA).

There were no strong reasons justifying a refusal to grant the permanent injunctive relief sought

59. The Applicant noted that at the Interim Hearing the Respondents had unsuccessfully relied on four matters which were said to constitute strong reasons against the grant of injunctive relief. They were: (a) the alleged delay in seeking injunctive relief; (b) the Applicant having submitted to the jurisdiction of the Pakistan Court; (c) the absence of prejudice to the Applicant if injunctive relief were not granted and (d) comity.

60. The Applicant submitted that the grounds on which the Court had rejected the Respondents' arguments remained good and justified their rejection after the trial. There was nothing in the expert evidence that justified a different conclusion.

61. Insofar as alleged delay was concerned, the Court's rejection of the Respondent's claim in the Judgment should be the end of that issue.

62. Similarly, the Court had rejected the argument that steps taken by the Applicant in Pakistan had meant that it had, as a matter of Cayman law, submitted to the jurisdiction of the Pakistan Court so as to disentitle it to relief from this Court. There was nothing in the expert evidence that altered or should alter that conclusion. While Justice Hussain had opined that in applying for relief from the Pakistan Court in seeking to set aside the Pakistan Interim Injunction against it and in seeking a stay, the Applicant had submitted to the jurisdiction, this was unpersuasive for the reasons given by Mr Shaukat.

63. Mr Shaukat had dealt with the issue at [89]-[91] of the Shaukat Report (in considering the approach under Pakistan law as to whether a party to an arbitration agreement seeking a stay of court proceedings had filed a statement or taken any other steps in the proceedings indicating that the right to invoke an arbitration clause had been intentionally abandoned in favour of court proceedings). He said this:

> *"89. Applying these principles to the case at hand, I note that the pleadings made before the High Court in the Referral Application and the Injunction Removal Application appear to be centred on the submission that the dispute between the parties is required to be resolved in accordance with Clause 25 (although reference has been incorrectly made to the unamended Clause 25 which contained a binding arbitration clause). Such submissions do not betray an intention to participate in the Pakistan Proceedings to the extent of the substantive adjudication of the claims as such submission seeks resolution of the dispute as per the SHA. However, there is one part of the Injunction Removal Application which is problematic. The prayer in such application states as follows:*
>
> > *It is prayed that this Hon'ble Court may be pleased to grant this application and recall/ modify the ad-interim order dated 21.10.2022 and allow nominations of Directors on the board of Defendant No.4 in proportion to the shareholding of the Defendant No.3. (Emphasis Added)*
>
> *90. This is problematic as the prayer can be interpreted in two ways. Under the first interpretation the emphasized portion can be read as a consequence of the recall/modification that has been sought whereby the nominations would be allowed as a result of the recall/modification. Under the second interpretation the*

> *emphasized portion can be read as a specific request to the High Court to make a direction positively allowing the nominations to be made to the board of KEL. Such an interpretation may entail a substantive determination of whether the nomination is allowed. The prayer in the Injunction Removal Application could have been worded so as to avoid this confusion, however, the current wording creates doubt as to the exact relief the Applicant is seeking and if such relief is a positive direction from the High Court, the seeking of such direction can be said to be a step in the proceedings.*
>
> *91. I note that the caselaw of the Supreme Court referenced above in relation to the taking of steps in proceedings places paramount importance on the intention of the parties. The reading of both applications of the Applicant as a whole suggests that the intention was not to seek a substantive determination from the High Court. In fact, it is expressly stated at paragraph 5 of the Injunction Removal Application that "if the [Other Shareholders] have any objections or reservations against the proposed directors of [the Applicant], it is bound to refer the matter for adjudication in accordance with Clause 25 of the [SHA]". Based on this, it would seem that the intention of filing the Injunction Removal Application was not to take a step in the proceedings and therefore the ambiguity in the prayer is likely to be resolved in favour of the first possible construction set out above."*

64. Moreover, as Mr McDonald had explained in his second affidavit, the Applicant was in substance contesting the jurisdiction of the Pakistan Court, relying on the provisions of the SHA. That being so, it was very difficult to see how, even as a matter of Pakistan law and procedure, the Applicant could be said to have submitted to (i.e. accepted) the jurisdiction of the Pakistan Court. But, critically, Pakistan law was not determinative on this issue. The question was whether this Court would consider, as a matter of Cayman law, a voluntary submission to the jurisdiction of the Pakistan Court had been made. The Plaintiff submitted that this was clearly not the case, as I had already found for the purpose of the granting of interlocutory relief, at [94] and [95] of the Judgment. There were no grounds for changing that conclusion for the purpose of granting the permanent relief sought at trial.

65. It was also wrong to say that the Applicant would not suffer any prejudice if injunctive relief was refused. Once again, this argument had already been considered and rejected by the Court (see [96] of the Judgment). Moreover, the position was stronger now than it was at the interim stage. At the interim stage it was said that temporary injunctive relief would not enable the Applicant to make its proposed appointments to the board of KEL and, that being so, failing to grant injunctive relief would not cause it to suffer any prejudice. That submission was rejected by the Court. As I had found, the Applicant was entitled to have the dispute with the Respondents determined in the contractually agreed forum. Moreover, a permanent injunction restraining the pursuit of the Pakistan Proceedings and requiring the Respondents to comply with their contractual obligations would or ought to have the effect of the Pakistan Proceedings being

discontinued and the Respondents complying with their obligations under clause 5.7 of the SHA so as to procure the necessary appointments to the board of KEL. The ongoing breaches of the Respondents are causing the delay in filling the vacancies on the board of KEL and causing prejudice. It should also be noted that, while not being dispositive of the issue of prejudice, a final resolution of the jurisdictional challenge in Pakistan was likely to take years (which the Applicant suggested was no doubt part of the Respondents' strategy, namely to bog down the Applicant in proceedings in Pakistan with a view to disrupting or blocking the Transaction).

66. The Applicant noted that the Respondents had argued that the Court should only at most consider granting an injunction to restrain proceedings against the Applicant (and Alvarez and Marsal) and that as a result some claims would or might continue in Pakistan. The Applicant's primary case was that there should be no claims left to continue in Pakistan since the Court should grant an injunction prohibiting the continuation of the Pakistan Proceedings against all parties but it submitted that even if some claims were permitted to continue, that would not constitute a strong reason not to enforce clause 25.2 as it applied to proceedings against the Applicant (and Alvarez and Marsal). As the discussion in Raphael at [8.12] made clear, even where there was a risk of multiple proceedings, the exclusive jurisdiction clause will still have considerable force and weight and will tend to be enforced, and that was all the more so where any risk of multiple proceedings arose from the voluntary acts of the contract breaker itself, which it plainly did in the present case. The Applicant relied on the decision of Nugee J in *Hamilton-Smith v CMS Cameron McKenna* [2016] EWHC 1115 (Ch) and the analysis of the authorities in Raphael at [8.12]).

67. In that sub-paragraph Raphael sets out the position as follows:

> *"The exclusive jurisdiction forum clause may cover only parts of an interconnected set of issues, so that enforcing it by injunction risks creating new problems with conflicting and overlapping proceedings continuing in different countries. Problems of this nature are capable of amounting to strong reasons against an injunction. It may be reasonable to suppose that serious problems due to conflicting and overlapping proceedings as a result of enforcing an exclusive forum clause are not something the parties would have had in mind at the time of agreeing the clause. Nevertheless, the exclusive forum clause will always have considerable force and may well be enforced even at the price of multiplicity of proceedings and this is the tendency of the recent case law [citing Hamilton-Smith and Nori Holding v Bank Otkritie Financial Corporation [2018] 2 Lloyd's Rep 80]. Further, if there would be inconsistent proceedings even if the injunction is refused, the risk of a multiplicity of proceedings if the injunction is granted is of less significance. Where the problems arise from the voluntary acts of the contract breaker in pursuing the foreign litigation, the courts have tended to give the risk of conflicting proceedings less weight [citing Hamilton-Smith again at [59], [62] and [71]]. Conversely, the interests of third-parties have been taken more seriously [citing Bouygues Offshore v Caspian Shipping*

*(Nos 1, 3, 4 and 5) [1998] 2 Lloyd's Rep 461 at 466 (CA), Donohue v Armco [2002] 1 Lloyd's Rep 425 (HL) (**Donohue**) at [16], [25] and [27] and Verity Shipping v NV Norexa (The Skier Star) [2008] 1 Lloyd's Rep 652 at [31]-[35]]."*

68. The Applicant also submitted that the other parties to the Pakistan Proceedings, in particular the Government of Pakistan or the local regulators would not be prejudiced by the grant of the injunction sought by the Applicant. The injunction would not prevent the Government of Pakistan or the regulators from acting to enforce local laws or to ensure that important public policy objectives and local interests were protected. The Applicant went further and submitted that looking at the responses that there have been to the Pakistan Proceedings from the other parties, it was reasonable to infer that a permanent injunction would be welcomed by those parties. KEL had challenged the Suit on the basis that the dispute concerned the SHA and the Privatisation Ministry had adopted a similar position. In the counter-affidavit dated 20 December 2022 filed in the Pakistan Proceedings on behalf of Privatisation Ministry the Privatisation Ministry identified three preliminary objections. These were that the cause of action relied on by the Respondents in the Pakistan Proceedings arose out of the SHA; that apparently no dispute existed as between the parties to the SPA and it remained to be seen whether the Pakistan Proceedings involved a claim that affected the rights of the Privatisation Ministry. The SECP's response to the Pakistan Proceedings (see [45(d)] of the Judgment) set out in the counter-affidavit dated 21 December 2022 sworn on its behalf referred to the news reports published on 12 and 20 October 2022 that "*a large part of the controlling stake in [KEL] had been acquired by [SVL]*", to KEL's announcement on PSX dated 20 October 2022 "*that changes have been consummated involving [the GP] being the fund manager, and [the Fund], being the owner of the Fund assets. In particular controlling interests in [the GP] and certain limited partnership interests in the Fund have been acquired by [SVL]*" and KEL's further announcements on the PSX of the same date and 24 October 2022 that the non-executive directors had resigned from KEL's board. It appeared, the Applicant said, that the SECP was content to rely on its statutory and other powers (and the Direction) and had not supported the Pakistan Proceedings or considered them necessary to protect its position.

The Respondent's submissions

In outline

69. The Respondents' submissions can be summarised as follows:

(a). the dispute evidenced by, and being litigated in, the Pakistan Proceedings does not engage the exclusive jurisdiction clause in the SHA.

(b). even if the Pakistan Proceedings (or part of them) were held to fall within the exclusive jurisdiction clause in the SHA, there were, in this case, strong reasons why the Court should not exercise its discretion to grant an anti-suit injunction. The Respondents relied on four main points:

(i). the Applicant had submitted to the jurisdiction of the Pakistan Court and in any event had acted in the Pakistan Proceedings inconsistently with the relief that it now sought from this Court.

(ii). the claims being litigated in the Pakistan Proceedings (even if they fell within clause 25.2 of the SHA) formed part of a wider set of claims which this Court cannot, or ought not to, interfere with. At least some of the claims in the Pakistan Proceedings would continue in any event, even if this Court granted the injunction sought by the Applicant. As a result, granting such an injunction would lead to the unwelcome result of different parts of the dispute being determined in different courts.

(iii). the Pakistan Proceedings had an intrinsic connection with Pakistan.

(iv). the Applicant was guilty of inexcusable delay in seeking the injunction.

(c). if (contrary to the Respondents' primary case) the Court decided to grant an anti-suit injunction, it must be confined in scope to (i) claims brought by the Respondents against the Applicant (and possibly KESP) and (ii) claims for, or that depend upon an allegation of, breach of the SHA.

70. The Respondents say that they have been kept in the dark and have not been properly informed about the Transaction and the related acquisitions to be made by SVL. This, they say, has given rise to real concerns (in particular as to the impact on KEL of the changes brought about by and in consequence of the Transaction) and this is relevant context to the action they have taken in Pakistan.

The key authorities and the applicable principles

71. The Respondents emphasised that the authorities made it clear that the Court had a real discretion to exercise in cases arising out of a breach of an exclusive jurisdiction clause. They relied in particular on the decision of the House of Lords in *Donohue*.

72. They noted that in *Donohue* Lord Bingham (at [24]) had referred with approval to the decision of Brandon J in *The Eleftheria* [1970] P 94 and his identification of some of the matters which would be relevant to the exercise of the discretion. Those matters included the country in which the evidence of the issues of fact was situated or more readily available and the effect of that on the relative convenience and expense of trial as between the English (Cayman) and foreign courts; whether the law of the foreign court applied and, if so, whether it differed from English (Cayman) law in any material respects; with what country either party was connected and how closely; whether the defendants genuinely desired a trial in the foreign country or were only seeking procedural advantages and whether the claimants would be prejudiced by having to sue in the foreign court, e.g. because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time-bar not applicable in England (Cayman), or for political, racial, religious or other reasons be unlikely to get a fair trial.

73. The Respondents argued that a factor that could justify a refusal to grant the injunction was the involvement in the foreign proceedings of other parties who were not bound by the jurisdiction clause and the fact that the foreign proceedings involved claims that did not fall within the clause. At [27] of *Donohue* Lord Bingham had pointed out that:

> *"The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions."*

74. At [28] of *Donohue* Lord Bingham had referred to the judgment of Rix J in *Credit Suisse First Boston (Europe) v MLC Bermuda* [1999] CLC 579 (***Credit Suisse***) at 595. This was a case where the judge did grant an injunction "*but only to restrain the prosecution of claims covered by the exclusive jurisdiction clause.*" *Donohue* itself was a case where it was held that the fact that granting an injunction would cause the litigation to take place in two different jurisdictions constituted strong reasons why an injunction ought not to be granted despite the existence of the exclusive jurisdiction clause.

75. The Respondents argued that the existence of overlapping claims and the potential for multiple sets of proceedings in different jurisdictions was an important factor for the purposes of exercise of the discretion (which was all the stronger where those proceedings include matters that could only sensibly be dealt with in another jurisdiction). They relied on the following passage from Briggs, *Civil Jurisdiction and Judgments* (7th ed.) (***Briggs***) at 28-21:

> *"A distinct element of public interest recognises that a court has a public duty to secure the proper administration of justice, and this may sometimes override the private interest of the parties in holding each other to an agreement on jurisdiction…The same point would arise if the material scope of the agreement were to be significantly narrow, so that the bringing of some claims did not fall within its range and would, even as between parties to the agreement, not involve a breach of its terms. As it cannot be correct that the parties may, by private agreement (otherwise than for arbitration), prevent the court from securing an orderly resolution of complex or multipartite disputes, the decision [in Donohue] is wholly rational, and marks a limit on the power of the parties to write the rules of civil litigation for themselves.*

76. But, the Respondents said, the matters relevant to the discretion were wide and various. The injunction applicant's conduct was relevant, and two aspects of such conduct were frequently invoked, namely delay and unconscionable conduct. In addition, submission to the foreign jurisdiction may provide a strong reason not to grant an injunction (e.g. *Schiffahrgesellschaft Detlev von Appen v Voest Alpine Intertrading (The Jay Bola)* [1997] 1 Lloyds Rep 179 at p.188 col. 2 to p.189 col. 1) and steps taken by the injunction applicant which were inconsistent with the exclusive jurisdiction clause being the sole forum for dispute resolution may also be a powerful factor against enforcement (citing Briggs at 28-05 where it is said that "*an applicant who has already submitted to the jurisdiction of a foreign court and asked for relief from it is liable to find that this is a substantial obstacle to his obtaining an antisuit injunction from an English court*.")

The expert evidence

77. The Respondents argued that it was important not to allow the disputes between the experts to assume a greater significance than was justified. The Respondents submitted that many of the disputes between them did not need to be resolved by the Court on this application.

78. Much of the expert evidence dealt with the merits of the claims made in the Pakistan Proceedings but, the Respondents argued, the Court on this application was unable and should not seek to resolve the disputes and decide, for example, whether the Respondents had standing to bring those claims as a matter of Pakistan law. These were matters for the Pakistan Court and this Court

was not engaged in a summary determination of those issues. As Lawrence Collins LJ had said in *Elektrim* at [84]:

> *"But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed: British Airways Board v Laker Airways Ltd* [1985] AC 58, 86; *Midland Bank plc v Laker Airways Ltd [1986] QB 689, 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on the merits may be a further compelling factor."*

79. In addition, the Respondents argued that, in any event, insofar as the Applicant was seeking to say that the claims in the Pakistan Proceedings were so hopeless as necessarily to be frivolous or vexatious, they had been unable to establish this on the evidence. On a number of points, Mr Shaukat had agreed that various of the issues were not open and shut arguments and had accepted that they were open to argument both ways even though he preferred one side of the argument. So, for example, in relation to questions of whether the Pakistan Court could hear claims under the Electric Power Act, Mr Shaukat had accepted that the issue was untested and open to argument. In relation to the Companies Act points, while Mr Shaukat did not go so far as agreeing that it was all open to argument, it was clear from the material that there were opposing points of view which were open to being tested in the Pakistan Court. Mr Shaukat had also accepted that it appeared arguable that indirect transfers of shares in KEL were caught under the relevant provisions of SPA. These disputes and issues had to be left to the Pakistan Court.

80. The Respondents relied on Justice Hussain's explanation and opinion as to the nature and merits of the claims in the Pakistan Proceedings. They submitted that his evidence was to be preferred to that of Mr Shaukat. The Respondents argued that Mr Shaukat's experience and expertise did not compare with that of Justice Hussain and that the weight to be given to his evidence was affected and reduced by the fact that he is not a litigation lawyer. Mr Shaukat had admitted that he had not been inside a Pakistan Court since around 2010, so that while he or those who assisted him in preparing his report had no doubt done a good job in looking matters up for the purposes of this case, Mr Shaukat did not bring his own personal expertise or experience to the process and especially in relation to what actually goes on inside a Pakistan Court. This, the Respondents said, was not a satisfactory basis for expert evidence.

