IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 34

Originating Application No 17 of 2024

Between

Frontier Holdings Limited

… *Applicant*

And

Petroleum Exploration
(Private) Limited

… *Respondent*

JUDGMENT

[Arbitration — Arbitral tribunal — Jurisdiction]

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Frontier Holdings Ltd
v
Petroleum Exploration (Pvt) Ltd

[2024] SGHC(I) 34

Singapore International Commercial Court — Originating Application No 17 of 2024
Thomas Bathurst IJ
17 September 2024

30 December 2024 Judgment reserved.

Thomas Bathurst IJ:

Introduction

1 By SIC/OA 17/2024 ("OA 17"), Frontier Holdings Limited ("FHL") seeks an order setting aside a ruling on jurisdiction in International Chamber of Commerce ("ICC") Case 27567/AB/CPB between FHL as claimant and Petroleum Exploration (Private) Limited, Pakistan ("PEL") as respondent (the "Jurisdictional Ruling"). In the Jurisdictional Ruling, the majority of the tribunal concluded that it had no jurisdiction to resolve the dispute before it. In these proceedings, FHL also seeks ancillary orders dealing with the further conduct of the arbitration in the event that its application to set aside the Jurisdictional Ruling is successful.

Facts

The parties

2 FHL is a company incorporated under the laws of Bermuda. FHL has a branch office in the Republic of Pakistan ("Pakistan"). FHL is involved in the exploration and production of oil and gas in Pakistan.[1]

3 PEL is a company incorporated under the laws of Pakistan. PEL, like FHL, is in the business of exploration and production of oil and gas in Pakistan. PEL's concession portfolio includes fourteen concessions, eight development and production leases, and one mining lease.[2]

Background to the dispute

4 On 5 January 2006, the President of Pakistan (the "President") granted PEL exploration licences in respect of two areas, Block No 2468-5 (the "Badin South Block") and Block No 2468-6 (the "Badin North Block") (collectively, the "Blocks").[3]

5 On the same day, the President and PEL concluded Petroleum Concession Agreements ("PCAs") in respect of each block. By the PCAs, PEL was awarded a 100% working interest in each block and thereby became a Working Interest Owner ("WIO") in respect of each block.[4]

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1 First Affidavit of Evidence-in-Chief of Muhammad Nadeem Farooq dated 19 April 2024 ("1MNF") at para 1.

2 Affidavit of Evidence-in-Chief of Bilal Kausar dated 15 July 2024 ("BK") at para 4.

3 1MNF at para 13; BK at para 39.

4 1MNF at para 14; BK at para 40.

6 The relevant provisions in the PCA for each block are identical and I refer to them below. By way of background, however, three matters should be noted. First, Art VII of the PCAs contains provisions setting out the terms on which PEL could assign or transfer the whole or any part of its interests to a third party. It provides that the terms of such transfer or assignment requires government approval and the assignee or transferee is required to assume all obligations under the PCA or any licence.[5]

7 Second, there was annexed to the PCAs a form of Joint Operating Agreement ("JOA"). Its purpose was stated in the recitals to further define the rights and obligations of WIOs and to regulate the conduct of the operations. Article 1 provides that in the event of any difference between the terms of the JOA and the PCA, the latter shall prevail. Article 2 provides that the JOA shall come into effect on the date the licence was granted and the PCA was executed. Article 12.2 of the JOA provides that any assignment of interest is conditional on the assignee ratifying and becoming a party to the JOA. Article 21.3 provides that no modification of the JOA shall be effective unless executed in writing by the WIOs.[6]

8 In this judgment, I will collectively refer to the licences, PCAs and JOAs as the "Concession Documents".

9 In April 2006, FHL and PEL entered into a Farm In Agreement ("FIA") and a Deed of Assignment ("Assignment Agreement") in respect of each block, whereby 50% of PEL's interest in the concessions was assigned to FHL. The Assignment Agreement, which was Appendix 1 to the FIA and to which the

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5 1MNF at pp 156–157 and 291–292.

6 1MNF at pp 198–200, 225, 234, 330–332, 357 and 366.