81. But even if it were to prove to be the case that Mr Shaukat was right and Justice Hussain was wrong, that would not of itself demonstrate that the claims are so frivolous that they ought to be characterised as such by this Court and taken into account on that basis. The Respondents

submitted that although various criticisms were levelled at Justice Hussain, it had not been suggested to him or argued that he was not putting forward his genuine views as to how the claims worked. Evidence from a retired Supreme Court Justice to the effect that the claims in the Pakistan Proceedings were properly formulated and were sound in law was at least sufficient to establish that they were arguable. Even though there were few, if any points, of Pakistan law or procedure that the Court really needed to decide and choose between the opinions of the two experts, where that was necessary Justice Hussain's opinions and evidence was to be preferred.

82. The Respondent also submitted that the Applicant's criticism of the arrangements under which Justice Hussain gave his evidence and of Mr Hasan Mandviwalla being in the room with Justice Hussain were wholly unfair. The Respondents had before Justice Hussain gave his evidence identified who was in the room (Mr Mandviwalla is well known to those acting for the Applicant) and if there had been an objection it could have been made at that time but was not. Mr Mandviwalla could have been asked to leave the room. But in the absence of any objection being made at that time, the Applicant could have no cause for complaint. There was also no basis for the suggestion that those in the room were seeking to prompt or influence Justice Hussain.

The proper approach for characterising the Pakistan Proceedings and deciding whether they give rise a breach of clause 25.2

83. The Respondents' primary position was that the Court had to stand back and characterise the entirety of the dispute being litigated in the Pakistan Proceedings and ask the overarching question of whether the dispute so understood did or did not arise out of, or was connected with, the SHA. The Respondents said that it did not.

84. The Respondents' secondary case was that the Court was required to consider separately each claim made in the Pakistan Proceedings and decide whether the relevant claim related to a dispute arising out of, or connected with, the SHA. But even on that approach, all or virtually all of the claims made in the Pakistan Proceedings, when correctly characterised, did not relate to a dispute arising out of, or connected with, the SHA.

The construction and scope of clause 25.2 of the SHA

85. The Respondents made three main points. First, that the Pakistan Proceedings should be understood as involving and litigating a dispute regarding and relating to the transfer of control of KEL. That was not a dispute arising out of, or connected with, the SPA. Secondly, clause 25.2

did not, when properly interpreted, cover or prohibit proceedings against non-parties. It therefore did not prohibit the commencement of proceedings in Pakistan by the Respondents against the Applicant and the other defendants named in the Pakistan Proceedings.

86. Properly characterised, the true nature of the claims made in the Pakistan Proceedings was that they were claims to enforce various contractual, statutory and regulatory rights and obligations to prevent, or as a minimum to regulate and superintend, any transfer of control and or ownership of KEL. The basis for that was (almost entirely) the SPA.

87. This was confirmed by a review of the Plaint:

(a). it identified at [12]-[13] the key provisions of the SPA that were relied upon (namely, sections 5.2 and 5.3) and went on (at [14]-[15]) to identify the framework created by Section 33 and Regulation 14.

(b). the allegation at [18] included an allegation that the proposed transfer of beneficial ownership/board/management control was subject to the restrictions in the SPA.

(c). [25] alleged an attempt to "*bypass*" the regulatory framework in Pakistan. There were various other references to the need for approval of the regulators (e.g. [30], [31], [33]).

(d). [27], [31] and [33] alleged a disregard of the process of election of directors under s.159 of the Companies Act 2017.

(e). the SHA was referred to in the Plaint but as part of the background and the story by which the Applicant came into the picture. It was introduced at [16] and its provisions in relation to directors were referred to at [17]. The SHA was also referred to at [23] but only by way of explanation of what was in the letter dated 17 October 2022. It was right that [24] alleged a breach of section 9.4 of the SHA.

(f). [32] referred to change of control provisions under both the SPA and the SHA.

(g). as well as the emphasis on the regulatory framework, the Plaint was replete with references to the importance of KEL as an "*essential utility*" and a "*national asset*" (e.g. [8], [32], [33], [37]), identifying the centrality to the claims in the Plaint of the Pakistan statutory and regulatory system.

(h). the prayer for relief identified eleven separate items of relief sought (including costs and a catch-all provision at 11). Of those, only one (paragraph 4) expressly mentioned the SHA, doing so along with a reference to the finance agreements that were also alleged to regulate change of control. The other items were premised upon the various other allegations that were made in the main body of the Plaint and many of those other paragraphs expressly referred to the other bases for the claims (in a way that obviously excluded the SHA as a basis for the particular relief there sought) and some of them were directed entirely against defendants other than the Applicant (in particular [5] and [8]).

88. The Respondents submitted therefore that while the SHA was referred to in the Plaint, and an allegation of breach was made along with a request for an order that the Applicant perform its obligations under the SHA, it was not the key claim that was made. It was parasitic upon, or collateral to, the other central claims.

89. The Respondents submitted that this view was supported and explained by Justice Hussain's evidence. In the Hussain Report (at [7.1]), Justice Hussain had described the SPA as the "*fountain document*" whereas the SHA was "*secondary*." In Justice Hussain's opinion, the primary cause of action in the Pakistan Proceedings related to "*regulatory control and transfer restriction provisions under the SPA*". Similarly, in the joint memorandum, Justice Hussain had said that the "*principal breach*" alleged was of the SPA with the other breaches complained of being a consequence of, and emanating from, that breach (at issue 1 and 1(1)).

90. This characterisation was confirmed by the material filed in the Pakistan Proceedings, for example in the evidence filed by the Respondents in response to the Applicant's Section 4 Application. The Respondents' counter-affidavit dated 3 December 2022 (the ***Section 4 Counter Affidavit***) made it clear (at [6]) that the Respondents' "*primary contention*" in the Pakistan Proceedings was in respect of the alleged "*violations of the provisions of SPA 2005 particularly section 5.2 and 5.3*" (see also [6] of the Other Shareholders' Counter Affidavit referred to and quoted at [44] of the Judgment which is in identical terms***).**

91. Furthermore, as Justice Hussain's evidence established, the Respondents had the ability and standing as a matter of Pakistan law to bring the claims made in the Pakistan Proceedings, including the claims against the Applicant under the SPA and the various statutes relied on and to seek declaratory, injunctive and other relief in relation to them. The Respondents referred in particular to the summary of Justice Hussain's opinion in his commentary on issue 1(3) in the

Joint Memorandum. He had explained that, as indirect shareholders in KEL, the Respondents were able under Pakistan law to seek declaratory and other relief.

92. Therefore, the Respondents submitted, the Pakistan Proceedings did not centrally concern the SHA. The Respondents did not deny that the SHA, and the allegation of breaches of it, were part of the material that had been presented to the Pakistan Court, but the heart of the Pakistan Proceedings lay elsewhere, namely in the governmental and regulatory framework governing the transfer of interests in KEL, a structurally important energy company in Pakistan, and in the terms of the SPA pursuant to which part of that company had passed into private hands. On a proper construction of clause 25.2, the Pakistan Proceedings could not be treated as involving a dispute arising out of, or in connection with, the SHA. That would be to allow the tail of the references to the SHA in the Plaint to wag the dog of the real heart of the Pakistan claims.

93. The Respondents noted that the relief sought by the Applicant would result in the termination of the entirety of the Pakistan Proceedings. In order to justify its position in this respect, the Applicant would have to prove that clause 25.2 of the SHA covered not only claims between the parties to the SHA but also claims that one party might bring against third parties and that the clause was sufficiently wide in terms of subject matter to cover all of the issues raised in the Pakistan Proceedings. The Respondents submitted that the Applicant could not show that clause 25.2 of the SHA covered claims by the Respondents against third parties.

94. The starting point when interpreting an exclusive jurisdiction clause was that the clause extended only to litigation between the contracting parties (see *Credit Suisse* at 589-591 and *Team Y&R Holdings Hong Kong Ltd v Ghossoub Cavendish Square Holding BV* [2017] EWHC 2401 (Comm) at [52]). Whilst it was possible for a jurisdiction clause to extend to litigation with third parties, there were obvious difficulties with this, in particular in relation to reciprocity of obligation.

95. The Respondents relied on the judgment of Rix J in *Credit Suisse.* In that case, the defendant (MLC) had purchased Russian bonds from an English subsidiary of Credit Suisse (CS Europe, the plaintiff) in two separate transactions. Both purchases were agreed in New York with CS US, an American subsidiary of Credit Suisse acting as the plaintiff's agent. Clause 5.2 of the purchase agreements gave the English court jurisdiction to settle any disputes which arose "*out of or in connection*" with them. The purchases were financed by a series of repurchase transactions governed by a separate agreement (the repurchase agreement) between the plaintiff and the defendant. That agreement contained a non-exclusive English jurisdiction clause. A third

agreement between CS US and the defendant (the customer agreement) was governed by New York law but was silent on the question of jurisdiction. CS US, acting under powers contained in the customer agreement, liquidated assets held in the defendant's accounts after the defendant had failed to pay a margin call. CS US transferred the proceeds to the plaintiff who commenced proceedings against the defendant in England claiming sums outstanding on the repurchase transactions. The defendant subsequently commenced proceedings in New York against the plaintiff, CS US and a Swiss subsidiary of Credit Suisse which had issued the bonds, invoking claims touching upon all of the agreements. The plaintiff then applied to the English court for an injunction to enforce clause 5.2 of the purchase agreements. The defendant argued that clause 5.2 did not extend to claims brought against the plaintiff under the repurchase agreement or to claims against CS US and CSS and should not be enforced because New York was the more appropriate forum for the whole litigation. The plaintiff argued that the defendant should be restrained from pursuing the New York litigation if any part of it fell within clause 5.2 since London was as convenient a forum as New York for the whole litigation. Rix J held that the exclusive jurisdiction regime established by clause 5.2 did not extend to claims under the repurchase agreement or to claims against CS US and CSS. Although duplicate litigation was undesirable, the New York court was best placed to decide whether those claims should be stayed, and it was not therefore in the interests of justice to restrain the defendant from pursuing them in New York. However, there was no good reason not to enforce clause 5.2 since London was just as convenient a forum as New York for the conduct of the whole litigation. The defendant was therefore restrained from pursuing its proceedings in New York but only in so far as those proceedings fell within clause 5.2.

96. In *Credit Suisse*, the plaintiff submitted that clause 5.2 was capable of referring to, and should be taken as referring to, disputes not only between the plaintiff and the defendant, who were the parties to the agreement, but as between the defendant and other Credit Suisse affiliates of the plaintiff, particularly in view of the fact that the purchase agreements themselves made provision about such affiliates. However, Rix J had rejected that submission. He said as follows (at page 251-252) (underlining added):

> *"It might be thought that the answer to this question must be no, but Mr Milligan submits otherwise. He takes the following points: (i) that 'any disputes' in the opening line of cl 5.2 ('The courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement') is capable of referring to and therefore should be taken as referring to disputes not only between CS Europe and MLC but also between MLC and other CS affiliates, especially seeing that the purchase agreements themselves make provision about CS affiliates; (ii) that CS Europe, as the recipient of MLC's promise not to take proceedings against CS affiliates otherwise than in the courts of England, is entitled to vindicate MLC's promise by claiming an injunction; and (iii) that in any event CS US, even if not also CS Switzerland, can take direct advantage of cl 5.2*

because it made the deals as agent and even signed the GKO notes purchase agreement 'acting as agent for' CS Europe.

In my judgment points (i) and (iii) are bad, and point (ii) fails on the back of point (i).

As for point (i), it seems to me to be far-fetched to regard 'any disputes' as covering disputes between MLC and anyone other than MLC's contract partner under the purchase agreements, namely CS Europe. Clause 5.2 is part of a bilateral agreement between a seller and a buyer, and the disputes to which such an agreement may give rise are prima facie bilateral disputes. Indeed, it is I would have thought axiomatic that, at any rate in the absence of plain language to the contrary, a contract seeks neither to benefit nor to prejudice non-parties: even where such plain language is used, it is black-letter law that the non-party can himself neither take the benefit nor suffer the burden of the contract. In the present case there is nothing in the language of cl 5.2 to suggest that it is intended to have an ambit beyond the parties to the purchase agreements themselves. While it is true that the agreements mention CS affiliates, there is nothing in the express language of cl 5.2 to suggest that the clause is intended to bind MLC as to where it is entitled to sue such affiliates. It would be all the more surprising if nevertheless cl 5.2 did bind MLC to sue CS US in England when the contract which does govern MLC's and CS US's mutual relations, the customer agreement, does no such thing; on the contrary, it provides for New York law as the governing law."

97. The Respondents also relied on the judgment of Laurence Rabinowitz QC, sitting as a Deputy High Court Judge, in *Team Y&R Holdings Hong Kong Limited v Ghossoub Cavendish Square Holding BV* [2017] EWHC 2401 (Comm) (***Team Y&R***). The dispute related to an exclusive jurisdiction clause in a sale and purchase agreement under which Mr Ghossoub and Mr Makdessi had agreed to sell 47.7% of the shares in TYRH, a Hong Kong company, to a subsidiary of the WPP group. Clause 23.2 of that agreement provided that "*The English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement and the parties submit to the exclusive jurisdiction of the English courts*." A dispute arose between Mr Ghossoub and WPP (the majority shareholders in TYRH) and Mr Ghossoub presented a petition to the Hong Kong Court (the ***HK Petition***) pursuant to section 724(1) of the Hong Kong Company Ordinance seeking relief for what was said to be the unfairly prejudicial manner in which the affairs of TYRH had been conducted. The respondents to the HK Petition were TYRH as a necessary party thereto and, among others, WPP plc. WPP applied in England for an anti-suit injunction. One of the issues in dispute concerned the proper construction and scope of the exclusive jurisdiction clause. Mr Rabinowitz summarised and dealt with Mr Ghossoub's submissions as follows:

"50. Mr Ghossoub advances the following argument: in circumstances where WPP appears to accept … that the English court lacks jurisdiction to grant relief in respect of a petition brought by a shareholder alleging the affairs of a Hong Kong company to have been conducted unfairly, it is most unlikely that the parties to the SPA would have intended that such a claim was required to be submitted "to the

exclusive jurisdiction of the English courts". Put differently, Mr Ghossoub's contention is that the parties should not be taken to have agreed to submit to the exclusive jurisdiction of the English court a dispute in respect of which the English court had no jurisdiction to grant a remedy.

……

52. I consider that there is force in the point made by Mr Ghossoub. In particular, I would accept that absent clear language to the contrary it is most unlikely that contracting parties will have intended to agree to submit to the English court a dispute in respect of which the English court would have no jurisdiction to resolve or grant a remedy.

98. The Respondents relied on this approach to the construction of an exclusive jurisdiction clause and submitted that it should be borne in mind when construing clause 25.2 in this case. It was necessary to ask whether that clause could properly be said to cover disputes against, for example, NEPRA or the Government ministries, which obviously could not be brought in England or the Cayman Islands.

99. The Respondents also relied on Mr Rabinowitz's summary at [82] of the principles to be applied when considering whether an exclusive jurisdiction clause should be interpreted as obliging a party to bring claims against non-parties in the chosen forum (underlining added):

"In light of the consideration given to this question by earlier authorities, it seems to me possible to make the following observations:

(1) Whether an exclusive jurisdiction clause should be understood to oblige a contractual party to bring claims relating to the contract in the chosen forum even if the claim is one against a non-contracting party, requires a consideration of the contract as a whole including not just the language used in the exclusive jurisdiction clause but also all other terms in the contract that may shed light on what the parties are likely to have intended.

(2) The principle that rational businessmen are likely to have intended that all disputes arising out of or connected with the relationship into which they had entered would be decided by the same court cannot apply with the same force when considering claims brought by or against non-contracting third parties. More particularly, whist it is well established that the language of an exclusive jurisdiction clause is to be interpreted in a wide and generous manner, the starting position in considering whether disputes involving a non-contracting third party might come within the scope of the clause must be that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties.

(3) Where it is clear from the express terms that the contracting parties have turned their minds to the position of third parties and more particularly whether such third parties are to benefit or bear the burden of rights and obligations agreed between the contracting parties, the absence of any express language in the exclusive

jurisdiction clause that provides for the application of that term in relation to claims brought by or against third parties may be an indication that the clause was not intended either to benefit or prejudice such third parties.

(4) Where the exclusive jurisdiction clause is silent on the question, the fact that any provision in the contract dealing with third parties indicates an intention that third parties should not acquire rights as against the contracting parties by virtue of the contract, may be a further indication that the clause was not intended either to benefit or prejudice such third parties.

(5) Where a particular interpretation of the exclusive jurisdiction clause produces a material contractual imbalance because for example it results in one party to a dispute relating to the contract being subjected to an obligation to bring proceedings in the chosen jurisdiction in circumstances where the other party to the dispute is not similarly obliged, or where that interpretation would require a claim against a non-contracting third party to be brought in the agreed jurisdiction even where the chosen forum may not actually have jurisdiction over such a claim against that party, this too may be an indication that the clause was not intended to so apply because such a result is unlikely to be what the contracting parties as rational businessmen would have agreed.

(6) The fact that there is nothing in the contract that might indicate a rational limit in terms of the identity of non-contracting third parties whose rights and interests might be affected by the application of an exclusive jurisdiction clause might provide a further indication that the clause was only intended to affect the rights and interests of the contracting parties.

(7) It follows that where contracting parties intend that any claim relating to the contract be subject to the exclusive jurisdiction clause even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected and, if relevant, the manner in which submission of any non-contracting parties to the jurisdiction of the chosen court is to be ensured."

100. Mr Rabinowitz concluded that the scope of clause 23.2 did not extend to claims against non-contracting third parties and that Mr Ghossoub was not in breach of contract by virtue of his pursuit of the HK Petition against TYRH and WPP plc. He summarised his reasoning at [83] as follows (underlining added):

"How then do these observations apply to the SPA? More particularly, are WPP correct to contend that clause 23.2 requires that Mr Ghossoub pursue any claim he may have relating to or connected with the SPA in this jurisdiction even where the claim is one brought against non-contracting third parties, in this case TYRH, WPP plc and Y&R? As to this:

(1) As noted above, clause 23.2 provides that the English court is to "have exclusive jurisdiction to settle any dispute arising in connection with this agreement and the parties submit to the exclusive jurisdiction of the English courts". Whilst the opening words of the clause, by which the parties agree the English court should have "exclusive jurisdiction to settle any dispute arising in connection with this agreement", are in my view wide enough to apply to "any dispute" relating to the SPA regardless of the identity of the parties to that dispute, it is notable that the remainder of the clause is concerned only with the conduct of the parties to the SPA,

referring as it does to "the parties" submitting to the exclusive jurisdiction of the English court. The fact that the clause expressly considers only the position of the parties to the SPA, in my view provides a clear indication that the parties did not intend or anticipate that the clause would apply also to claims against non-contracting third parties over whom the jurisdiction of the English court might or might not extend.

(2) Even allowing for a wide and generous interpretation of the opening words in clause 23.2 (which are in my view directed towards identifying the scope of disputes to be covered, rather than the identity of the persons whose rights and interests are to be affected by the clause), there is nothing in the clause to rebut the prima facie starting point suggested by Rix J in Credit Suisse, namely that parties to a contract containing a dispute resolution clause are likely to intend only to regulate disputes between themselves and not disputes involving third parties. On the contrary, as already noted at (1) above, there is language in clause 23.2 that supports the conclusion suggested by that prima facie starting point.

(3) As in Morgan Stanley - and in contrast to the contracts under consideration in Donohue and in Winnetka - the SPA contains a term dealing with the position of third parties. Thus, as noted earlier, clause 21.11 provides that, "Except as otherwise expressly stated in this agreement, a person who is not a party to this agreement may not enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999". It is thus clear that the parties to the SPA did consider how the provisions of the contract might affect third parties but notwithstanding this one finds no wording in the contract to suggest the parties thereto intended the position of third parties to be affected by the choice of jurisdiction provision. If anything, clause 21.11 suggests an intention that third parties should, save where the contrary expressly appears, be unaffected by anything contained in the SPA.

(4) The absence of any language to delineate in a rational way the identity of non-contracting third parties whose rights and interests might be affected by clause 23.2 were it to apply other than to the contracting parties –for example by limiting its application to claims brought by or against companies associated with or affiliated to the contracting parties - is a further indication that the parties did not intend clause 23.2 to have this wider application.

(5) So too, as noted above, the fact that if given this wider reach clause 23.2 might operate to compel claims against non-contracting third parties to be brought in England even where the English court had no jurisdiction in respect of such parties and might result in a situation in which one party to a dispute that might arise in connection with the SPA might be obliged by clause 23.2 to pursue that dispute in England but the other party to the same dispute would not be similarly obliged. This, as Teare J observed in Morgan Stanley, might be said to be anomalous and if the parties had intended so curious a result, one would have expected them to use clear words to indicate such an intention."

101. Applying the approach established by these authorities, the correct conclusion was that clause 25.2 did not extend to claims brought by the Respondents against anyone other than the other parties to the SHA. In this case, as in *Credit Suisse*, there was nothing in the language of clause 25.2 to suggest that it was intended to have an ambit beyond the parties to the SHA itself. It was inherently commercially unlikely that the parties would have agreed, or intended to agree, to bind

themselves to a clause whose scope went further than claims between the parties to the SHA. A clause that did so would be purporting to give exclusive jurisdiction over claims against entities which were not party to the agreement and over which the court would have no (or at least might not have any) jurisdiction. The parties to the SHA cannot have intended the clause to apply to any claim relating to the SHA against any other party. There was no reason to suppose that every potential party to such a claim would be subject to the jurisdiction of the Cayman or English courts (in the Pakistan Proceedings there were various defendants who clearly were not subject to the jurisdiction of either such court in relation to these matters, most obviously the Government of Pakistan and the Energy Ministry.) Accordingly, if the clause was to apply to claims against such parties, that would effectively amount to a contractual provision preventing parties to the SHA from suing those non-parties (whatever the cause of action and whatever the jurisdictional connections to another forum). It would constitute a complete exclusion of liability in favour of those non-parties. A clause whereby a party to a contract agrees not to sue the counterparty at all must be in clear terms – the law assumed a party did not give up such rights without clear words. *A fortiori* where it was said to be agreeing not to sue a non-party.

102. The Respondents noted that the Applicant had also argued that the Pakistan Proceedings themselves constituted a breach of the SHA (of clause 5.7) because those proceedings sought to prevent or interfere with the appointment of directors to the KEL board in breach of what the Applicant claimed was the Respondents' obligation to procure those appointments (but, the Respondents also noted, no application for separate relief in relation to clause 5.7 of the SHA, such as a mandatory injunction, was included in the Summons). However, the Respondents argued, the Applicant was unable to rely on clause 5.7 either to compel the Respondents to act, or in support of their submission that the Pakistan Proceedings should be restrained because, in so relying on clause 5.7, the Applicant would be seeking to take advantage of its own wrong, namely its own breach of contract, which it had committed by acting in breach of clause 9.4 of the SHA. The principle confirmed in *Alghussein Establishment v Eton College* [1988] 1 WLR 587 was that a party could not seek to enforce a contract or sue for breach when what they were doing was taking advantage of their own breach of contract. The party who sought to obtain a benefit under the continuing contract on account of his breach was just as much taking advantage of his own wrong as a party who relied on his breach to avoid a contract.

103. Clause 9.4 stipulates that the Applicant "*shall not permit nor take any action that would result in a change of Control*" (as defined in schedule 9 of the SHA) in respect of itself save for an Exit in accordance with clause 11 (which it had never been suggested the Transaction and related transactions constituted). The Respondents had made inquiries of the Applicant as to whether there had been a change of Control but had not received a satisfactory response. However, the

Applicant in correspondence had not denied that there had been a change of Control for the purpose of the SHA. Rather, the Applicant had said that it was not party to the Transaction and related transactions or taking any action in relation to those transactions. However, the Respondents argued that this was not the case although they faced the difficulty that they did not have full information about these transactions. But from what they knew, it appeared that whatever was being done in relation to these transactions was being permitted by the Applicant and it was possible that the Applicant had taken action to promote them. The Applicant's articles (article 9) stipulated that shares are transferrable subject to the consent of the directors, who may in their absolute discretion decline to register any transfer of shares without giving any reason. Accordingly, in order to complete the Transaction so that SVL becomes a member and the registered holder of the voting share in the Applicant, the directors of the Applicant will have to give their consent. The Respondents said that they did not know whether SVL had yet been registered as the member – if it had been, there had already been a breach of the SHA but if not there was an apprehended breach. In response to a question from me during his submissions, Mr Birt confirmed that the Respondents argued that, based on the evidence currently available, it could be said that there had been a change of Control because it was clear that there had been an agreement to sell the voting share, it appeared that the purchaser (SVL) was able to give instructions to the seller (AIML) as to how to vote the share, the voting share gave the power to direct (directly or indirectly) the management of the Applicant and *prima facie* such an agreement to sell and assign was specifically enforceable and gave the purchaser an interest in, or beneficial ownership of, the voting share to SVL. The definition of Control required a person to possess:

> *"directly or indirectly .. the power to direct, or cause the direction of, the management of [the Applicant] whether through the ownership of shares, voting securities, partnership or other ownership interests, agreement or otherwise provided that if one person owns directly or indirectly fifty per cent (50%) or more of the share capital, voting securities, partnership or other ownership interests of another person such person shall be deemed to Control such other person.."*

104. The Respondents submitted that the Applicant's breach of the SHA not only prevented it from relying on, and asserting a breach by the Respondents of, clause 5.7 but had a broader impact on the Applicant's application. The Applicant was asking the Court to assist it by exercising its discretion in circumstances where it was itself in breach of its obligations under the SHA. The Court should give this considerable weight when deciding whether to grant the injunction sought.

There are strong reasons justifying a refusal to grant the permanent injunctive relief sought

Submission to the jurisdiction of the Pakistan Court

105. First, the Respondents maintained their claim that the Applicant was to be treated as having submitted to the jurisdiction of the Pakistan Court or acted in the Pakistan Proceedings inconsistently with the relief that it now sought from this Court.

106. Males LJ in *SAS Institute Inc. v World Programming Limited* [2020] EWCA Civ 599 had said (at [114]) that the following passage in *Briggs*, Civil Jurisdiction and Judgments (6th Edition) at page 550 fairly summarised the applicable law (underlining added):

> *"No reported case holds, clearly and precisely, that an applicant will forfeit the right to ask for an injunction if he has already submitted to the jurisdiction of the foreign court. But if the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction, it will be more difficult to persuade an English court that the respondent should now be restrained from continuing with those proceedings. … But the principle of the matter seems reasonably clear: an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court."*

107. The Respondents accepted that this was an issue governed by Cayman and not Pakistan law. They submitted that the Applicant's steps in the Pakistan Proceedings had gone beyond a challenge to the jurisdiction of the Pakistan Court.

108. The Applicant had engaged with the domestic proceedings at a substantive level by way of their Order 39 Application. That application had to been seen in the context of their other application, the Section 4 Application. The Section 4 Application was the application they had brought to challenge jurisdiction. That was the application that sought a vacation of the Pakistan Interim Injunction on the basis of the arbitration clause and that, in it, the Applicant made all of their jurisdiction points. The Order 39 Application went further than that. It didn't seek the vacation of the Pakistan Interim Injunction but instead sought its recall or modification. It sought positive relief in relation to the appointment of the KEL directors. If all the Order 39 Application was doing was seeking dismissal of the Pakistan Proceedings on grounds of jurisdiction, why did it need to be made at all. So the starting point was to assume that the Order 39 Application was seeking to do something beyond challenging jurisdiction. Mr Shaukat's evidence was consistent with this view. He had explained that the Order 39 Rule 4 procedure had advantages for the party making the application, partly because it was an application made not only on the basis of a jurisdiction challenge but could also be made on any basis when what was sought was the discharge or variation of an interim injunction. Mr Shaukat said that a party to an application under Order 39 rule 4 could seek relief beyond just a discharge or vacation of the injunction – it

can seek modifications of the order. He said that the applicant gets a chance to set out its case. Furthermore, the Order 39 Application did not seek a vacation of the Pakistan Interim Injunction as the Section 4 Application did. It sought to recall or modify it. These matters, the Respondents argued, suggested an engagement with the substantive process in relation to the scope of the injunction which went beyond simply repeating the same challenge to the jurisdiction that had been made in the Section 4 Application.

109. Further, the Section 39 Application sought positive relief from the Pakistan Court. It asks (in the prayer) the Court to allow nominations on the KEL board in proportion to the shareholding of KESP. That was a clear request for substantive relief. It was obvious what the words in the prayer meant and why they had been included. They set out the relief being sought from the Pakistan Court. Mr Shaukat had been astute enough in his report to recognise that these words presented a problem for the Applicant and indeed had described the language in the prayer as problematic. The Respondents submitted that his attempts in his cross-examination to deal with the issue, though dogged, were ultimately ineffective. His suggestion that these words were a description of the consequence of the Recall application rather than a request for relief was not consistent with the clear words in the prayer. The Respondents asked hypothetically what would have happened had the Pakistan Court responded to the request in the prayer and granted the relief sought thereby permitting the board nominations to proceed. The Applicant would, they said, no doubt then be relying upon the order made by the Pakistan Court as against the Respondents (it was incredible to think that the Applicant would have said that they were not seeking such an order and invited the Pakistan Court not to make it).

110. Accordingly, the Respondents said, the Section 39 Application was the Applicant's attempt to engage with the substance of the Pakistan Interim Injunction and its scope and was not confined to raising issues at the jurisdiction level.

The risk of a multiplicity of proceedings and of inconsistent findings

111. The Respondents submitted that even if the Court were to grant a permanent injunction in relation to claims within the scope of clause 25.2, the Pakistan Proceedings will continue. That clause did not, as the Respondents had submitted, cover claims against third parties and any injunction could not do so. Accordingly, should proceedings subsequently be commenced in relation the SHA either in the Cayman Islands or in England, there would be a multiplicity of proceedings and an attendant risk of inconsistent findings.

112. The Respondents argued 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 tribunal best suited to the task in this case was the Pakistan Court, being the only tribunal capable of being seized of the Pakistan statutory, regulatory and public interest aspects of the dispute, which were in reality the most fundamental aspects of it.

113. The discussion of the need to promote certainty in *Donohue* made it clear that there was a presumption in favour of one-stop shopping and it was open to the Court, even if the exclusive jurisdiction clause is engaged in relation to part of the dispute, to decline to grant an anti-suit injunction and to allow all the issues to be dealt with by the Pakistan Court. This course had been followed in *Team Y&R*. Mr Rabinowitz discussed this issue at [89]-[92] and [112]-[113] of the judgment:

> *"89. As already noted above, Lord Bingham in his classic formulation in Donohue of the English law response to a breach of an exclusive jurisdiction clause emphasised the fact that an English court in such circumstances should ordinarily be willing to exercise its discretion in favour of the grant an injunction to restrain the foreign proceedings unless the contract breaker is able to show 'strong reasons' why the foreign proceedings should be permitted to continue. See also, e.g., Star Reefers Pool Inc v JFC Group Co Ltd [2012] EWCA Civ 14, per Rix LJ at [25].*
>
> *90. It is important to observe that Lord Bingham, at this part of his speech in Donohue, was addressing the straightforward case where the foreign proceedings in breach of an exclusive jurisdiction clause involve only the contracting parties so that the interests of no other parties are involved. Reflecting this, Lord Bingham said, at [25], that "Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause."*
>
> *91. The position may however be otherwise where the interests of third parties are involved or indeed where the foreign proceedings include claims not within the ambit of the exclusive jurisdiction clause. Thus, at [27], Lord Bingham continued by observing that, "The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions." It is clear from Lord Bingham's consideration of the earlier authorities, as well as the approach taken by their Lordships in Donohue itself, that these matters might, but need not, constitute a strong reason for not granting injunction. See especially [27] to [36].*

92. *Mr Ghossoub, naturally enough relies on these passages from Lord Bingham's speech and the fact, as I have found, that the HK Petition will be allowed to continue in Hong Kong as against TYRH, WPP plc and Y&R and, indeed, against Cavendish in part as well, as constituting a strong reason for declining to grant the injunction. He also relies on other matters which he says constitute further strong reasons, in particular, (1) that the injunction would deprive him of what he says is his inalienable statutory right to bring a claim for unfair prejudice in Hong Kong and would leave him without an effective remedy for the complaints made in the HK Petition in circumstances where an English court would not have jurisdiction to entertain and grant relief in such a petition, TYRH being a Hong Kong company; and (2) that WPP has delayed unduly in seeking the anti-suit injunction and that this raises comity issues. I deal with each of these arguments below.*

……

112. *I come back therefore to the question whether Mr Ghossoub is able to identify any factor that either alone or in combination with other factors provides a strong reason why I should not grant an anti-suit injunction to restrain his continuing breach of clause 23.2 of the SPA in the manner I have described above.*

113. *In my view, having considered the matters referred to above, strong reason does exist for not granting injunctive relief. In particular:*

(1) It is plain that it is impossible to disentangle matters in a way that will ensure that the whole dispute can be resolved against all parties in this jurisdiction.

(2) This follows from the fact that there is no basis for restraining the HK Petition in so far as it is brought against TYRH, WPP plc and Y&R. Inevitably therefore, to require any part of that dispute to be litigated in England will bring about duplication and indeed the risk of conflicting decisions that might otherwise be avoided. I am of course conscious that there are already also proceedings in this jurisdiction in the form of the defaulting shareholder claim, but the allegations in those proceedings do not cover the same territory as the HK Petition and are focussed on a rather different dispute the resolution of which need not overlap with the matters the subject of the HK Petition.

(3) The fact that, as I have found and as WPP themselves accept, it must be for the Hong Kong court alone to determine whether or not there has in fact been unfair prejudice such as to entitle Mr Ghossoub to a remedy (and if so what remedy), and, further, that there are additional, albeit probably limited, aspects of the underlying disputes relied upon in the HK Petition which fall outside the scope of clause 23.2, are also matters of significance. This is because, even in relation to Cavendish, it is therefore inevitable that the dispute, or at least some parts thereof, will need to be substantively considered by the Hong Kong court.

(4) Whilst it is of course nonetheless possible to require Mr Ghossoub to bring to the English court for resolution those disputes arising in the context of the HK Petition which do come within the scope of clause 23.2 at the same time as the whole of the HK Petition as against the respondents other than Cavendish and parts of the claim against Cavendish are before the Hong Kong courts, this does not strike me as a desirable outcome.

> *(5) In particular, it seems to me to be preferable that the court that is ultimately to determine the HK Petition and consider whether relief is appropriate, viz. the Hong Kong court, should be able to do so after having itself adjudicated in relation to the underlying disputes with regard to all parties without having to wait until some of the matters likely to be relevant to its determination have been adjudicated upon by a (for it) foreign court."*

114. The Respondents submitted that this was a course that ought to be followed in the circumstances of this case.

Close connection between the disputes and Pakistan

115. The Respondents argued that there was another reason, related to the last one but going further than it, that constituted a strong reason (or was a significant factor to be taken into account in justifying) a refusal to grant an injunction in this case.

116. It was clear that the underlying centre of gravity of the dispute between the Respondents and the Applicant was in Pakistan. This was the case because KEL is a company of some public importance in Pakistan (given its role as energy supplier to over 22 million customers), that it is subject to regulation by the energy regulator, NEPRA, as well as to the control of the SECP. Furthermore, the SPA emphasised the role of the Pakistan Government in relation to national security interests. The fundamental issue in the Pakistan Proceedings concerned the control and ownership of KEL, which is a public limited company in Pakistan, subject to Pakistan statutes and regulations. It is also subject to the control of the Pakistan SECP (and the SECP's counter-affidavit in the Pakistan Proceedings has confirmed that the Transaction fell under its purview and that certain statutory reporting obligations applied to it). Although the parties to this injunction application (the Applicant and the Respondents) are incorporated in the Cayman Islands, the dispute in reality has very little to do with this jurisdiction. Moreover, four parties are directly connected with Pakistan because they are Pakistan Government departments or Pakistan regulatory authorities.