President was also a party, amended the PCAs and the JOAs to accommodate the acquisition by FHL of its interest in the concessions. It also inserted pre-emptive right provisions into the JOA. Subsequently, each of PEL and FHL assigned part of their interests such that at the time the dispute arose, PEL held a 47.5% working interest in the JOAs, FHL a 27.5% interest and a third party a 25% interest.[7]

10 In June 2022, PEL as operator of the JOA sought to forfeit FHL's interest in the Badin North Block for its failure to meet a cash call. In January 2023, PEL also sought to forfeit FHL's interest in the Badin South Block for failure to meet a cash call in respect of that block.[8]

11 FHL disputed PEL's entitlement to forfeit its working interests and commenced the ICC arbitration seeking declarations that PEL was in breach of each of the JOAs, damages and equitable compensation. In the absence of agreement between the parties, the ICC fixed the seat of the arbitration as Singapore.[9]

12 PEL contended that the tribunal constituted by the ICC to hear the arbitration did not have jurisdiction to determine the dispute as the JOAs did not provide for ICC arbitration in disputes between FHL, a Foreign Working Interest Owner ("FWIO"), and PEL, a Pakistani Working Interest Owner ("PWIO"). There was no dispute that FHL was a FWIO and PEL a PWIO.[10]

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7 1MNF at paras 22–27 and pp 422–428 and 459–465.

8 BK at paras 46–52.

9 1MNF at paras 41–42 and 48, and pp 959–960.

10 1MNF at para 44.

13 In the Jurisdictional Ruling, the tribunal by majority held that it had no jurisdiction to hear the dispute.[11]

The relevant contractual provisions

14 Before the turning to the arbitral proceedings before the ICC, I set out the contractual provisions that are relevant to the resolution of this dispute.

15 Article 1 of the JOAs provides:[12]

> In the event of any difference or inconsistency between the terms of this Joint Operating Agreement and those of the Concession Agreement, the latter shall prevail.

16 Article 17 of the JOAs contains an arbitration clause in the following terms:[13]

> Any dispute arising out of this Joint Operating Agreement shall be dealt with mutatis mutandis in accordance with Article XXVIII of the Concession Agreement.

17 Article 18 of the JOAs should also be noted. It provides as follows:[14]

> 18.1 This Joint Operating Agreement is subject to the Concession Agreement and all Joint Operations shall be conducted in accordance with its provisions, and of all other valid and applicable laws, rules, regulations and orders of the Government. If this Joint Operating Agreement in any respect shall be found to be inconsistent with or contrary to the terms of the Concession Agreement, this Joint Operating Agreement shall be regarded as modified to conform thereto and as so modified shall continue in full force and effect.
>
> 18.2 No Working Interest Owner shall resort to any action for partition of the Area or Joint Property, except in

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11 1MNF at p 116.

12 1MNF at pp 199 and 331.

13 1MNF at pp 230 and 362.

14 1MNF at pp 231 and 363.

> accordance with the provisions of the Concession Agreement and this Joint Operating Agreement.

18 Article 28 of the PCAs to which reference is made in Art 17 of the JOAs provides as follows:[15]

> 28.1 Any question or dispute arising out of or in connection with the terms of this Agreement or the Licence or any Lease (regardless of the nature of the question or dispute) shall, as far as possible, be settled amicably. Failing an amicable settlement within a reasonable period, such dispute shall be submitted to the International Center for Settlement of Investment Disputes (ICSID) established by the "Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" of 1965 and THE PRESIDENT and the Working Interest Owners, to the extent required by said Convention, hereby consent to arbitration thereunder.
>
> The venue of the arbitration shall be in Pakistan or elsewhere as mutually agreed between THE PRESIDENT and the Foreign Working Interest Owners. If such mutual agreement cannot be reached, the venue shall be decided by the ICSID. The award rendered shall be final and conclusive. The judgment on the award rendered may be entered in court having jurisdiction or application may be made in such court for a judicial acceptance of the award and an order of enforcement as the case may be. The official language of arbitration will be English.
>
> 28.2 If, for any reason, the request for arbitration proceedings is not registered by ICSID, or if the ICSID fails or refuses to take jurisdiction over such dispute, such difference or dispute shall be finally settled by arbitrators under the Rules of Arbitration of the International Chamber of Commerce (the "Chamber Rules") and by three (3) arbitrators appointed in accordance with the Chamber Rules. The arbitrators shall not be nationals of Pakistan or of the country of the other party to the dispute nor shall any of such arbitrators be employees or agents or former employees or agents of any of the parties to the proceedings.

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15 1MNF at pp 187 and 321.

> 28.3 This Article is only applicable in case of a dispute between foreign Working Interest Owners inter se, or between foreign Working Interest Owners and THE PRESIDENT, provided that in the event of a dispute between the Pakistani Working Interest Owner(s) inter se, or between the Pakistani Working Interest Owners and THE PRESIDENT, the arbitration shall be conducted in accordance with the Arbitration Act, 1940.