117. Although, in cases where there is an exclusive jurisdiction clause, it is often said there is no real role for considerations of comity, in the present case that was displaced by the connections between this dispute and the Pakistan regulatory, governmental and public interest matters.

Delay

118. The Respondents also maintained their case based on what they said was the unjustifiable delay by the Applicant in applying for injunctive relief in this jurisdiction.

119. The Applicant had made applications in the Pakistan Proceedings on 4 November 2022 seeking a recall or modification of the Pakistan Interim injunction, asking the Pakistan Court to allow its nominations of directors on the KEL board, and seeking a stay of the Pakistan Proceedings and a referral of the matter for arbitration (based on the superseded version of clause 25 providing for arbitration at the election of any party). Those were listed to be heard on 8 November (albeit that they went unheard on that date).

120. The Applicant did not issue the Summons in this jurisdiction until 24 November 2022. The Respondent said that while that delay was not, on its own, a very long period, it must be seen in the context of the applications that the Applicant had chosen to make in the Pakistan Proceedings before it sought any form of anti-suit relief in this jurisdiction. Time and costs in Pakistan were spent in considering those applications, and in continuing to deal with the Pakistan Proceedings before the Applicant chose to take action in this jurisdiction. That was a relevant matter to take into account. The point was also linked to the Respondents' submissions on comity (which the respondents argued, as I have noted, had a continuing relevance). The applications made in Pakistan by the Applicant had been part-heard and an injunction made now would render the parties' time, and the judicial time in Pakistan, spent on them wasted.

Comity

121. The Respondents did not include in their written submissions comity as a separate factor to be taken into account when considering whether (or as one of their four points in support of their argument that) there were strong reasons for refusing to grant the injunction. But they did make reference to the principle in various submissions and I have taken the need to take comity into account in my review of the Respondents' argument and the exercise of my discretion (see generally [76]-[[78] and [97] of the Judgment).

Discussion and decision

The issues

122. The applicable law was summarised at [47]-[53] of the Judgment and is not in dispute.

123. 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 justification for the grant of the injunction is that without it the applicant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy.

124. As I noted at [53] of the Judgment, the first issue is whether the foreign proceedings constitute, in whole or in part, a breach of the exclusive jurisdiction clause. It is for the Applicant to establish that it is entitled to enforce the clause, that the Respondents are parties to, or in substance bound by, the clause, that the clause is binding, and that the foreign proceedings fall within the terms of the clause. The second issue is whether there are strong reasons for not granting the injunction. The burden of showing strong reasons falls on the Respondents.

125. I made a number of findings and reached various conclusions in the Judgment for the purpose of deciding the Applicant's application for an interlocutory (interim) anti-suit injunction. At [82] of the Judgment I noted that:

> *"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."*

126. I must now reconsider the Applicant's case for, and the Respondents' opposition to, the granting of a permanent anti-suit injunction in light of all the evidence adduced by the parties, taking into account where relevant the new expert evidence, and the further submissions the parties have made.

127. The particular issues that arise are as follows:

(a). what is the proper approach to characterising the Pakistan Proceedings for the purpose of deciding whether they are covered by clause 25.2 of the SHA?

(b). what is the proper characterisation of the Pakistan Proceedings for that purpose?

(c). what is the scope and proper interpretation of clause 25.2 of the SHA?

(d). has the Applicant established that the Pakistan Proceedings or any part of them are covered by and subject to clause 25.2?

(e). does the Respondents' claim that the Applicant is in breach of the SHA affect the Applicant's entitlement to a permanent injunction?

(f). have the Respondents shown that the Applicant, as a matter of Cayman law, has acted in the Pakistan Proceedings in such a way that it is to be treated as having submitted to the jurisdiction of the Pakistan Court or as having acted inconsistently with the relief it now seeks, and that as a result, either when considered alone or when taken together with the other grounds relied on by the Respondents, there are strong reasons for not granting the injunction sought by the Applicant?

(g). have the Respondents shown that if the injunction sought is granted there will be a real and material risk of a multiplicity of proceedings and of inconsistent findings by relevant courts so as to establish, either when considered alone or when taken together with the other grounds relied on by the Respondents, that there are strong reasons for not granting the injunction?

(h). have the Respondents shown that the connection between the dispute being litigated in the Pakistan Proceedings and Pakistan and its significance and importance to the Government and regulatory authorities of Pakistan constitute (either when this factor is considered alone or together with the other grounds relied on by the Respondents) strong reasons for not granting the injunction?

(i). have the Respondents shown that the Applicant delayed in seeking injunctive relief from this Court to such an extent that there are (either when this factor is considered

alone or together with the other grounds relied on by the Respondents) strong reasons for not granting the injunction?

The expert evidence

128. I am satisfied that both experts were sufficiently and suitably qualified to give expert evidence on the issues of Pakistan law and procedure that arise in this case.

129. I found Mr Shaukat to be a reliable and helpful witness who set out his opinions, both in writing and orally during his cross-examination, clearly with supporting analysis and arguments. He dealt directly and candidly with points of difficulty and adopted a balanced and impartial approach. I reject the Respondents' assertion that his limited direct experience of litigation affected his ability to express reliable opinions on Pakistan law or procedure or on the likely decision which would be made by the highest court in Pakistan on the issues in dispute. He impressed me with his broad knowledge of the applicable law and practice.

130. Justice Hussain is a distinguished former senior judge with extensive judicial experience who has also held other significant appointments in the academic world and been appointed to other important positions in Pakistan. As a result, he is to be treated as having sufficient experience and expertise to provide an expert opinion on the points of Pakistan law and procedure in dispute and those opinions, in view of seniority and judicial experience, are, subject to reviewing their cogency and coherence, to be given substantial weight. Justice Hussain's written evidence (the Hussain Report and his commentary in the Joint Memorandum) was clearly and cogently expressed if not always fully argued. Unfortunately, however, his oral evidence in cross-examination was, in a number of key areas, unsatisfactory.

131. I do not accept the Applicant's criticism of the conditions in which Justice Hussain gave his evidence. The Applicant (as the Respondents pointed out) had the opportunity to object to the presence of Mr Hasan Mandviwalla in the room in which Justice Hussain gave his evidence but failed to do so. While on one occasion I did, to ensure that proper procedures were being followed, remind those in the room to ensure that in assisting Justice Hussain to locate documents to which he wished to refer they only respond to his requests to be given a particular document and not suggest responses for him to give, there was no evidence of any failure to act properly or to prompt Justice Hussain.

132. However, I do accept the Applicant's criticism of the adequacy and cogency of key parts of Justice Hussain's evidence. As the Applicant asserted, Justice Hussain misunderstood a number of key facts, in particular that there had been no transfer of the shares in KESP and that the Transaction (and the related transfers of limited partnership interests) only related to a shares in the Applicant. When this was brought to his attention, he failed to acknowledge the significance of the error or to explain why these factual errors did not affect or undermine his analysis of the impact of the Transaction (and the related transfers) on the SHA. His new analysis to the effect that shareholders of KEL would be bound by the SPA was unconvincing because he had not referred to or relied on it previously and because he was unable to provide a reasoned justification for his construction of the definitions in the SPA on which he relied. When pressed to provide such an explanation and justification, he refused to engage with the issue and repeatedly cut-off further discussion by saying that he had nothing further to add and that the Court would need to decide the point without further assistance. Justice Hussain was also unable to appreciate that his acknowledgement that his argument that shareholders of KEL were to be treated as bound by the SPA could not apply to the Applicant undermined his opinion that the Applicant was in fact bound by the SPA. Furthermore, while responding to the issues that the parties had formulated, he frequently went beyond the permissible bounds of expert testimony when addressing the construction of a contract governed by foreign law. Rather than addressing the principles of interpretation that would be applied by the Pakistan Court he gave his opinion on how the SPA was to be construed. It may be that, in the context of an application for an anti-suit injunction to enforce an exclusive jurisdiction clause when the Court is considering whether foreign proceedings are covered by the clause and interpreting that clause rather than directly construing the foreign law governed agreement, the usual rule is to be relaxed (and this was not a point on which the Applicant focussed) but it was a weakness of Justice Hussain's approach that he failed to adduce proper evidence of Pakistan law on the construction of contracts to assist the Court in forming its own view, to the extent relevant on this application, or to support his own opinion.

133. I am conscious that Justice Hussain was giving evidence late in the evening in Pakistan and that this may have affected him to some extent (although when asked by me he – robustly – indicated that he was content to continue). As a result, it would be wrong and I do not wish to be unduly critical of Justice Hussain, who as I have said is clearly a distinguished former judge and lawyer (who was at all times courteous when giving his evidence). But these difficulties do affect, and to my mind significantly weaken, the weight to be given to his opinion on the issues affected.

The approach to analysis and characterisation of the Pakistan Proceedings

134. As I noted at [53] of the Judgment, whether a foreign claim is covered by an exclusive jurisdiction clause involves a two-stage analysis. The first requires an analysis of the claims made and the nature of the foreign proceedings. 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?*"

135. The question arises as to whether, when at the first stage analysing and characterising what is being litigated before the Pakistan Court for the purpose of deciding whether the Pakistan Proceedings are covered by clause 25.2, the Court's focus should be on the overall nature of the claims being made in the Pakistan Proceedings or on the separate causes of action and material allegations on which the Respondents' various claims for relief in the Pakistan Proceedings are based (or on both aspects).

136. Mr Chapman, in his oral closing submissions, noted that both parties agreed that the task that the Court had to perform was one of essentially stepping back and seeking to characterise the dispute in the Pakistan Proceedings as a whole and then ask whether the dispute so characterised fell within the terms of clause 25.2. This is correct on the basis that, as I have noted above, this was also the Respondents' primary position. But the Respondents did also argue an alternative case, if this was not the right approach, based on a separate review of each claim made in the Pakistan Proceedings to decide whether the relevant claim related to a dispute arising out of, or connected with, the SHA.

137. The core question is whether the Pakistan Proceedings involve "*[a]ny dispute arising out of or in connection with [the SHA].*" The clause refers to a dispute, a non-technical term rather than, for example, a cause of action. The parties to the SHA agreed that such disputes must and can only be settled by the English or Cayman courts. Therefore, the Court is required to assess what dispute is, or if there is more than one, what disputes are, being litigated in, and raised by, the Pakistan Proceedings and then decide whether that dispute arises out of, or is connected with, or whether all or some of the disputes arise out of or are connected with, the matters agreed upon and covered by the SHA.

138. Where the foreign proceedings rely on and seek to litigate multiple claims (or causes of action) against multiple parties, the Court must assess whether they are based on and are the result of a single dispute or alternatively various different disputes. If the latter, then the Court must consider

each dispute separately and decide whether it arises out of, or is connected with, the matters agreed upon and covered by the SHA.

139. In forming a view as to the dispute or disputes being litigated in the foreign proceedings or to which they relate, the Court needs to examine all aspects of the foreign proceedings. Where there are multiple claims, the Court needs to assess each such claim and its factual and legal basis to determine what is in issue and whether the dispute to which that claim relates and which it seeks to settle is one covered by the exclusive jurisdiction clause (in this case therefore is a dispute arising out of or connected with the SHA).

140. This approach was adopted by Mr Rabinowitz in *Team Y&R*. At [53]-[64], he considered whether it followed from his decision that the parties to the SPA could not have intended the exclusive jurisdiction clause to cover the foreign proceedings (the unfair prejudice petition) because their chosen forum (England and Wales) could not deal with it, that the parties must also have intended that other disputes arising within those foreign proceedings, which the chosen forum would be able to deal with, were also not covered. He decided that this conclusion did not follow and that the exclusive jurisdiction clause should be interpreted (widely) so as to cover particular claims in the foreign proceedings where they related to or were connected with the SPA. He concluded that "*it would be wrong to treat the word "dispute" as it appears in that provision as limited so as to apply only to a consideration of the overall nature or type of the claim.*" Mr Rabinowitz said this (underlining and bold added):

> *"60. On the other hand, it is not clear to me that the presumption really can assist much in a case such as the present where the parties have in fact expressly agreed that the English court should have a wide exclusive jurisdiction over disputes arising but the Court is faced with a claim which, at least when looking at its overall nature, cannot have been intended to come within the provision for the reasons already identified.*
>
> *61. I turn back therefore to the question whether in seeking to characterise the dispute for the purposes of clause 23.2, one should focus only on the overall nature of the claim or whether, rather, it is appropriate also to consider the particular disputes that arise in the context of that overall claim.*
>
> *62. Approaching the question as one must, giving the language in clause 23.2 a wide and generous interpretation,* ***I consider that it would be wrong to treat the word "dispute" as it appears in that provision as limited so as to apply only to a consideration of the overall nature or type of the claim. Rather, it is my view that the fact that a particular dispute arises only as an aspect or element of that claim does not make it any the less a dispute for the purposes of clause 23.2. Not only does this interpretation appear to me to be in line with the language used by the parties in clause 23.2, it is also one that accords with commercial common sense. Were the position otherwise, it would be much open to abuse: it would allow a***

party to construct artificial forms for proceedings, when the real or substantial issues in dispute are plainly contractual, simply as a means of seeking to evade the application of the provision. That is most unlikely to have been what reasonable commercial parties would have intended.

63. Whilst I recognise that this might introduce, or perhaps exacerbate, the risk of bifurcation of proceedings and in this way appear to offend against the presumption in favour of 'one-stop shopping', I have already explained why in the context of the present case I do not find that presumption of much assistance; put shortly, where the express choice of the parties is, as here, for English jurisdiction, I consider it most unlikely that the presumption could have been intended to operate so as to increase, as it would here, the scope of matters taken away from that expressly chosen jurisdiction.

64. In short, whilst Mr Ghossoub is in my view correct to say that the parties could not have intended to be obliged to submit to the English court a petition for unfair prejudice in respect of which the English court would have no jurisdiction to entertain and provide a remedy, I nonetheless find that clause 23.2, properly interpreted, would cover within its scope disputes raised by the HK Petition that are related or connected to the SPA."

141. It seems to me that the comments made by Mr Rabinowitz at [62] that I have highlighted in bold are particularly apposite. The Court should where possible adopt a construction of the reference to a dispute which accords with commercial common sense and be astute to the risk of parties constructing artificial forms of proceedings which disguise the real issues in dispute in order to evade the exclusive jurisdiction clause.

142. Accordingly, it seems to me that the first task for the Court is to decide whether the Pakistan Proceedings litigate, raise or arise out of one or more disputes. Having done so, the Court must then consider the proper interpretation of clause 25.2 of the SHA (recognising that each exclusive jurisdiction clause has to be separately interpreted in the context of the whole agreement of which it is a part) and decide whether the dispute or each dispute arises out of, or is connected with, the SHA (and whether the clause covers proceedings against defendants who are not parties to the SHA).

143. This is the approach I followed in the Judgment in which I concluded, on the preliminary basis I have described, that the Pakistan Proceedings were litigating, raised and arose out of a single dispute, namely the dispute between the Respondents and the Applicant as shareholders of KESP as to the validity and effectiveness of the steps taken by the Applicant as shareholder of KESP to have new directors appointed to the KEL board. My approach and views can be seen in the following paragraphs from the Judgment (underlining added):

> *"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.*
>
> *……*
>
> *89. ……. 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."*

The construction and effect of clause 25.2 of the SHA

144. As can be seen from the extract from his judgment set out above, the general approach to the construction of exclusive jurisdiction clauses was summarised by Mr Rabinowitz in *Team Y&R* at [56] of his judgment.

> *"WPP refers in this context to the general approach that English law adopts to the interpretation of exclusive jurisdiction clauses. This was succinctly summarised by Asplin J in Black Diamond Offshore Limited and Ors v Fomento De Construcciones y Contratas S.A. [2015] EWHC 1035 (Ch) where she said (at [19]): "There is no dispute that the relevant principles which apply to the construction of jurisdiction provisions can be derived from Donohue v. Armco Inc [2001] UKHL 64 and [2002] Ll Rep 45; Fiona Trust and Holding Corporation v. Privalov [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep 267 and Satyam Computer Services Limited v. Upaid Systems Limited [2008] EWCA Civ 487 and [2008] 2 AE (Comm) 465 . It is accepted therefore, that jurisdiction clauses must be construed "widely and generously" with a presumption in favour of "one-stop shopping" for dispute resolution."*

145. I set out at [30] of the Judgment the key provisions of the SHA. There are some other provisions that are important to note.

146. The recitals make it clear that the SHA concerns, and is intended to regulate, the rights and obligations of the shareholders of KESP both in respect of KESP and also, because KESP is a substantial shareholder in KEL, in relation to KEL. Recital (D) states that "*The parties have entered into this agreement to regulate their conduct in relation to [KESP] and [KEL]*."

147. As originally drafted, the SHA sought to regulate and give to the Applicant the "*full management and control" of both KESP and KEL*" (see clause 5.1 before it was amended by the Second Deed). The Second Deed, dated 5 January 2021, however amended the governance arrangements and clause 5.1 was amended so as to provide that in future KESP's board would have management and operational control of KESP. But the new clause 5.7 was introduced which required the Applicant and the Respondents to "*procure that the directors of [KEL] be nominated or appointed by [KESP]*" so that five were nominated by the Applicant and four were nominated by the Respondents (with the chairman to be appointed by the KESP board). The Applicant and the Respondents were also obliged to procure that their nominees followed the instructions of the KESP board. The new clause 5.8 included provisions relating to the appointment of directors to the boards of subsidiaries of KEL.

148. The general prohibition on the transfer of (Class O) shares by the KESP shareholders remained unaltered from the first version of the SHA although there were amendments (in the Second Deed and the earlier deed of amendment dated 30 April 2009) to the various exceptions to that prohibition and the range of permitted transfers including amendments to when a transfer by the Applicant was permitted.