19 Reference should also be made to Art 29 of the PCAs. It is in the following terms:[16]

> 29.1 The Operator shall conduct all exploration, exploitation, drilling, development, and production operations in accordance with Good Oilfields Practices and the principles and standards as laid down in the Rules. Consistent with this requirement, the Operator shall endeavour to minimize exploration, development, production and operation costs and maximise the ultimate economic recovery of Petroleum.
>
> 29.2 The Operator shall not start production from any well prior to testing and making sure to the satisfaction of THE PRESIDENT's representative that the well has been properly completed.
>
> 29.3 The Operator shall not flare Natural Gas but shall use it commercially or for recycling. If Associated Gas is not so used or not planned to be so used, the Working Interest Owners shall negotiate an arrangement making it available to THE PRESIDENT or its designee free of cost at the down stream flange of the gas/oil separation facilities in accordance with Article 11.4. If THE PRESIDENT for whatever reason is unable or unwilling to take delivery of the Natural Gas that would otherwise be flared as provided for above, the Operator will be allowed to flare such gas in accordance with the Rules without any royalty or excise duty liability until such time as THE PRESIDENT or his designee can take delivery.
>
> 29.4 This Agreement shall be governed by and given effect in accordance with the laws of Pakistan.
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> 29.5 All the rules, laws, regulations in effect on the Effective Date, including the Workers' Welfare Fund Ordinance, 1971 and the Companies Profits (Workers' participation)

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[16] 1MNF at pp 188–189 and 322–323.

Act, 1968 shall apply to this Agreement, throughout its term, whether or not subsequently amended or revised.

29.6 This Agreement sets forth the entire agreement reached between the Working Interest Owners and THE PRESIDENT and it shall remain and continue in force and shall be binding upon each of them throughout its duration without any amendment, revision or alteration thereto except as may hereafter be mutually agreed by the Working Interest Owners with the approval of THE PRESIDENT. The Rules, Income Tax Ordinance 2001, Regulations of Mines and Oilfields and Mineral Development (Government Control) Act, 1948 and other laws that are in force on the Effective Date shall remain applicable for purposes hereof, whether or not the same are subsequently amended or revised; provided that where any matter is not specifically dealt with in this Agreement or where there is any conflict between the provisions of this Agreement and the laws, such matter shall be governed in accordance with the applicable provision of the Rules, Income Tax Ordinance 2001, Regulations of Mines and Oilfields and Mineral Development (Government Control) Act, 1948 and other laws as are in force on the Effective Date of this Agreement.

29.7 This Agreement shall inure to the benefit of and be binding upon the respective successors and permitted assigns of the Working Interest Owners.

29.8 All headings used therein are for the purpose of reference only and shall not be construed as in any way defining or limiting the meaning of any provision.

29.9 The Operator shall observe all laws, rules and regulations issued by the Government in respect of protection of the environment and safety of operations, including the Oil and Gas (Safety in drilling and Production) Regulations, 1974, the Pakistan Environmental Protection Act, 1997 and the Mines Act, 1923 as amended from time to time.

29.10 The Working Interest Owners, other than GHPL, shall be required, in consultation with local civil administration/Provincial Governments, to undertake social welfare programmes such as fight against narcotics, promotion of sports, rehabilitation of the mentally retarded and handicapped children, improvement of educational facilities, drinking water, health, roads and grant of scholarships for local students and shall spend during the exploration phase

> prior to Commercial Production not less than twenty thousand Dollars ($ 20,000) per year. The Government will issue necessary guidelines for social welfare programs as deemed appropriate from time to time. After the commencement of Commercial Production in the Area, the following minimum amounts will be spent during each year:
>
> | **Production Rate (BOE/Day)** | **Amount/Year (US Dollars)** |
> |---|---|
> | Less than 2000 | 20,000 |
> | 2000–5000 | 40,000 |
> | 5000–10,000 | 75,000 |
> | 10,000–50,000 | 150,000 |
> | More than 50,000 | 250,000 |
>
> These amounts will be increased from time to time by mutual agreement of the Working Interest Owners mentioned above and THE PRESIDENT. The Pakistani Working Interest Owners will make these payments in equivalent Rupees. Any amounts so spent shall be treated for Pakistani Income Tax purposes as wholly and exclusively incurred for the purpose of the business of the Working Interest Owners and shall be allowed against income under Rule 2(5) of the Fifth Schedule.

20 Article 29.6 states that where matters are not specifically dealt with in the Agreement, the matters will be governed in accordance with, among other things, applicable provisions of "the Rules". The Rules refer to the Pakistan Petroleum (Exploration and Production) Rules 2001. Rule 74 of those Rules is in the following terms:[17]

> **Arbitration.–** Except as otherwise agreed or expressly provided for in these rules, any question or dispute regarding a petroleum right or any matter or thing connected therewith shall be resolved by arbitration in Pakistan and in accordance with Pakistan laws.

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17 Affidavit of Rana Sajjad Ahmad dated 19 April 2024 ("RSA") at p 273.