149. The Second Deed also introduced the exclusive jurisdiction provision in clause 25.2 and removed the obligation to arbitrate, substituting an option to arbitrate if all parties agreed.

150. Accordingly, the SHA was clearly intended to govern the relationship between the shareholders of KESP and how they exercised their rights and performed their obligations in that capacity. The SHA also dealt with the management of KEL and acknowledged that KESP's 71.5% (now 66.4%) shareholding in KEL was its key asset. Initially, the Applicant was given management powers in respect of KEL (as well as KESP). After the Second Deed, the Applicant no longer had direct management powers in respect of KEL but had the right (via KESP) to appoint

directors (and more directors than the Respondents) to the KEL board and to make appointments to committees of the boards of KELs' subsidiaries (thereby ensuring that the Applicant was able to ensure that individuals satisfactory to it were appointed to the KEL board and to exercise indirect oversight of the governance arrangements relating to the management of KEL and its subsidiaries). The SHA recognises, as it must, that KEL is an entity separate from KESP but it nonetheless deals with important aspects of KEL's management (appointments to the boards of KEL and its subsidiaries and to the audit and finance committees of the KEL board and its subsidiaries) by regulating the exercise of the rights and powers of KESP's shareholders to cause KESP to exercise its rights as majority shareholder in KEL. No reference is made in the SHA to the SPA or the other shareholders of KEL (including the Government of Pakistan) and it is clear that the terms of the SHA (and the rights granted by the SHA) are not made subject to, or dependent on, the terms of (or obligations imposed by) the SPA. Of course, KESP is a party to, and therefore bound by, the SPA. But the rights and obligations *inter se* of the shareholders of KESP are independent of, and not affected by, the terms of the SPA.

151. The SHA also deals with the restrictions affecting the ability of shareholders in KESP to transfer their KESP shares or to permit or take action that would result in a change of Control of the shareholder concerned save in the case of an Exit (see clauses 9.3 and 9.4 of the SHA). The SHA also contains warranties relating to the relationship between KESP and KEL (see 1.6 of schedule 8). In addition, in schedule 4 of the SHA, the Respondents and the Applicants agree (and KESP covenants) that certain reserved matters will only be undertaken with the consent of the Respondents and the Applicants including various very significant actions related to KEL. These include any alteration of the accounting policies or practices of KEL; the declaration of a dividend or payment out of distributable reserves ; any arrangement for a joint venture, partnership or other business organisation by KEL with a value in excess of US$500 Million; any change to the auditors of KEL; the solvent liquidation, winding-up or dissolution of KEL; the issuance by KEL of any debentures or loan stock or the entry into by KEL of any loan or guarantee; any merger or acquisition *of* KEL (or KESP) or any merger or acquisition *by* KEL (or KESP) with a value in excess of US$500 Million; the increase or decrease in the directors of KEL and the creation of any security interests over the shares in KEL.

152. The scope and subject matter of the SHA as so defined is relevant to, and influences the interpretation of, clause 25.2, in particular the meaning of the reference in that clause to *"Any dispute arising out of or in connection with [the SHA]*." It is reasonable to assume that a dispute that relates to the exercise by one of the parties to the SHA of their rights as a KESP shareholder (relating to KEL) granted by the SHA is a dispute which the parties intended to be covered by

clause 25.2 and is to be treated as "*arising out of or in connection with [the SHA]*." The right to nominate directors to the KEL board and to have the Respondents join with the Applicant in procuring that its nominees be appointed is a clear right granted by the SHA. It is also reasonable to assume that a dispute that relates to alleged changes in Control in the Applicant was intended to be covered by clause 25.2 and is to be treated as "*arising out of or in connection with [the SHA]*" since, as I have noted, the extent to which such a change of Control by the KESP shareholders is permitted is regulated by the SHA. It is clear that KEL is dealt with extensively by the SHA and that action taken by the KESP shareholders that relates to or affects KEL are intended to be regulated and governed by the SHA.

Does clause 25.2 cover proceedings brought by one party against non-parties?

153. Does clause 25.2 only cover proceedings commenced by the Respondents against parties to the SHA or does it extend to proceedings against non-parties? This is a question of contractual construction to be decided by considering the drafting of clause 25.2 and the terms of the SHA as a whole and applying the principles applicable to the interpretation of exclusive jurisdiction clauses set out in the relevant authorities.

154. The defendants to the Pakistan Proceedings are the Applicant, Alvarez and Marsal (in its capacity as manager of the Applicant), KESP, KEL, the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP. The Applicant and KESP are parties to the SHA, as are the Respondents. KEL is not a party but, as I have explained, is referred to in the SHA and aspects of its corporate governance and management (in so far as they relate to the control and exercise of KESP's powers as shareholder of KEL) are dealt with by the SHA. Alvarez and Marsal is not a party to the SHA but is, it appears, sued by reason of being a decision maker for the Applicant and is only referred to and linked with the Applicant (see, for example, the prayer which only seeks relief against both the Applicant and Alvarez and Marsal but not Alvarez and Marsal separately). Indeed, the Plaint assumes that Alvarez and Marsal is bound by the SHA (although the Respondents are presumably seeking an order against Alvarez and Marsal requiring it to exercise its rights and powers so as to direct the Applicant to perform its obligations under the SHA). The Privatisation Ministry, the Energy Ministry, NEPRA and the SECP are not parties to or referred to in the SHA.

155. KESP is, as I have said, a party to the SHA and so the objection to the claim for injunctive relief based on clause 25.2 not covering disputes with third parties does not arise. However, it will still be necessary to determine how it is affected by the Pakistan Proceedings and whether it is a party to a dispute covered by the SHA. I deal with this issue below.

156. As Mr Rabinowitz said (at [82], quoted above) in *Team Y&R*, while an exclusive jurisdiction clause is to be interpreted in a wide and generous manner, the starting position (as suggested by Rix J in *Credit Suisse*) in considering whether disputes involving a non-contracting third party might come within the scope of the clause is that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties. As Mr Rabinowitz concluded, where contracting parties intend that any claim relating to the contract be subject to the exclusive jurisdiction clause even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected and, if relevant, the manner in which submission of any non-contracting parties to the jurisdiction of the chosen court is to be ensured. There are no such clear words in this case.

157. Mr Rabinowitz also noted a number of factors which are relevant to the construction of an exclusive jurisdiction clause in this context:

(a). where the exclusive jurisdiction clause is silent on the question, the fact that any provision in the contract dealing with third parties indicates an intention that third parties should not acquire rights as against the contracting parties by virtue of the contract, may be an indication that the clause was not intended either to benefit or prejudice such third parties. In this case, the SHA contains (in clause 18.3) a clause to the effect that third parties are not entitled to enforce any of the terms of the SHA under the Contracts (Rights of Third Parties) Act 1999.

(b). the fact that there is nothing in the contract that might indicate a rational limit in terms of the identity of non-contracting third parties whose rights and interests might be affected by the application of an exclusive jurisdiction clause might provide a further indication that the clause was only intended to affect the rights and interests of the contracting parties.

158. Dealing first with Alvarez and Marsal, it seems to me that clause 25.2 should be treated as covering the proceedings against them. They have been joined, as I have said, by reason of their relationship with the Applicant and are at all times twinned with the Applicant in the Plaint and should be treated as in the same position as the Applicant for the purpose of clause 25.2.

159. Dealing next with KEL, it seems to me that clause 25.2 should be interpreted as covering disputes involving KEL (and proceedings brought by a party to the SHA litigating such disputes) if and to the extent that the subject matter of the dispute (and those proceedings) comes within the clause.

As I have noted, various aspects of the corporate governance and management of KEL and its subsidiaries, and the relationship between KESP and KEL, is dealt with in the SHA. The exercise of KESP's rights as KEL shareholder to appoint directors to the KEL board is regulated by the SHA (as we have seen the Respondents and the Applicant are given the right to cause KESP to appoint directors to the KEL board) and the SHA imposes (see the amended clause 5.8) an obligation on the Respondents and the Applicant to use reasonable endeavours to procure that their nominees on the KEL board ensure that subsidiary boards include at least one director nominated by the Respondents and the Applicant and gives the Respondents and the Applicant the right to appoint at least one of their nominees to the audit and finance committees of those boards. In my view, in these circumstances the parties should be treated as having contemplated that their decision in January 2021 (when executing the Second Deed) to require that all disputes (arising out of in connection with the SHA) be dealt with by litigation in Cayman or England included and extended to proceedings against KEL (in particular since the revised arrangements with respect to the appointment of directors to the KEL board and those of its subsidiaries were included in and dealt with by the Second Deed). The disapplication by clause 18.3 of the Contracts (Rights of Third Parties) Act 1999 so as to prevent KEL (and other non-parties) from being able to enforce the terms of the SHA does not affect this conclusion. Clause 18.3 deals with a different issue.

160. The position of the other defendants in the Pakistan Proceedings is different. In my view, clause 25.2 cannot be treated as extending to *disputes* with them. There is nothing in the SHA which indicates that the parties had them in mind or intended to regulate disputes between parties to the SHA and the Pakistan Government and regulators. The principles of interpretation of exclusive jurisdiction clauses to which I have referred indicate that clear words would be needed to support an interpretation of clause 25.2 that covered disputes with the Pakistan authorities. Furthermore, following *Team Y&R*, it is significant for the purpose of construing clause 25.2 that it was likely to be difficult for disputes against the Pakistan authorities to be brought in England or the Cayman Islands (although not impossible if the conditions for leave to serve out could be satisfied, for example because one or more of them could be said to be proper and necessary parties to proceedings between the Applicant and the Respondents but on the facts of this case, it appears to be unlikely that leave to serve out would be granted).

161. I note that clause 25.2, unlike clause 23.2 in *Team Y&R*, does not refer to "*the parties*" submitting to the jurisdiction of the chosen fora. It is drafted without reference to the parties. This is an indication that the parties to the SHA did not intend to limit the effect of the clause to the parties. Having said that, I treat this as a factor of limited weight. In the absence of clear words making

it explicit that the disputes envisaged by clause 25.2 are to be treated as including disputes with non-parties, the mere omission of the reference to the parties in the exclusive jurisdiction wording is to be read as a matter of mere drafting style and not of substance.

162. But it is important to note that what is not covered is a *dispute* with the Pakistan authorities. It is possible that proceedings to which they are defendants can and should be treated as litigating or relating to a dispute between the Respondents and the Applicant so that their involvement is merely ancillary to a dispute between the contracting parties. It seems to me that clause 25.2 is to be treated as extending to such a case. Clause 25.2 focuses on and governs disputes and will preclude proceedings outside the chosen fora which litigate or relate to relevant disputes even if those proceedings incidentally join and involved non-contracting parties who are not in dispute with the parties to the SHA. Whether this is the case here depends on the proper analysis and characterisation of the Pakistan Proceedings as they apply to the Pakistan authorities, to which I now turn.

The analysis and characterisation of the Pakistan Proceedings

163. It is worth, for the purpose of identifying the dispute or disputes being litigated in the Pakistan Proceedings, starting with an overview of the key document in the Pakistan Proceedings that sets out that claims made by the Respondents. This is, as was accepted by all parties and both experts, the Plaint.

164. The Plaint (underlining and italics added):

(a). starts by *referring* to the SPA. It refers to the transfer restrictions in section 5.2 which apply to the shares held by KESP in KEL under which KESP agreed not to sell, transfer or assign any of those shares or to permit them to become subject to any lien. It also refers to section 5.3 which sets out the transfers which are permitted including a permission given to KESP following the third anniversary of the closing date "*directly or indirectly [to] sell transfer, encumber or otherwise dispose in any form or manner any of its legal or beneficial interest in all or any part of the Strategic Equity Stake*", that is shares constituting 51% or more of the shares in KEL (note that section 3.10(a) of the SPA states that that until that date, the 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"* those shares).

(b). *refers* to Section 33 which is said to "*trigger an approval for any reorganisation of a utility company*" such as KEL and cover a merger, a major acquisition or sale of facilities, the expansion of the licensee's business and a reorganisation of the licensee's business structure.

(c). *refers* to Regulation 14.

(d). *refers* to the circumstances in which the Applicant was established and acquired shares in KESP and in which the SHA was entered into

(e). *refers* to the membership and appointment of the board of directors of KEL.

(f). *asserts that* "*the transfer of beneficial ownership/change in board or management control of [KESP] and consequently [KEL]*" is (i) subject to the transfer restrictions in the SPA and several change of control provisions in finance agreements (which are not identified) and (ii) triggers various mandatory regulatory approvals, relevant notifications and disclosures under Pakistan law.

(g). refers to what the Respondents then knew about the Transaction (and related transfers of limited partnership interests) and *asserts that what is contemplated [by the Transaction]* is "*the transfer of beneficial ownership/change in board or management control of a large part of [KESP] and consequently [KEL].*"

(h). *refers* to the AGM due to be held on 26 October 2022 and *asserts* that the notice of the AGM failed to refer to the proposed change of control resulting from the contemplated transfer of beneficial ownership/change in board or management control of a large part of [KESP] and consequently [KEL].

(i). *states* that the Respondents were unaware of the proposed transactions and transfers until they were reported in newspaper articles whereafter the Respondents made various enquiries.

(j). *asserts* that the Applicant is in breach of clause 9.4 of the SHA in attempting to transfer the beneficial ownership/effect a change in the board or management control of KESP "*in order to secure board and management rights*" in KEL.

(k). *refers to* the Respondents becoming aware that the Applicant has sent to KEL nominations to the board of KEL "*on the basis of the transaction ... entered into in order to hijack [KEL] bypassing the regulatory framework in Pakistan*."

(l). *asserts* that the process for electing directors under section 159 is being disregarded and that the Applicant is relying on its rights under the SPA to justify a "*gross violation of the .. laws of Pakistan* (see [27]).

(m). *refers* to the continued interest of Shanghai Electric Corporation in proceeding with its tender offer in relation to KEL.

(n). *refers* to the application by the AIML JOLs to this Court for permission to enter into the Transaction and related transactions which is said to have been an attempt to use "*offshore jurisdictions and complexed [sic] structures to disguise the transfer of the beneficial ownership/change in board and management control of the national asset in which [the Government of Pakistan] maintains ownership*."

(o). *asserts* that the transfer the beneficial ownership/effect a change in the board or management control of KEL is only permissible with the "*approval of Respondents (as shareholders) or the regulators in Pakistan*."

(p). asserts that the Applicant is seeking to use "*its contractual rights [under the SPA] to secretly transfer the beneficial ownership/effect a change in the board or management control of KEL outside Pakistan and evade Pakistani regulators*" and has acted in breach of section 159.

(q). *asserts that any change of control of KEL* has implications in Pakistan and "*triggers obligations under the shareholder agreements, disclosures and approvals in Pakistan and shall result in acceleration of finance facilities*" and that *the transfer the beneficial ownership/change in board or management control of KEL cannot be "unilaterally executed" by the Applicant "whose rights under [the SPA] and the [SHA] are restricted as regards change of control especially since the liquidators have been selected through a Cayman court*."

(r). *asserts* that the nomination and appointment of new directors to the board of KEL is only possible with the consent of the shareholders and regulators in Pakistan.

(s). *asserts* that the Applicant plans "*to hijack [KEL] via contractual arrangements that were entered into at the time of the Abraaj acquisition without taking on board the regulators in Pakistan*" and accordingly with the ultimate objective of appointing their nominees to the KEL board "*without any vetting exercise*."

165. As I noted at [41] of the Judgment, the relief claimed by the Respondents in the prayer to the Plaint is as follows (underlining and italics added):

(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 [implicitly by the Applicant] 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]"*

166. The Plaint is the pleading and the core document setting out the Respondents' claims and the facts upon which they rely. There is also some further commentary from the Respondents in other documents filed in response to the Applicant's Filings, in particular in the Section 4 Counter Affidavit the Respondents. In [6] of the Section 4 Counter Affidavit, the Respondents stated that:

> *"Notwithstanding the breaches of the [SHA] by [the Applicant, Alvarez and Marsal and KESP] (obligations and rights of [the Respondents] and [the Applicant and KESP]) the Respondents' primary contention is in respect of the violations of the provisions of [the SPA] particularly sections 5.2 and 5.3 which is governed by the laws of [Pakistan]. It is respectfully submitted that until and unless [the Applicant, Alvarez and Marsal and KESP] do not adhere to the provisions of [the SPA] 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 [Respondents] would otherwise gravely be prejudiced*."

167. This summary of the facts asserted, claims made, and relief asserted in the Plaint clearly indicates (subject to taking into account the expert evidence to which I shall turn shortly) that the Pakistan Proceedings have been commenced because of the Transaction (and the related transfers of limited partnership interests to SVL) and relate to and arise out of a dispute (at least primarily) between the Respondents and the Applicant as to whether the Applicant is entitled, without obtaining the consent or approval of the Respondents and the Pakistan Government and regulatory authorities:

(a). to exercise its right to cause KESP to appoint its nominees to the KEL board (and to require the Respondents to procure, join in and support the making of such appointments).

(b) to permit itself to become, or to take any action that results in it becoming, subject to a change of Control.

168. The dispute is to be treated as being between the Respondents and the Applicant because the conduct complained of by the Respondents is that of the Applicant and the relief sought by the Respondents is primarily against the Applicant. There is an implicit complaint against the share transfer by AIML to SVL but there is no suggestion that there is a dispute with AIML (or that there could be in view of the contractual framework). The dispute is with the Applicant as a result

of the action it has taken in consequence of the Transaction (and related transfers of limited partnership interests), as to the effect thereof on the Applicant's obligations and rights under the SHA and on the right of the Applicant to give effect to such Transaction (and such other transfers) by changing and appointing Mr Chishty and others to the board of KEL.

169. The dispute between the Respondents and the Applicants arises out of, or is in connection with, the SHA because the challenge made by the Respondents relates to matters governed by the SHA. The Respondents, as I have noted, dispute and challenge the Applicant's right to cause KESP to appoint the Applicant's nominees to the KEL board and to allow or to put into effect an asserted change of Control of the Applicant. The Respondents seek to prevent such an appointment being made consequential upon the asserted change of Control. They also seek to enforce the Applicant's obligations under the SHA (as they relate to a change of Control).

170. It is true that the Respondents also seek to show that the Applicant is bound by, and has breached, the transfer restrictions in the SPA and has acted in breach of Section 33 and Regulation 14. The Respondents argue that its claims against the Applicant, based on the asserted breach of these provisions in the SPA and of these laws, relate to a dispute that is not covered by clause 25.2. But the facts on which these claims are based once again relate to action which is regulated and governed by the SHA. The action taken by the Applicant which is said to result in a breach of the SPA and these laws was either taken as a shareholder in KESP in reliance on, and pursuant to the SHA (the steps taken to appoint directors of KEL), or is itself governed by, and dealt with, in the SHA (the change of Control in respect of the Applicant). The Respondents agreed in the SHA that if they wished to complain about and challenge (dispute) the steps taken by the Applicant (i) in its capacity as a shareholder in KESP when exercising its rights in that capacity given or governed by the SHA (including the rights that relate to or affect KEL) or (ii) in relation to matters regulated and governed by the SHA, they must do so via proceedings in Cayman or England. In any event, even if the claims in the Pakistan Proceedings against the Applicant based on an asserted breach of the transfer restrictions in the SPA and of Section 33 and Regulation 14 cannot be treated as relating to a dispute arising out of the SPA, they arise in relation to a dispute in connection with the SHA.

171. For these reasons, the question of whether the Respondents' claims against the Applicant in the Pakistan Proceedings are to be treated as litigating and relating to a dispute between them, arising out of or in connection with the SHA, is to, and can, be determined primarily by reference to a review of the facts upon which those claims are based. The Pakistan law analysis of the causes of action is of secondary importance. But it does need to be addressed.

172. I have set out at length above Justice Hussain's evidence and opinions.

173. As regards the question of whether the Respondents had a proper basis for their claims based on a breach of the SPA, it appears in summary that Justice Hussain considers that as a matter of Pakistan law the Applicant is bound by the terms of the SPA, in particular the transfer restrictions contained in the SPA, that at least a transfer by the Applicant of its shares in KESP would be subject to those transfer restrictions and that, on the basis that there has been such a transfer, the Applicant was in breach of the SPA and the Respondents have standing to enforce the SPA and seek relief in the Pakistan Court in respect of such a breach.

174. His reasoning initially assumed that the Respondents had standing to enforce the SPA, to which they are not a party, because of the effect of the Waiver (see his commentary in the Joint Memorandum quoted above in which he said that the "*principle of Privity of Contract [did] not come into play as the provisions of [the Waiver] (being [a] continuation of SPA) are fully applicable to the shareholders of KESP, i.e. the Applicant and [the Respondents] and the same may be enforced by either of the Parties i.e., KESP or its shareholders."*). He then appears to have abandoned this (difficult to follow and unconvincing) explanation and instead relied on his interpretation of the reference to "*permitted successors and assigns*" in the definition of "Company" in section 1 of the SPA. That definition defines the Company for the purpose of the SHA as being KEL "*and its permitted successors and assigns*." During his cross-examination, Justice Hussain said that in his view "*whosoever gets any right or interest in the company [KEL], .. may be a successor in accordance with this definition of the Company.*" But, neither the Applicant nor the Respondents are shareholders in KEL and Justice Hussain did not explain how or why this wording in the SPA should be interpreted as covering a person who held shares in a shareholder in KEL. Indeed, it was implicit in much of Justice Hussain's analysis that the SPA should be interpreted when referring to KESP as including the Applicant (and the Respondents) as shareholders in KESP. It appeared as though he considered that the separate corporate entities and separate corporate identity of KESP and its shareholders could be ignored (and the corporate veil of KESP effectively pierced). This can be seen in his commentary in the Joint Memorandum dealing with the question of whether the Respondents had the right to make a claim for breach of the SPA (quoted above) where he said that *"The purpose of incorporating KESP was simply to create a special purpose vehicle for the [Respondents] and [the Applicant] to coexist to invest in KEL. The [Respondents] and [the Applicant] vis a vis KESP are joint shareholders with the Government of Pakistan. By prioritizing the SHA, the rights and obligations of the Government of Pakistan in KEL as per the SPA are compromised. While the SHA governs the relationship*

between the KESP shareholders, the entire constitution, functioning and working of KEL is under the SPA in which the Government of Pakistan is a party, and accordingly the same cannot be ignored…"

175. There is a reference in section 5.3 of the SPA, which is referred to in the Plaint and sets out when KESP is permitted to transfer its shares in KEL, to direct and indirect sales but Justice Hussain did not seek to and could not show that this drafting justified a construction of the SPA which resulted in the Applicant being bound by the transfer restrictions (which did not refer to indirect sales and by which in any event only KESP was expressed to be bound).

176. In my view, Justice Hussain never sought (or was unable) to identify the applicable legal principles or authorities which supported his view on these points and failed to provide a cogent explanation for his opinion. I also found his reliance on the legitimate expectations principle unpersuasive. It was unclear how the principle was said to apply in this case so as to give the Respondents a claim against the Applicant and once again there did not appear to me to be a cogent, let alone convincing, basis for Justice Hussain's view. Even giving due weight to Justice Hussain's standing and the need to avoid accepting evidence as to foreign law just because it fits and is consistent with the law and style of thinking under Cayman law, I prefer the evidence of Mr Shaukat on all of these issues. Mr Shaukat, for the reasons I have explained, adopted a different interpretation of the SPA and considered that the Applicant was not bound by the transfer restrictions in the SPA. I found his analysis to be clear and cogent and supported by the applicable law and authorities (in particular, with respect to Pakistan law on privity of contract). It seems to me that, as a matter of Pakistan law, it is at least likely that the Applicant is not bound by, or subject to, the transfer restrictions in and the other provisions of the SPA.

177. But even if Justice Hussain's view was correct, it would not in my view change the analysis of whether the Pakistan Proceedings involved the litigation of, and related to, a dispute arising out of, or connected with, the SHA. First, as the Applicant pointed out, Justice Hussain's analysis depended (at least to a significant extent) on there being a transfer by the Applicant of its shares in KESP. No such transfer has taken place. So even on Justice Hussain's main view, the Applicant cannot be bound by the SPA. Secondly, even if Justice Hussain is right that the Applicant is bound by the transfer restrictions in the SPA and that the Respondents are entitled to enforce the SPA, despite none of them being a party to it, the claims made against the Applicant in the Pakistan Proceedings are to be treated as covered by clause 25.2 since the acts complained of remain, for the reasons I have already explained, acts taken by the Applicant *qua* KESP shareholder in respect of matters regulated, covered and governed by the SHA.

178. Justice Hussain considered that the dispute in the Pakistan Proceedings revolved around the ultimate management and control of KEL and that the primary cause of action was in respect of the ultimate management control of KEL which is subject to regulatory control and the transfer restrictions in the SPA. He also considered that the SPA was "*a fountain document and the SHA [was] secondary to it whereby only the shareholders have rights and obligations inter se*." Mr Shaukat did not agree with Justice Hussain's view and considered that it was not relevant to the issues which the experts were asked to address. The issue for this Court when considering the scope of clause 25.2 is the meaning (interpreted in accordance with the principles of English law, which are on this application treated as the same as those applicable under Cayman law) of the terms used in the clause (in particular "*dispute*" and "*arising out of or in connection with*"), an assessment, in light of that meaning so ascertained, of what dispute is or disputes are being litigated in the Pakistan Proceedings and whether clause 25.2 so interpreted should be understood as covering it or them. The expert evidence on Pakistan law is to be taken into account for the purpose of the assessment of what is covered by, and the nature and elements of the cause or causes of action relied on in, the Pakistan Proceedings but is not determinative. It is not to be given any weight for the purpose of interpreting the SHA in general and the scope of clause 25.2 in particular. As I have explained, on my construction of the SHA, it is to be treated as covering the exercise of the rights and powers of the KESP shareholders with respect to KEL without reference, or being subject, to the terms of the SPA. On this basis, and for the purpose of this application, it seems to me that Justice Hussain's view, to the extent that it is relevant, is not right.

179. As regards the question of whether the Respondents had a proper basis for their claims based on a breach of Article 33, regulation 14 and section 159 of the Companies Act 2017 (although no relief was sought by reference to section 159) I found Mr Shaukat's analysis and explanation cogent and persuasive. I have noted his responses during his cross-examination but do not consider that these materially undermined his evidence or qualified his conclusions. On that basis, I conclude that it is likely that the Respondents' do not have, as a matter of the law of Pakistan, standing to bring proceedings against the Applicant (or Alvarez and Marsal) for a breach of contract or a cause of action recognised under Pakistan law based on Article 33 and regulation 14 (or section 159). But once again, even if that is not correct and the Respondents do have standing to bring and may assert a cause of action based on these provisions, these claims litigate and relate to a dispute covered by clause 25.2. The facts on which the claims are based namely the Transaction (and the related transfers of limited partnership interests) relate to steps taken in relation to and also by a shareholder of KESP, whose rights in that capacity are governed by the SHA and the challenge to (and dispute over the effects of) the Applicant's right to permit or give

effect to the Transaction (and the related transfers of limited partnership interests) engages the restrictions on changes in Control of the Applicant in, and is governed by, the SHA.

180. As regards KESP, no relief is sought against it in the Plaint. For that reason, it might be said that the Pakistan Proceedings are not litigating, and do not relate to, a dispute between the Respondents and KESP. But that would not be the correct approach. KESP is joined as a party and made a defendant to the Pakistan Proceedings in connection with (and as part of) the Respondents' dispute with the Applicants. In my view, in those circumstances, the proceedings against KESP are covered by clause 25.2. I would add this. It might be thought to be curious that the Respondents have not sought relief against KESP. It is the party to the SPA and if there is a proper basis for complaining about the effect of the Transaction (and the related transfers of limited partnership interests) on KEL and on the other shareholders of KEL, and of a breach of the SPA, it might be thought that KESP was the proper and primary defendant.

181. The Pakistan Proceedings also include the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP as defendants but there is no claim that they have acted in breach of any statutory duty or other obligation or have acted without complying with applicable standards or requirements (the Privatisation Ministry and NEPRA are expressly referred to only as a proper and necessary party as regards any transaction involving the transfer of ownership, board or management control in relation to KEL). Relief is sought against these defendants but only prospective relief requiring that they perform their statutory duties and do not consent to such transfer without the security clearance referred to in or other violation of clause 5.2 of the SPA being obtained.

182. In these circumstances, it seems to me that it is strongly arguable that there is no genuine or real dispute between the Respondents and these defendants (as the responses filed by the Pakistan authorities to the Pakistan Proceedings confirm) or that, if there is a dispute, it (or part of it) must be seen as ancillary to, and closely connected with, the dispute between the Respondents and the Applicant (which as I have held is to be treated as arising out of, or in connection with, the SHA).

183. Paragraph 5 of the prayer in the Plaint seeks an order that these defendants monitor and regulate the affairs of KEL and paragraph 8 seeks an order that they be restrained from authorising any transfer of beneficial ownership or change in the board/management control of KEL without the security clearance (referred to in) or in violation of section 5.2 of the SHA.

184. Having said that, the Respondents have identified a basis for a claim and applied for relief against the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP although the expert evidence did not address (or addressed only tangentially) the standing of the Respondents to bring proceedings and seek relief against the Pakistan authorities (the issues for the experts failed to raise this questions). But it is clear that at least the latter three parties have regulatory responsibilities with respect to KEL and that the first is of course a shareholder in KEL and party to the SPA. Furthermore, Justice Hussain's reference to, and reliance on, the legitimate expectation principle, particularly in the section dealing with issue 1(3) in the Joint Memorandum, appeared to me to provide a basis for standing to seek relief in respect (and in Cayman law terms, judicial review) of the decisions of the Pakistan authorities.

185. It seems to me that the right approach is to say that to the extent that the Respondents have a bona fide dispute with the Energy Ministry, NEPRA and the SECP regarding the exercise of their powers and the performance and enforcement of their duties in respect of KEL (and KESP if and to the extent it is subject to their powers), and a dispute with the Privatisation Ministry regarding the exercise by it of its contractual rights under the SPA, then that is a dispute with a non-party which is independent of the SHA (and therefore neither arises out of, or in connection with, it). Clause 25.2 does not apply to such a dispute and the Applicant does not have a contractual right to restrain the commencement or continuation of proceedings to litigate and which relate to that dispute.

186. As I have said, I regard it as a close call as to whether in this case the Respondents' claims against the Pakistan authorities can be regarded as genuinely being the result of a dispute with them because it looks as though the claims are, in reality, another (albeit indirect) means of litigating the dispute with the Applicant regarding the appointment of directors to the KEL board. However, on balance I have concluded, since disputes with the Pakistan authorities are not covered by the SHA and since the Respondents may have some basis under Pakistan law to seek relief against the Pakistan authorities, it is right to accept that the Respondents may have a dispute with the Pakistan authorities and that since the matter is before the Pakistan Court, which is best placed to adjudicate on this dispute, and since the exercise by the Pakistan authorities of their rights, both contractual and statutory (or regulatory), is a matter of considerable public interest and local importance and for them, it is right (having regard *inter alia* to the need to respect the comity principle) to leave it to the Pakistan Court and the Pakistan authorities to deal with the relief sought in the Pakistan Proceedings against them. If it turns out that KESP is not permitted to give effect to the Applicant's instructions to make appointments to the KEL board because of KESP's contractual obligations to the Privatisation Ministry or the regulatory requirements of Pakistan

law, the Applicant can have no complaint about action being taken thereunder by the Pakistan authorities because the terms of the SHA could never override those independent obligations of KESP (and KEL). If the Respondents have a right to require the Pakistan authorities to exercise their rights and powers as against KEL (and KESP) (and a real dispute with them concerning their exercise) then they may do so even if that prevents KESP from putting into effect and complying with the Applicant's instructions because the prohibitions and limitations on the exercise of KESP's rights as a KEL shareholder which the Respondents are seeking to enforce were always unaffected by the SHA and arose independently of it. If clause 25.2 was to go so far as preventing the Respondents from taking such steps, clear words should have been included.

187. However, to the extent that the Respondents seek to go further and apply for relief against Privatisation Ministry, the Energy Ministry, NEPRA and the SECP which seeks to raise issues concerning or require the Pakistan authorities to take action to prohibit the exercise by *the Applicant* of its rights under the SHA, in particular the appointment of directors to the KEL board or to restrain the Applicant from giving effect to Transaction (and the related transfers of limited partnership interests) as between itself, the Respondents and KESP, then they would be bringing proceedings to litigate a dispute with the Applicant in connection with the SHA in breach of clause 25.2. The Respondents would be using the claims made against the Pakistan authorities as a backdoor route for indirectly bringing claims covered by the SHA against the Applicant.

188. Following that approach, paragraph 5 of the prayer in the Plaint appears to be unobjectionable and should not be subject to any injunctive relief to be granted by this Court. Paragraph 8 is, at least as a matter of drafting, ambiguous. It is currently drafted very widely and could be understood, when reference is made (using the ambiguous language adopted by the Respondents throughout the Plaint) to "*any transfer of beneficial ownership or change in the board/management control of [KEL]*" as requiring the Pakistan authorities to adjudicate on the steps taken by the Applicant as a KESP shareholder. That language does not reflect the drafting of the SPA or the relevant statutes and regulations. If it were drafted so that an order was sought requiring the Privatisation Ministry as party to the SHA to exercise its rights thereunder against KESP to the extent that they have become exercisable and requiring the Energy Ministry, NEPRA and the SECP to exercise their respective regulatory powers in relation to KEL (and if relevant KESP) then it would in my view would be unobjectionable. The exercise by the Pakistan authorities of their rights, both contractual and statutory (or regulatory) is a matter of considerable public interest and local importance and for them, and not regulated by the SHA. But what would be objectionable, as I have said, is for *the Respondents* to use a claim against the Pakistan authorities which seeks to require them to act so as to interfere with the exercise of the Applicant's

rights and deal with matters covered by the SHA. Of course, it would be a different matter were the Pakistan authorities to do so on their own initiative and in light of their own view as to the scope and reach of their own rights and powers.

The relevance of the Applicant's claim that the Pakistan Proceedings interfere with its right to (cause KESP) appoint directors to the KEL board and the Respondents' claim that the Applicant is itself in breach of contract

189. The Respondents argued that the Applicant was not entitled to rely in its claim for injunctive relief on its claim that the Respondents were in breach of 5.7 of the SHA because it would then be seeking to take advantage of its own wrong, since, so the Respondent claimed, the Applicant was also in breach of clause 9.4 of the SHA (as it had claimed in the Pakistan Proceedings).

190. The Applicant submitted that the Respondents' claim that it was in breach of clause 9.4 did not affect its claim to injunctive relief. First, the Respondents had not argued that the Applicant's alleged breach prevented it from relying on clause 25.2. The Applicant's case in reliance on clause 25.2 was based on its claim that Pakistan Proceedings litigated and related to a dispute (or disputes) covered by the clause and not on the Respondents' alleged breach of clause 5.7. Clause 25.2 covered a dispute between the Applicant and the Respondents concerning the exercise of the Applicant's rights under the SHA including its right to cause KESP to appoint directors to the KEL board. The Pakistan Proceedings, the Applicant said, had resulted in a breach of the Respondents' obligations under clause 5.7 and the Respondents' flagrant disregard of their contractual obligations but that breach was not relied on for the purpose of showing that clause 25.2 was engaged and covered the Pakistan Proceedings.

191. The Applicant argued that if the Respondents wished to rely on a breach of the SHA by the Applicant, then they needed to bring a claim for breach of clause 9.4 in the proper jurisdiction. The Respondents were seeking to prevent the exercise of rights under clause 5.7 of the SHA by bringing the Pakistan Proceedings in breach of contract and then to respond to an application seeking relief for that breach by arguing that there had been a breach of clause 9.4, the very claim that they had not been prepared to bring in the proper jurisdiction.