21 Finally, it should be noted that the FIA, entered into between FHL and PEL at the same time as FHL acquired its interest in the Blocks, contained a separate arbitration clause in the following terms:[18]

> **17. GOVERNING LAW AND JURISDICTION**
>
> 17.1 The construction, validity and performance of this Agreement shall be governed by the laws of England. In the event of any dispute in relation to this Agreement such dispute shall be referred to arbitration in accordance with the Rules of Arbitration and Conciliation of the International Chamber of Commerce. The venue of arbitration shall be London.

The Jurisdictional Ruling

22 In reaching its conclusions, the tribunal unanimously agreed on a number of matters.[19]

23 First, the tribunal concluded that Pakistani law is the proper law of the arbitration agreement.[20]

24 Second, although it did not assume particular significance in the proceedings, the tribunal concluded that Pakistan was not the seat of the arbitration at least for the purpose of determining the jurisdictional issue.[21]

25 Third, the tribunal concluded that the rules governing the interpretation of commercial contracts in Pakistan are as set out by the Supreme Court of Pakistan in *House Building Finance Corporation v ShahinShah Humayun*

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18 1MNF at pp 419 and 456.

19 1MNF at p 120.

20 1MNF at p 85.

21 1MNF at pp 68 and 75.

Cooperative House Building Society and others (1992) SCMR 19 ("*HBFC*")[22] where the Court made the following remarks (at [11]):[23]

> 11. The main purpose of construction of terms of a written agreement is to find out the intention of the parties to the agreement. By looking to the words used one has to construe the intention which has persuaded the parties to enter into the agreement. Chitty on Contract[s], 26th Edition, Vol. 1, page 514, observed as follows:--
>
> > "The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself. One must consider the meaning of the words used, not what one may guess to be the intention of the parties. However, no contract is made in a vacuum. In construing the documents, the Court may resolve an ambiguity by looking at its commercial purpose and the factual background against which it was made.
> >
> > Further, the law does not approach the task of construction with too nice a concentration on individual words. 'The common and universal principle ought to be applied; namely, that (agreement) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent."
>
> Odgers in the Construction of Deeds and Statutes, third edition, at page 23 said:
>
> > "In other words the intention of the parties must be discovered, if possible, from the expressions they have used."
>
> He has relied on various authorities and quoted Pearson, J. in Helbers v. Parkinson (1983) 25 Ch. D200, who observed: --
>
> > "I conceive that all deeds are to be construed not only strictly according to their words, but so far as possible,

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22 1MNF at p 60.

23 RSA at pp 58–59.

> without infringing any rule of law, in such a way as to effectuate the intention of the parties."

Odgers further observed at page 26:

> "Ordinarily, parties use apt words to express their intention; but often they do not. The cardinal rule again is that clear and unambiguous words prevail over any intention. But if the words used are not clear and unambiguous the intention will prevail. We have seen that the most essential thing is to collect the intention of the parties from the expression they have used in the deed itself[."]

In construing the deeds the words are to be taken in their literal plain and ordinary meaning where the plain and ordinary meaning may lead to inconsistency with other expressions used in the document or absurdity then such plain and ordinary meaning can be modified to avoid absurdity and inconsistency because the law favours to save a deed, if possible. In order to avoid inconsistency and absurdity resulting from plain and ordinary construction the Courts are always anxious to adopt a reasonable construction by which the intention of the parties can be spelt out. In Perrin v. Morgan (1943) AC 399 at page 421 Lord Romer while construing a will observed:--

> "Rules of construction should be regarded as a dictionary by which all parties including the Court are bound, but the Court should not have recourse to it to construe a word or phrase until it has ascertained from the language of the whole will read in the light of the circumstances whether or not the testator has indicated his intention of using the word or phrase otherwise than in its dictionary meaning."

Thus, it is clear that the intention of the parties has to be collected from the document as a whole and every part of the deed should be examined and read together. According to Odgers:--

> "The intention must be inferred not from the force of a single expression, if it militates against the collected general intention, but at the same time, as it is the rule that 'ordinary words ought to be given their plain and ordinary meaning', the Court cannot disregard that meaning or deviate from the force of any particular expression unless it finds from other parts of the deed some expression which shows that the author could not have had the intention which the expression used and in its literal form would imply."

26 Fourth, the tribunal concluded that the incorporation of Art 28 of the PCAs into the JOAs by Art 17 of the latter agreements, demonstrated that each of FHL and PEL consented to resolve disputes arising out of the JOAs by arbitration *per se* to the exclusion of litigation before domestic courts. Thus, an agreement to arbitrate *per se* existed.[24]

27 The first three of these matters and the fourth (subject to one qualification) were not in dispute between the parties. The majority of the tribunal, however, concluded the arbitration agreement on its proper construction provided that disputes between FWIOs and PWIOs were to be resolved by domestic arbitration in Pakistan and thus, the tribunal lacked jurisdiction to determine the dispute before it. The dissenting member reached the contrary conclusion.[25]

The majority reasoning

28 The majority reasoning stated that the scope of the parties' consent to arbitrate turned on the interpretation of "*mutatis mutandis*". It stated in simple terms that *mutatis mutandis* means making necessary modifications and adjustments to a given situation (here, a contractual provision) so it makes sense in the new context but not so that its essence is altered. They stated that the use of *mutatis mutandis* indicates a mutual consent that Art 28.3 of the PCAs would be adjusted to account for the differences between the PCAs and the JOAs.[26]

29 The majority stated that to determine the scope of what FHL and PEL consented to, it is necessary to identify how the JOAs differ from the PCAs and

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[24] 1MNF at pp 96–97.

[25] 1MNF at pp 107–108, 116, 120, and 133.

[26] 1MNF at p 97.

then assess in what manner Art 28.3 of the PCAs was meant to be adapted to account for the difference identified.[27]

30 In dealing with the first issue, the majority stated that the main difference between the agreements was that whilst the PCA was an agreement between the President and the WIOs, the JOAs were agreements between the WIOs only. But the majority also pointed out that the PCAs admit to the possibility of Government Holdings (Private) Limited ("GHPL"), a state owned entity, becoming a party if another PWIO is unable or unwilling to maintain a 25% working interest in a concession. This is the effect of Art 5.2 of the PCAs, which provides that PEL must maintain a 25% working interest in the Blocks and if PEL intends to reduce its interests below that limit, GHPL will be entitled to an unconditional assignment of that interest at no cost. The majority stated that the effect was that although the President may not be a party to the JOAs, there was a possibility of an emanation of the state becoming a party. The majority stated the parties had not drawn the majority's attention to any other difference that might influence the *mutatis mutandis* modification of Art 28 of the PCAs.[28]

31 In these circumstances, the majority stated that a straightforward modification intended by *mutatis mutandis* is the substitution of GHPL for "the President" in Arts 17.1 and 17.3 of the JOAs. I pause here to note that in referring to Art 17.3 of the JOAs, the majority was evidently referring to Art 28.3 of the PCAs. The majority stated that this aligns with Art 25 of the Convention on the Settlement of Investment Disputes between States and

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27 1MNF at p 97.

28 1MNF at pp 98, 149 and 284.

Nationals of Other States ("ICSID Convention") which extends its jurisdiction to a constituent subdivision or agency of a contracting state.[29]

32 The majority stated that FHL's alternative interpretation, which posits a replacement of "THE PRESIDENT" in Art 17.3 of the JOAs (again, presumably referring to Art 28.3 of the PCAs) with "Pakistan Working Interest Owners", does not withstand scrutiny. They stated the consent of a state under one agreement cannot be attributed to a private enterprise under another agreement through the mechanism of "*mutatis mutandis*".[30] The majority, with respect, did not make it entirely clear why this was the case when Art 28.3 at least covers disputes between foreign working owners *inter se* which would not be subject to ICSID arbitration.

33 Notwithstanding these remarks, the majority stated it was persuaded that *mutatis mutandis* had the effect of bringing FWIO-PWIO disputes within the scope of Article 17.3 of the JOAs (again, presumably Art 28.3 of the PCAs). At the same time, the majority stated that nothing in the plain meaning of *mutatis mutandis* sheds light on how FWIO-PWIO disputes should be resolved. They considered two alternative formulations of Art 28.3 of the PCAs, having regard to Art 17 of the JOAs. The first, contended for by FHL, was as follows:[31]

> This Article is only applicable in case of a dispute between foreign Working Interest Owners *inter se*, or between foreign Working Interest Owners and Pakistani Working Interest Owners or between foreign Working Interest Owners and THE PRESIDENT, provided that in the event of a dispute between the Pakistani Working Interest Owner(s) inter se, or between the Pakistani Working Interest Owners and THE PRESIDENT, the arbitration shall be conducted in accordance with the Arbitration Act, 1940.

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29 1MNF at p 98.

30 1MNF at p 99.

31 1MNF at pp 99–100.