192. I agree with the Applicant. The Applicant relied on the subject matter of the SHA – what it covered including its rights to appoint directors to the KEL board – and not on a breach of clause 5.7 the SHA. There is a dispute between the Respondents and the Applicant as to whether the Respondents have breached its obligations under clause 5.7 and whether the Applicant has breached its obligations under clause 9.4. That dispute is covered by clause 25.2 and must be

litigated in England or the Cayman Islands. Had the Respondents relied on and sought to establish the Applicant's breach of clause 9.4 as disentitling it to rely on clause 25.2, then they would have a basis for challenging the Applicant's application for an injunction but would need to do so in proceedings in one of the chosen fora (and the mere existence of a breach of another provision of the SHA would not necessarily have prevented the Applicant from relying on the exclusive jurisdiction clause in the SHA).

Strong reasons for refusing to grant an injunction

193. I now turn to consider whether the Respondents have established that, despite the Pakistan Proceedings having engaged, and, in the respects I have described, giving rise to a breach of clause 25.2 of the SHA, there are strong reasons for refusing to grant an injunction. I shall review each of the Respondents' arguments in turn.

Submission

194. As I have noted, both parties accepted that this was an issue governed by Cayman and not Pakistan law. Accordingly, the expert evidence on the law regarding submission to jurisdiction in Pakistan was not determinative or directly relevant. It can, however, assist, for the purpose of the Cayman law analysis, in assessing the significance and effect of steps taken by the Applicant in the Pakistan Proceedings.

195. There was no dispute that the test set out by Lord Justice Males in *SAS Institute Inc.* at [114] (set out above) was the right one. The question is whether the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction. If it had done so, this would be a strong reason for refusing injunctive relief albeit not a decisive one.

196. In the Judgment, I concluded that the Applicant had only been doing what it could to resist the Pakistan Court's assumption of jurisdiction and had not conducted itself in a manner that was inconsistent with the contractual forum being the sole forum for the resolution of the parties' dispute.

197. The Applicant has made two applications in the Pakistan Proceedings, the Section 4 Application and the Order 39 Application.

198. In the Section 4 Application, the Applicant asserted that the Suit was "*not maintainable as it essentially [emanated] from a subject matter which if at all should have been referred for foreign arbitration between [the Respondents and the Applicant].*" The Section 4 Application referred to, and relied on, the old form of clause 25 and claimed that this clause meant that the Respondents and the Applicant were "*bound to resolve any disputes exclusively in terms of clause 25*." In the prayer, the Applicant sought an order that the Pakistan Court "*vacate the [Pakistan Interim Injunction] and stay [the Suit] and refer the matter for adjudication in accordance with clause .. 25 of the [SHA]*."

199. The Order 39 Application also starts by asserting that the Suit was "*not maintainable as it essentially [emanated] from a subject matter which if at all should have been referred for foreign arbitration between [the Respondents and the Applicant]"* and that "*the entire dispute [in the Suit] is governed by English law [and the SHA] and [that the Respondents and the Applicant] are "bound to resolve any disputes exclusively in terms of clause 25*." The Applicant then complains that, as a result of the Pakistan Interim Injunction, its appointment (via KESP) of directors to the KEL board has been put on hold so that the board is functioning without the proportionate representation envisaged by the SHA and asserts that it is entitled to make these appointments under the SHA and that, if the Respondents object to the Applicant doing so, they are bound to refer the matter for adjudication in accordance with clause 25 of the SHA. The Applicant claims at [6] that "*In view of the above, it is submitted that the Pakistan Interim Injunction may be recalled/modified thus enabling the [Applicant] and [KESP] to exercise its lawful right of nominating the proposed replacements of the board of [KEL].*" In [7], the Applicant avers that unless the Order 39 Applications was allowed and the Pakistan Interim Injunction recalled/modified and the Suit stayed and referred to adjudication in accordance with clause 25 of the SHA, the Applicant will be seriously prejudiced. In the prayer, the Applicant then states that it is prayed that "*the [Pakistan Court] be pleased to grant [the Order 39 Application] and recall/modify [the Pakistan Interim Injunction] and allow nominations of the Directors on the [KEL board] in proportion to the shareholding of [KESP].*"

200. The focus of the Respondent's case related to the Order 39 Application. The Order 39 Application, they said, went further than the Section 4 Application, which was the application by which the Applicant sought to challenge the Pakistan Court's jurisdiction based on the arbitration clause in the SHA. The Order 39 Application sought positive relief in relation to the appointment of the KEL directors and involved a step in the Pakistan Proceedings which went beyond a challenge to that court's jurisdiction. Mr Shaukat had recognised that the Order 39 Application

could be seen as having involved such a step and gone too far and his attempt to explain away the problem for the Applicant should not be accepted.

201. The Applicant however maintained that the Order 39 Application was in substance only contesting the jurisdiction of the Pakistan Court, in reliance on the provisions of the SHA, and that Mr Shaukat had properly concluded that the drafting of the application, including the wide wording in the prayer, was entirely consistent with this view. The Applicant submitted that this was the correct interpretation and analysis of the Order 39 Application which the Court should follow.

202. I accept the Applicant's submissions on this issue. In my view, the Applicant has not taken a step in the Pakistan Proceedings which goes beyond a challenge to that court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora being the sole fora for the resolution of the dispute with the Respondents.

203. Mr Shaukat helpfully summarised in the Shaukat Report (at [99]) the nature of an application under Order 39 rule 4:

> *"Rule 4 of Order 39 of the Civil Code permits a court to "discharge, vary or set aside" an injunctive order and an application under this rule essentially allows the applicant an opportunity to approach the court and make submissions against an injunction already granted. In the case where only an ad-interim injunction has been granted the aggrieved party is in any case given the opportunity to file a reply and be heard by the court. Rule 4 of Order 39 of the Civil Code is ordinarily meant to apply to a situation where the aggrieved party does not have the opportunity to make such submissions. This is consistent with the caselaw on this provision which sees Rule 4 of Order 39 of the Civil Code as a means of apprising the court of altered circumstances after the grant of an injunction which merits the vacation or variation of the injunction. In the circumstances where the interim injunction application of the [Respondents] is pending in the Suit, the High Court will not be making any separate order on the Injunction Removal Application and will simply proceed to decide the interim injunction application. That being said, applications under Rule 4 of Order 39 of the Civil Code are often filed for strategic reasons in order to expedite the hearing of an interim injunction application. They allow litigants an opportunity to obtain a preliminary order on the application and create pressure on the party seeking the injunction. To this extent the Injunction Removal Application appears to have served its purpose."*

204. The Order 39, rule 4 jurisdiction relates to applications to discharge, vary or set aside an injunction. The application focuses on the injunctive relief granted by the court. A person who is made a party to proceedings in Pakistan in breach of an exclusive jurisdiction or arbitration clause and who is then made subject to an injunction, and who wishes to have the proceedings stayed and the clause enforced, is able and may need both to challenge the main proceedings and separately the injunctive relief granted pursuant to it. In this case, it appears to me, having regard

to the drafting and terms of the Order 39 Application and all the expert evidence, that the Applicant was using the Order 39 Application to challenge the granting of the injunction based on the Respondents' obligation to submit disputes to arbitration and the references to the Pakistan Court permitting the appointment of the Applicant's nominees as KEL directors to proceed should be seen as relief that would flow as a consequence of the application being successful and of a stay being granted and not as substantive relief sought to enforce the Applicant's right under the SHA to appoint the KEL directors. The drafting of the Order 39 Application, taken as a whole, makes it clear that the Applicant relies on the arbitration clause and wishes to have the dispute with the Respondents submitted to arbitration in accordance with the clause. It does not show that the Applicant wished (and had elected) to have its substantive rights and claims in relation to the appointment of the KEL directors be adjudicated and dealt with by the Pakistan Court.

205. Mr Shaukat had noted that there was some ambiguity in the drafting of the prayer and addressed the question of whether the references to the Pakistan Court allowing the appointment of the KEL directors to proceed should be understood as a statement that the Applicant sought relief based on clause 25 discharging the injunction so as to allow the appointment to proceed or relief adjudicating on, and enforcing, the Applicant's right to proceed with the appointment. He focused on the underlined words: "*the [Pakistan Court] be pleased to grant [the Order 39 Application] and recall/modify [the Pakistan Interim Injunction] and allow nominations of the Directors on the [KEL board] in proportion to the shareholding of [KESP]*" and said as follows at [99] of the Shaukat Report:

> "*90. This is problematic as the prayer can be interpreted in two ways. Under the first interpretation the emphasized portion can be read as a consequence of the recall/modification that has been sought whereby the nominations would be allowed as a result of the recall/modification. Under the second interpretation the emphasized portion can be read as a specific request to the High Court to make a direction positively allowing the nominations to be made to the board of KEL. Such an interpretation may entail a substantive determination of whether the nomination is allowed. The prayer in the Injunction Removal Application could have been worded so as to avoid this confusion, however, the current wording creates doubt as to the exact relief the Applicant is seeking and if such relief is a positive direction from the High Court, the seeking of such direction can be said to be a step in the proceedings.*"

206. So, Mr Shaukat recognised that there was some uncertainty but accepted at [97] of the Shaukat Report that "*The premise of both applications is the same, i.e., the subject matter of the Pakistan Proceedings ought to have been referred to foreign arbitration in accordance with Clause 25 of the SHA and that the [Respondents] have misled the High Court in obtaining the injunctive order.*" Furthermore, in his lengthy and extensive cross-examination on this issue, Mr Shaukat

made it clear that in his view, when the Order 39 Application was viewed as a whole, it could not be understood as seeking substantive relief as to the Applicant's rights to appoint the KEL directors or as being inconsistent with, or going beyond, the Applicant's application for a stay of the Pakistan Proceedings in reliance on clause 25. Because his cross-examination on this topic was so lengthy, I have included in an appendix to this judgment an extract from the hearing transcript which sets out Mr Shaukat's evidence in full, with key passages underlined. But the following extracts summarises his views:

> *"A. it's not just the prayer, it is the entire application, and the overall facts and circumstances as to what steps have been taken by the party in the entire proceedings and not just in [the Order 39 Application] so the judges would be considering, you know, all of the applications and the responses that have been filed, what sort of adjournments have been sought and whether there is a written statement that has been filed or not, so it will be the, you know, the entire totality of all of the steps that the party has taken and not just the particular prayer in one application in order to decide what was the real intention, so in that way, of course, the statements made by the Applicant in the application with respect to the facts and what the parties had agreed in the SHA and the exclusive jurisdiction clause or the arbitration clause because they had actually recently referred to the unamended Section 4 at that point in time, so the judge would have to consider all that to come to an opinion as to whether or not he should say that whether a step has been taken or not.*
>
> *Q. And when looking at trying to work out what the relief is that [the Applicant] is seeking at page 526 of the bundle, ... in your paragraph 91, having averted to the difficulties that you've discussed, you say that the intention - the possible – the ambiguity is like resolved in favour of your first possible construction. In other words, that these words are to be read as a consequence of the recall/modification that is sought....*
>
> *A. Well, you see, the step in the proceedings for me, the judgment is all about are they doing the bare minimum that they should be doing in order to protect their interest and the intention of the party is always to -- that the matter may be referred to the foreign court, so when I was -- so after highlighting the fact that this particular provision is problematic, but when I look at the applications and the content of the applications, the stress has always been by the Applicant that they were - that the matter might be referred to the foreign court. It could be - I could see as, you know, in my own personal opinion that when I'm reading the application, there was a very clear intention of not having these proceedings carried out over here, but rather to safeguard [their] interests and to request the Court to refer the matter to the foreign court. So in my personal judgment, I was leaning in favour of the fact that this is - should not be taken as a step in the proceedings, but the learned judge would be absolutely free in deciding either way.*
>
> *……*
>
> *Q. Yes. And can I just ask you to, further up the document, if you look at page 525, at paragraph 4, it talks about the nominations of the individuals that have been put on*

> *hold, it goes on to say the board is functioning without proportionate representation and the mandatory requirement of a woman director cannot be made either, and then in paragraph 5 it talks about Defendant No. 1 being entitled to nominate specifically agreed upon representation. Aren't those facts that it's wanting to put before the Court in favour of its full prayer for relief, in other words, it's not confined itself simply to narrating the relevant arbitration clause, it is trying to ask the Court to take notice of what it's done in relation to nominations so that it can grant relief in that respect as well?*
>
> *A. Well, this is all factual statements in support of the application. I don't know how these could be read as statements which would lead to the Court or would give the Court or which would suggest that the party is interested in having the matter adjudicated in Pakistan…"*

207. In my view, Mr Shaukat's analysis is cogent and reasonable and consistent with my own assessment and analysis of the impact and effect of the steps taken by the Applicant in the Pakistan Proceedings in general and of the Order 39 Application in particular.

The risk of a multiplicity of proceedings and of inconsistent findings

208. The Respondent submitted that, assuming that an injunction was not granted restraining the Pakistan Proceedings as a whole, there would be a multiplicity of proceedings and an attendant risk of inconsistent findings so 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, and that tribunal was the Pakistan Court.

209. As Mr Rabinowitz said in *Team Y&R* at [90]:

> *"The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions." It is clear from Lord Bingham's consideration of the earlier authorities, as well as the approach taken by their Lordships in Donohue itself, that these matters might, but need not, constitute a strong reason for not granting injunction..."*

210. I have decided that, subject to my review of the Respondents' claims, there are no strong reasons for refusing to grant injunctive relief, the Respondents are in breach of clause 25.2 of the SHA as a result of having commenced and continued the Pakistan Proceedings against the Applicant, Alvarez and Marsal, KESP and KEL and therefore that the Applicant is entitled to a permanent injunction to restrain the Respondents from continuing the Pakistan Proceedings against those parties. I have also decided that the Respondents are not in breach of clause 25.2 of the SHA as

a result of having commenced and continued the Pakistan Proceedings against the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP to the extent that the Respondents seek to require those parties to exercise their duties or powers in relation to KEL provided that the Respondents do not seek to challenge in the Pakistan Court (or seek relief that requires these parties to challenge) the steps taken by the Applicant as a KESP shareholder. It is in my view permissible for the Respondents to seek to enforce, to the extent that they have standing under Pakistan law and procedure to do so, the regulation of KEL by the Pakistan authorities and the enforcement by the Pakistan Government of KESP's obligations under the SPA, since compliance by KEL with its Pakistan law regulatory obligations and compliance by KESP with its own contractual obligations under the SPA are not matters covered by the SHA and do not involve a dispute between the Respondents and the Applicant arising out of, or in connection with, the SHA. But the proceedings in Pakistan commenced by the Respondents must not seek to challenge or seek relief that will interfere with the actions taken by the Applicant as KESP shareholders.

211. If, under the SPA or applicable Pakistan law, *KESP* is at least arguably prohibited from appointing (or *KEL* is unable to permit the appointment of) new directors to the KEL board without the approval of the Privatisation Ministry or without regulatory approvals or disclosures, then any dispute as to these matters, involving the interpretation of the SPA (governed by Pakistan law) and of the applicable local laws and regulations, can and should be dealt with by the Pakistan Court, which is best placed to do so.

212. There is, because of the corporate structure of the KESP-KEL group of companies, a dividing line at the KESP level. Above KESP is the territory occupied by the shareholders of KESP who have set out and regulated their rights and relationship in that capacity in the SHA, and KESP has agreed to act in accordance with the SHA. At and below the level of KESP is KEL and KESP's position as shareholder in KEL. KESP is bound to act in accordance with its obligations under the SPA (and its obligations under the SHA cannot relieve it of, or qualify its obligations under, the SPA) and KESP and KEL are bound to act in accordance with applicable Pakistan law. I see no serious difficulty in issues (disputes) relating to the rights and obligations (largely governed by English law although potentially affected by Cayman law) of the shareholders in KESP (a Cayman company) and of KESP's obligations to its shareholders (issues above the line) being determined by this Court/the English Court and issues (disputes) relating to the rights and obligations (governed by Pakistan law) of the shareholders in KEL and of KEL to its shareholders and the Pakistan authorities being determined by the Pakistan Court. The dispute regarding the proposed appointment of new directors to the KEL board raises separate issues (governed by different laws and involving different parties) at the two levels, namely as to the Applicant's right

as against the Respondents (and KESP) to make the appointment (in fact to cause KESP to make the appointments) and KESP's (and KEL's) right and obligations *as against the Privatisation Ministry (as KEL shareholder) and against the Energy Ministry, NEPRA and the SECP as regulators* to make and permit the appointment (without consent and approvals).

213. The different issues and disputes involving all the parties could be adjudicated by one court (namely the Pakistan Court) but it seems to me that there is no sufficiently substantial benefit to be derived from one court doing so or a need for one court to do so that would justify overriding the Applicant's contractual right to have the disputes relating to the SHA adjudicated in the agreed fora. In this case, as I have noted, there are distinct and separate issues governed by different agreements and different laws that arise in relation to the exercise of rights by, and changes of Control in respect of, the KESP shareholders which are governed by the SHA and in relation to the extent of KESP's obligations and the Privatisation Ministry's rights under the SPA (triggered by a change of control of any of KESP's shareholders or to appoint directors of KEL) – and also in relation to the extent of the obligations of KEL (and KESP) to regulators flowing from the appointment of new directors or a change of control of one of KESP's shareholders. Not only can these issues be dealt with separately so that there would be limited benefits to be derived from permitting one-stop shopping but there would be advantages in having the Cayman/English issues dealt with by this Court/the English Court and the Pakistan law issues dealt with by the Pakistan Court. The expert evidence adduced on this application suggests that there may be differences of approach or substance between the two legal systems so that such separate adjudication would be safer and sounder (and would avoid what also appears from the expert evidence to be a potential issue, namely of the local policy issues and importance of KEL affecting and possibly infecting the analysis of the position of the KESP shareholders above the line). This case is distinguishable from *Team Y&R* where Mr Rabinowitz found (at [113(2)] that there would a risk of duplication and conflicting decisions that otherwise might be avoided and *Donohue* in which the House of Lords found that core questions of fact would need to be decided by both the English and New York courts even if the injunction was granted (it was found that it would be necessary for any court determining the truth or falsity of the allegations against the defendant and his alleged co-conspirators to form a judgment on their honesty and motives and therefore there was a real risk of inconsistent judgments). The evidence also indicates that there may be material delays in Pakistan that will be prejudicial to the Applicant.