> [emphasis in original]

The second, advanced by PEL, was as follows:[32]

> This Article is only applicable in case of a dispute between foreign Working Interest Owners inter se, or between foreign Working Interest Owners and THE PRESIDENT, provided that in the event of a dispute between the Pakistani Working Interest Owner(s) inter se, or between Pakistani Working Interest Owners and foreign Working Interest Owners, or between the Pakistani Working Interest Owners and THE PRESIDENT, the arbitration shall be conducted in accordance with the Arbitration Act, 1940.
>
> [emphasis in original]

34 The majority stated the fact that there were two alternative interpretations meant that Art 17.3 of the JOAs (again, presumably Art 28.3 of the PCAs) is ambiguous and the tribunal therefore had to examine the JOAs (presumably the PCAs) as a whole and in their context to establish the parties' objective common intention.[33]

35 In dealing with the question of context, the majority first pointed out that the JOA was not a standalone document but was executed as part of the Concession Documents and was subordinate to the PCA. They stated that this meant that Art 17.3 of the JOAs (again, presumably Art 28.3 of the PCAs) may be interpreted as providing for international or domestic arbitration of FWIO-PWIO disputes as long as there is a positive basis or nothing inconsistent in the language of the PCAs considered as a whole "and/or in the circumstances surrounding the execution of the Concession Documents that supports one or other interpretation".[34]

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32 1MNF at p 100.

33 1MNF at p 100.

34 1MNF at pp 100–101.

36 The majority stated that the language of the PCAs did not envisage submission of FWIO-PWIO disputes to international arbitration. They stated that Art 28.3 delineated the precise scope of application of the international arbitration agreement in Arts 28.1 and 28.2 of the PCAs and by that extension fixed the limit of the parties' consent thereto. They emphasised the use of the word "only" in Art 28.3. In these circumstances, they concluded that the language of Art 28.3 of the PCAs does not contain an expression of common intention of the parties to the PCAs to submit FWIO-PWIO disputes to international arbitration. They concluded that what they described as a lacuna was to be addressed by the fallback mechanism in Art 29.6 of the PCAs and Rule 74 of the Rules (see [19]–[20] above).[35]

37 The majority also stated it was entitled to consider the contract's commercial purpose and factual background against which it was made to resolve any ambiguities. They stated that whilst the JOAs and Concession Documents were commercial contracts, their purpose was to allocate to private entities the right to a state-owned and controlled natural resource which they stated influences the extent of consent to international arbitration in Art 28. They stated the heavily regulated nature of the petroleum industry in Pakistan pointed to the fact that international arbitration was likely intended as a comfort to prospective FWIOs and was limited in the circumstances to what was expressly identified in Art 28.3 of the PCAs.[36]

38 The majority also concluded that the conduct of the parties at the time they entered into the agreements did not indicate a common intention to submit FWIO-PWIO disputes for arbitration. They pointed to the fact that the FIA

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35 1MNF at pp 101–104.

36 1MNF at p 104.

contained an international arbitration clause which they stated demonstrated that when the parties intended the dispute to be resolved by international arbitration, they provided for it. They stated that the parties' failure to address the lacuna in Art 28.3 could only mean it was not open to it to negotiate or modify the language of the provision, they deliberately chose not to address the lacuna or they overlooked it. They stated that in each scenario the parties' conduct was not sufficient to conclude they intended to submit FWIO-PWIO disputes under the PCAs to international arbitration. They stated that even if FHL was of the view that the *mutatis mutandis* provision in Art 17 of the JOAs was sufficient to refer such disputes to international arbitration, there was no evidence that PEL held that view.[37]

39 The majority also stated that whilst it was open under Pakistani law for them to consider the parties' subsequent conduct as an aid to construction, there was nothing in such conduct which assisted them in determining the intention of the parties.[38]

40 The majority also stated that the submission of FWIO-PWIO disputes under the JOAs to arbitration gave rise to inconsistencies which reinforced their conclusion that the parties did not intend for their dispute to be resolved by international arbitration. They stated that the PCA and the JOA are two parts of the same transaction and that whilst the JOA primarily governs the conduct of the joint operation by the WIOs, it does so in conjunction with the PCA. In these circumstances, they stated it was conceivable that a FWIO-PWIO dispute stemming from a common set of facts may arise under the PCA as well as the JOA in relation to overlapping provisions. They stated that in such a scenario it

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[37] 1MNF at pp 104–106.

[38] 1MNF at p 106.

would be unreasonable to split the cause of action such that an international arbitration would decide the dispute so far as it relates to the JOA but a domestic tribunal in so far as it relates to the PCA. They stated that as the PCA prevails over the JOA, the mechanism of dispute resolution must be domestic arbitration.[39]

41 The majority pointed out that there is no inherent right to submit disputes involving a foreign party to international arbitration and it is plausible for a party to agree to two different types of arbitration depending on the nature of the dispute in question.[40]

42 In these circumstances, the majority concluded that especially in view of the insertion of the term "*mutatis mutandis*", Art 17 of the JOAs should be interpreted as providing for domestic arbitration of FWIO-PWIO disputes. They stated that this interpretation is founded in the language of the PCAs and does not create inconsistencies with the latter. They stated it was reasonable and was borne out by the commercial context and the parties' conduct.[41]

43 The majority recognised that their decision was inconsistent with the decision of the England and Wales Court of Appeal ("EWCA") in *Hashwani and others v OMV Maurice Energy Ltd* [2015] EWCA Civ 1171 ("*Hashwani*"). Stating they were not bound by the decision, they concluded that it was wrongly decided.[42]

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39 1MNF at pp 106–107.

40 1MNF at p 107.

41 1MNF at pp 107–108.

42 1MNF at pp 108–110.

The dissenting member's opinion

44 The dissenting member stated first that his conclusion depended on the following factors. First, Art 17 of the JOAs provides for three classes of disputes. Second, Art 29.6 of the PCAs is not determinative of the interpretation of Art 17 of the JOAs. Third, it is possible to determine the common intention of the parties which points to international arbitration. And fourth, the Court of Appeal in *Hashwani* had reached the same conclusion.[43]

45 In relation to the first factor, the dissenting member stated that Art 28.3 provides for three classes of disputes: (a) disputes between FWIOs *inter se*; (b) disputes between FWIOs and the President; and (c) disputes between PWIOs *inter se* or between PWIOs and the President. He stated that too much should not be made of this characterisation at this stage of the analysis as the only instance of foreign-Pakistani disputants in Art 28.3 of the PCAs involves the Pakistani State rather than Pakistani private parties.[44]

46 The dissenting member stated that the next step in the analysis was to consider the structure of Art 28.3 of the PCAs. He stated that the word "only" referred to the first two classes of disputes (*ie*, between FWIOs *inter se* or between FWIOs and the President), with the third class of disputes (*ie*, between PWIOs *inter se* or between PWIOs and the President) being referred to domestic arbitration. He referred to the conclusion of the majority which had the effect of substituting "THE PRESIDENT" in Art 28.3 of the PCAs with GHPL. He said that whilst that might qualify as an emanation of the Pakistani State, the PCA contemplates the possibility of GHPL no longer being majority owned by the State. In that context, he referred to Art 23.3 of the PCAs, which states that

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43 1MNF at p 122.

44 1MNF at p 122.

GHPL was not liable to pay production bonuses to the President as long as the government remained its majority shareholder.[45]

47 The dissenting member then determined that Art 29.6 of the PCAs was not determinative of the interpretation of Art 17 of the JOAs. In his view, the requirement for consistent interpretation reached its limits when the JOA was specifically drafted to depart from the PCA. The provisions of the PCAs and JOAs gave rise to one of two consequences: (a) either the term "*mutatis mutandis*" in Art 17 of the JOAs was ignored altogether in disputes under the JOAs such that all FWIO-GHPL and FWIO-PWIO disputes were to be dealt with under Rule 74; or (b) the term "*mutatis mutandis*" was to be given its full meaning and take precedence across the concession documents for all disputes relating to the JOAs (in which case Rule 74 operated simply as an aid to interpretation as part of the factual background to the agreement). The dissenting member took the view that as a matter of Pakistani contract law, the terms "*mutatis mutandis*" must bear a meaning.[46]

48 Next, the dissenting member concluded that the parties' common intention was to submit their dispute to international arbitration. In dealing with the relevant provisions he pointed out first that in the language of the concession documents taken as a whole, there was no express agreement to submit FWIO-PWIO disputes to domestic or international arbitration, only to arbitration. Second, he repeated that Art 17.3 of the JOAs (again, presumably Art 28.3 of the PCAs) had in both instances of dispute involving foreign and Pakistani parties (*ie*, the President and GHPL) entailed submission to international arbitration such that it was arguable that a FWIO–GHPL dispute covers within

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45 1MNF at pp 122–123.

46 1MNF at pp 123–125.

it FWIO–PWIO disputes. He referred to the determination of the majority of the tribunal that Art 17.2 of the JOAs (presumably Art 28.2 of the PCAs) manifests the intention of the JOAs to uphold the neutrality of ICC proceedings which he said would point away from a domestic arbitration of FWIO-PWIO disputes. Fourth, he said it was not known whether the parties were aware of Rule 74 when they concluded the concession documents.[47]

49 The dissenting member referred to the reference by the majority to the nature of the contract which I have set out earlier (see [37] above). He suggested that the limitation was not as strict as suggested by the majority. He also questioned the appropriateness of what he described as the majority's attempt at reading into the intentions of PEL and FHL the intentions of the Pakistani State. He stated that whilst the State clearly had an interest in ensuring that WIOs' operating arrangements conformed with the scheme set out in the PCAs, it was questionable whether it was concerned with the detailed manner in which the operators would resolve disputes between them.[48]

50 The dissenting member said that the inconsistencies referred to by the majority (see [40] above) were both unlikely and irrelevant. He stated they were unlikely to arise because the JOAs only concerns WIOs, typically expands on the PCAs regarding the relationships among WIOs and are deemed modified as needed to conform to the PCAs. He stated as a consequence that any dispute between the WIOs not involving the President would typically arise under the JOAs. He stated that the inconsistencies were irrelevant because the present dispute arose under the JOAs.[49]

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47 1MNF at pp 125–126.