Close connection between the disputes and Pakistan

214. The Respondents argued that that the fundamental issue in the Pakistan Proceedings concerned the control and ownership of KEL and that the centre of gravity of the dispute between the Respondents and the Applicant was in Pakistan.

215. As will be clear from what I have already said, I disagree. I accept, as the Respondent says, that KEL is a company of public importance in Pakistan in which the Government of Pakistan is a shareholder and which is subject to regulation by the energy regulator, NEPRA, as well as to the control of the SECP. But the Pakistan Proceedings insofar as they relate to the Applicant are first and foremost about the rights and obligations of the shareholders of KESP. Of course, the dispute affects KEL because the Applicant is seeking to exercise its rights as against the Respondents and KESP to cause KESP to appoint its nominees to the KEL board. But as between the Applicant and the Respondent (and KESP) this is a matter regulated by the SHA. The position of KEL is subject to the separate regimes of the SPA and the regulatory law and rules of Pakistan.

216. The interests and position of the Pakistan authorities will be protected and not prejudiced by the granting of the injunction on the terms I propose. The Privatisation Ministry will be able to exercise its rights as shareholder in KEL and the Energy Ministry, NEPRA and the SECP will be able to maintain and perform their regulatory functions in relation to KEL and KESP. It will be a matter for them to decide whether to resist the Applicant's applications for relief against them requiring them to exercise their rights and perform those duties. It would certainly be wrong for this Court to seek to interfere with or fetter the actions of the Pakistan authorities by reason of the exclusive jurisdiction clause in the SHA which does not affect them. Even after the grant of the permanent injunction I propose to make, it will be open to the Government of Pakistan to bring any proceedings that it considers appropriate under the SPA, and it remains open to the other regulators to take whatever action they consider to be appropriate as regulators of KEL. The injunction will not in any material way cut cross those important public policy matters which the Pakistan authorities are bound to take very seriously.

217. It also seems to me that the Respondents are not prejudiced by the grant of the injunction on the terms I propose. As I said during oral argument during a discussion with Mr Chapman, if the Respondents have serious concerns regarding the impact of the Transaction (and the related transfer of limited partnership interests) and the apparent acquisition of control of the Applicant by Mr Chishty, and consider that the Applicant is in breach of clause 9.4 of the SHA and precluded from exercising its rights to procure the appointment of directors to the KEL board,

they have adequate remedies available to them because they can seek (or could have sought) relief in England or Cayman including injunctive relief .

Delay

218. I remain of the view that the timing of the application for injunctive relief in this jurisdiction does not constitute delay or otherwise constitute a strong reason justifying a refusal to grant the injunction.

219. As I said at [94] of the Judgment:

> *"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."*

220. There has been no new evidence and nothing emerging from the expert evidence which requires me to change that view.

221. The Respondents acknowledged that the delay between the Applicant making the Applicant's Filings and issuing the Summons was under one month and not a lengthy period. I do not regard the fact that the Summons was only issued, and injunctive relief sought, after the Pakistan Interim Injunction was issued and after the Applicant had sought to challenge the Pakistan Court's jurisdiction based on clause 25.2 of the SHA as constituting relevant or impermissible delay.

222. As Mr Rabinowitz noted in *Team Y&R* at [109] (albeit on different facts of course):

> *"This is not therefore a situation such as for example that in Ecobank where no application for anti-suit relief was made until after judgment was given in the foreign (Togo) court. Nor is it comparable with the position in ADM Asia Pacific Trading where ADM had been aware of the foreign (Indonesian) proceedings for over two years and indeed participated in those proceedings for over a year before making the application for anti-suit relief."*

The Applicant's case based on the claim that the Pakistan Proceedings are vexatious and oppressive

223. As I have noted, the Applicant argued in oral submissions that the Pakistan Proceedings were vexatious or oppressive in the sense described by Lawrence Collins LJ in *Elektrim*. The Applicant

submitted that the Pakistan Proceedings were clearly weak (on the balance of the expert evidence, other than a claim under the SHA as a matter of Pakistan law the Respondents did not have standing to bring any of the claims made) 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.

224. It is unsatisfactory that the Applicant failed to renew and spell out in its written submissions that it was making a claim on this basis. As a result, the claim did not receive a full and proper review. The Respondents did not even deal with it in their written submissions although, as I understood it, they did not formally object to the Applicant relying on this alternative claim and jurisdiction.

225. There is of course a jurisdiction to grant an anti-suit injunction even in a single-forum case (no substantive proceedings have been commenced in the Cayman Islands – see Raphael at [5.26] and [5.27]) and there is no exclusive jurisdiction clause that applies to the relevant dispute. Where the Court has jurisdiction over a person who has commenced proceedings against a party in a foreign court, then the Court may issue an injunction to restrain the person from continuing with or commencing such foreign proceedings and the general basis upon which the Court will do so will be that it is inequitable for the respondent so to act. But the power to order an injunction is exercised with great caution. The Cayman Islands will need to be the natural forum for the resolution of the dispute (the Court will need to have a sufficient interest in, or connection with, the matter in question to justify intervention), the defendant's conduct should be unconscionable and analogous to an abuse of process, and the granting of an injunction needs to be required in the interests of justice (there will be such unconscionable conduct if the pursuit of foreign proceedings is vexatious or oppressive or interfere with the due process of this Court).

226. In exercising its jurisdiction to grant an injunction, regard must be had to comity and so the jurisdiction is one which, as I have said, must be exercised with caution. See, for example, *Cadre v Astra Asigurari* [2006] 1 Lloyd's Rep 560 which is cited in Raphael in footnote 20 to [5.07]. In that paragraph of Raphael, it is said that foreign proceedings can be vexatious or oppressive due to their nature or consequences and that duplicative foreign proceedings have been restrained where a weak appeal, which was likely to be expensive and protracted, was brought against a first instance decision to stay the foreign proceedings and England was the natural forum, where the aim of the foreign proceedings was to pre-empt proceedings in the natural forum and where the foreign proceedings were viewed as an illegitimate attempt to hijack the English court's determination of questions going to its own jurisdiction.

227. I have decided that the Pakistan Proceedings as they relate to the Applicant, Alvarez and Marsal, KESP and KEL are subject to the exclusive jurisdiction clause in the SHA and that injunctive relief should be granted to prevent the Respondents from continuing those proceedings. I therefore do not need to decide whether, had I found that clause 25.2 did not apply to the proceedings in respect of these parties, an injunction should have been granted on the alternative vexatious and oppressive ground.

228. As regards the Pakistan Proceedings as they relate to the Pakistan authorities, I have already decided that there are strong reasons, based on the significant connections of this aspect of the Pakistan Proceedings with local public interest and public policy as well as the involvement of entities of the Pakistan state (which may give rise to questions of public law), for leaving it to the Pakistan Court to decide on what is to be done with the claims and the Pakistan authorities to deal with the relief sought against them. While accepting that there is a strong argument that these claims are in substance an indirect means of litigating the dispute with the Applicant regarding the appointment of directors to the KEL board, and while there is no need for the Applicant to establish *in personam* jurisdiction over the Pakistan authorities, I am not persuaded that this view of the facts, or these concerns, are sufficient to justify the grant of an anti-suit injunction to prohibit the Respondents from pursuing their claims for relief against the Pakistan authorities. On the basis that these claims are not subject to clause 25.2, I do not consider that the Cayman Islands is the natural forum for adjudicating the dispute and the need for caution and to avoid overreach justifies a refusal to grant anti-suit injunctive relief in the circumstances of this case.

Preparing the draft order and consequential matters

229. I have not sought to review and amend the draft order filed by the Applicant but invite the parties to discuss and seek to agree the form of order to give effect to this judgment and also to deal with costs and any other consequential matters (which will include the Applicant's claim for damages which, as the Respondents submitted in their written submissions are best dealt with after the handing down of this judgment, and will require further submissions and possibly a further hearing). If the parties are unable to do so, they should file their respective proposed draft orders and brief submissions so that I can deal with settling the order on the papers. The parties should

provide the draft order or their respective proposed drafts and submissions within 14 days from the date on which this judgment is handed down.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
20 July 2023

Appendix

Extract from the cross-examination of Mr Shaukat on the submission to jurisdiction issue

Q. *And am I right in thinking that an application under Order 39, Rule 4 doesn't have to be made on the basis of a jurisdiction clause or an arbitration clause, it's any application by which a party is seeking to discharge or vary an interim injunction?*

A. *Yes.*

Q. *Because there was another application filed at the same time, wasn't there? ... an application by [the Applicant] under Section 4 of the recognition of enforcement arbitration awards.*

A. *Yes.*

Q. *And that application was based on Section 25 of the SHA and that seeks ... [and] prays that the [Pakistan] Court may be pleased to grant this application and vacate the interim order and stay proceedings in the title suit and refer the matter to adjudication in accordance with the clause. So that's the relief that you saw premised on the arbitration clause as it was put at the time, isn't it?*

A. *Yes.*

Q. *And then the application, the [Order 39 Application], presumably that is not made simply to be duplicative of the arbitration application, it's made because you've then got the ability to be slightly more flexibility when you get to Court in the way that you said?*

A. *Well, the purpose of [the Order 39 Application] is to get an earlier hearing from the Court to try and modify the interim order which has been passed, so it's your first try because otherwise once the [applicant] has been put on notice, then the procedures and the formalities take a long time, so it's that one shot that you have to seek the indulgence of the Court and try and seek modification of the order if possible. So now when the [applicant] has already notice on there and the parties - so to me, Order 39/4 now will - is not going to serve any new purpose, it's just going to be heard together with 39/1-2 filed by the plaintiffs and it will be disposed of together.*

Q. *I see. And so if - just so I understand what you're saying about the process, when you say Order 39, Rule 4 is your first shot or your best chance of getting your foot in the door or however you put it, does that mean that that is an application that would be heard before the [Section 4 Application] or would they be heard at the same time?*

A. *Well, they could be heard at the same time. All applications which are filed depending on the timing, they are put up before the Court, and depending on which one was put up first, we can look at the timing, but if they're both there, then once the case is fixed, then both the applications could also be heard simultaneously. It could be one, it could be how the lawyer or the counsel puts them up, and ... So yes, they could be heard together, as well it could be that the first one would get listed*

first and the other one was filed subsequently after the hearing has been conducted, but on the same date, it's all possible like that.

Q. *... so if you wanted to get back before the Court - well, put it like this. Normally a respondent to an interim injunction has got the right to be heard at some point anyway because the application comes back to the Court even if they don't make any applications; that's right, isn't it?*

A. *Yes. But the chances of 39/1-2 getting heard .. are slim as opposed to 39/4.*

Q. *.. If you make your 39/4 application, you've got some leverage to get things heard more quickly?*

A. *That's right.*

Q. *And presumably [it is] the same if you make an application under Section 4 of the Arbitration Act, you put your application in, you can use that to move things along as well?*

A. *Yes. But over there, the focus is that, you know, whether the arbitration agreement is in place or not and the judge would normally [require notice be given to] and would like to hear from the other party as well as to [whether] the arbitration agreement is there or not and what their comments are, so 39/4 is your initial strike to modify the interim order which has been passed and, of course, the .... Section 4 application is where the judge would like to hear the other side as well and to see their comments as to whether there is a valid and binding arbitration agreement in place and, therefore, the proceedings should be stayed or not. So ... I guess that the counsel had decided to file both the applications around the same time.*

Q. *And as you said, the [Order 39 Application] allows you to be a bit more flexible noticing the difference in relief, that the Section 4 application just asks for a vacation and the Section 39 application asks for - it's got the recall or modify language?*

A. *39/4, you do have an advantage to set your case out in an application as well, so the judge again is not – he already has the case of the plaintiff in 39/1-2 and then 39/4 comes up, so you don't have to wait for rejoinders and he's able to modify the order if he's convinced with 39/4 on the first date of hearing as well. So yeah, I mean it could happen under 39/1-2 as well, but normally judges are keen on just giving orders and asking the parties to file affidavits and rejoinders.*

Q. *... So doing the 39/4 gives you a chance to have your say on the merits at this stage?*

A. *Yes. There is a chance to modify the order, that's your route to seek an urgent hearing, to seek a modification of the interim order.*

Q. *Yes. And then if we come to ... the second part of the prayer for relief refers, it says and allow nominations of directors on the board of KEL in proportion to the shareholding of KESP, and this is something that you addressed directly in your report at paragraph 90 and 91.... These are the words that you described as problematic, I think.*

A. *Yes.*

Q. And you identified two possible interpretations of paragraph 90. The first is that those words are just a consequence, you say, of the relief sought, and the second is that they can be read as a specific request to the [Pakistan} Court to make a positive direction, and you say entirely fairly that this could have been worded better to avoid confusion because the current wording creates some doubt as to the exact relief being sought.

A. Yes.

Q. And then you say in paragraph 91 you think a Pakistan Court would in seeking to work out which to follow would place paramount importance on the intention of the parties?

A. That is the test that the judge will apply to the situation.

Q. ..... It's just the [intention of the] party who files the application?

A. That's correct.

Q. And where do you say that documentation is to be derived from? Is it from the terms of the document alone?

A. Well, this is again the Court would be looking at the facts and circumstances and ... whether the prayer is something which the Court would feel that the intention of the party is for this Court to actually decide the entire issue and that whether - or is it that they will just do whatever is necessary, but the main purpose of making these applications before the Court was to - just to take the minimum, the bare minimum what they needed to do to protect themselves, but actually, of course, request the Court to stay the proceedings and refer the matter to the Court which has been granted jurisdiction. Now, it's not -- that's why I highlighted the provision. It's not easy for me to say with certainty as to what the judges would decide under the circumstances, it could go either way, but because of the fact that there has been this additional language that could go against the applicant as well, but at the same time, the other judge could consider that this is just a natural suggestion or prayer which is a consequence of, you know, recalling of the order or with some modification of the fact that the intention of the party has always been to - that the matter may be referred to the Court which has been granted exclusive jurisdiction. It's not - for me it wasn't easy to say that the Court will decide one way or the other, and that is why I highlighted that challenge that I was facing when I was looking at it.

……

[The Pakistan Court] will have to see the entire application for that; right? What is the - it's not just the prayer, it is the entire application, and the overall facts and circumstances as to what steps have been taken by the party in the entire proceedings and not just in [the Order 39 Application] so the judges would be considering, you know, all of the applications and the responses that have been filed, what sort of adjournments have been sought and whether there is a written statement that has been filed or not, so it will be the, you know, the entire totality of all of the steps that the party has taken and not just the particular prayer in one application

in order to decide what was the real intention, so in that way, of course, the statements made by the Applicant in the application with respect to the facts and what the parties had agreed in the SHA and the exclusive jurisdiction clause or the arbitration clause because they had actually recently referred to the unamended Section 4 at that point in time, so the judge would have to consider all that to come to an opinion as to whether or not he should say that whether a step has been taken or not.

Q. *And when looking at trying to work out what the relief is that [the Applicant] is seeking at page 526 of the bundle, ... in your paragraph 91, having averted to the difficulties that you've discussed, you say that the intention - the possible – the ambiguity is like resolved in favour of your first possible construction. In other words, that these words are to be read as a consequence of the recall/modification that is sought....*

A. *Well, you see, the step in the proceedings for me, the judgment is all about are they doing the bare minimum that they should be doing in order to protect their interest and the intention of the party is always to -- that the matter may be referred to the foreign court, so when I was -- so after highlighting the fact that this particular provision is problematic, but when I look at the applications and the content of the applications, the stress has always been by the Applicant that they were - that the matter might be referred to the foreign court. It could be - I could see as, you know, in my own personal opinion that when I'm reading the application, there was a very clear intention of not having these proceedings carried out over here, but rather to safeguard [their] interests and to request the Court to refer the matter to the foreign court. So in my personal judgment, I was leaning in favour of the fact that this is - should not be taken as a step in the proceedings, but the learned judge would be absolutely free in deciding either way.*

……

Q. *Yes. And can I just ask you to, further up the document, if you look at page 525, at paragraph 4, it talks about the nominations of the individuals that have been put on hold, it goes on to say the board is functioning without proportionate representation and the mandatory requirement of a woman director cannot be made either, and then in paragraph 5 it talks about Defendant No. 1 being entitled to nominate specifically agreed upon representation. Aren't those facts that it's wanting to put before the Court in favour of its full prayer for relief, in other words, it's not confined itself simply to narrating the relevant arbitration clause, it is trying to ask the Court to take notice of what it's done in relation to nominations so that it can grant relief in that respect as well?*

A. *Well, this is all factual statements in support of the application. I don't know how these could be read as statements which would lead to the Court or would give the Court or which would suggest that the party is interested in having the matter adjudicated in Pakistan. I mean, these are just in support of the application. If you look at the application and further down in the same paragraph, the Applicant is also saying that the plaintiffs cannot avoid or bypass the arbitration forum by joining unnecessary parties and giving semblance of this (indiscernible) when it has in fact nothing to do with the present dispute, and the fact that they've always referred to that the matter should be dealt with in accordance with Clause 25 has been, you know, said time and again in all of the applications, not only in the Section 4 Application, but also in [the Order 39 Application] so all of this would be seen...So*

I am saying that the application, yes, you are right in highlighting some of the provisions of our appointment of the directors, but at the same time, the Court will be looking into the entire application which makes references to Clause 25 of the agreement and the fact that the dispute needs to be resolved in accordance with Clause 25."