48 1MNF at p 126.

49 1MNF at pp 126–127.

51 The dissenting member also stated that the parties' conduct at the time was relevant, pointing out that the FIA contained an ICC arbitration clause. According to the dissenting member, that suggested that given the opportunity, FHL and PEL would refer their disputes to international arbitration. He stated that the majority's reasoning as to the failure to address what they described as the lacuna (see [38] above) hinged upon a strict subordination of the JOAs to the PCAs and neutralised the term "*mutatis mutandis*", an approach with which he disagreed.[50]

52 He stated that in these circumstances, the evidence pointed to an intention of the parties to submit their dispute to international arbitration. He stated that his conclusion was consistent with the decision of the EWCA in *Hashwani*.[51] It is to this decision I now turn.

Hashwani

53 *Hashwani* appears to be the only decision which has directly dealt with Art 28 of the PCAs and Art 17 of the JOAs. As I have already indicated, *Hashwani* was held to be incorrectly decided by the majority of the tribunal whilst that decision was relied on by the dissenting member in support of his contrary conclusion.

54 *Hashwani* involved an appeal against an order made by the primary judge on an application under s 72 of the Arbitration Act 1996 (c 23) (UK) for a declaration that the ICC did not have jurisdiction in a dispute between the appellants, Zaver Petroleum Corporation Ltd ("Zaver"), a Pakistani company, and Ocean Pacific Ltd ("OPL"), a company incorporated in California, and the

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50 1MNF at p 128.

51 1MNF at pp 129–131.

respondent OMV Maurice Energy Ltd ("OMV"), a company incorporated in Mauritius. The primary judge held that the ICC had jurisdiction in respect of the dispute between OMV and OPL and made a declaration accordingly. At the same time, he stayed the proceedings between Zaver and OMV to give the arbitrators an opportunity to decide whether they had jurisdiction in respect of that dispute. Zaver and OPL appealed against the declarations made by the primary judge whilst OMV cross-appealed contending that the primary judge should have made the same declaration as he made in respect of the dispute between OMV and OPL.

55 The EWCA dismissed the appeal but allowed OMV's cross-appeal, holding that the ICC had jurisdiction in respect of all disputes (*Hashwani* at [29]–[30], [36]).

56 The dispute related to the working of an area in Pakistan known as the "Mehar Block". In December 1999, the President of Pakistan issued a Pakistan exploration licence in respect of that area to OPL and to the Government of Pakistan (referred to as "Government Holdings"). OPL was granted a 95% working interest and Government Holdings a 5% working interest. On the same day, the President entered into a PCA with OPL and Government Holdings, and OPL and Government Holdings entered into a JOA. Article 28 of the PCA and Art 17 of the JOA were in identical terms to Art 28 of the PCAs and Art 17 of the JOAs in the present case. Article 29.6 of the PCA was also in similar terms in each of the PCAs here, while Rule 73 in the case before the EWCA was in similar terms to Rule 74 in the present case.

57 In March 2000, OPL entered into a Farm Out Agreement ("FOA") with Zaver and OMV. As a result the parties had the following working interests in respect of the bloc: OMV 75%, OPL 15%, Zaver 5%, and Government Holdings

5%. Disputes arose between OMV, OPL and Zaver which OMV sought to refer to arbitration under the auspices of the ICC.

58 Though the court ultimately held that the dispute arose out of the JOA, Moore-Bick LJ (with whom Lewison LJ and Hayden J agreed) made the following remarks concerning the relationship between the PCA and the JOA:

> 16. Apart from the exploration licence itself, which has not played a significant role in the argument, the PCA is the primary document. The JOA is expressed to form part of it, but is subsidiary in the sense that it was intended to contain more detailed provisions covering the practical aspects of operations. One can therefore take Art. XXVIII as the starting point. As is clear from the terms of Art. 28.1 and 28.2, the parties have gone to some trouble to identify well-recognised independent international bodies for the resolution of disputes under the PCA. In particular, the agreement to refer disputes to ICSID suggests that they were conscious of the status of OPL as a foreign investor which wished to have the comfort of a dispute resolution procedure insulated from the country in which it was investing. On the other hand, there is a clear intention to subject other kinds of dispute to domestic arbitration, as might be expected. In this context, Art. 28.3 poses difficulties. Although OPL might have a dispute with the President, to which the provisions for ICSID or ICC arbitration might apply, it was the only foreign working interest owner and there could therefore be no disputes between foreign working interest owners inter se. Moreover, one obvious possibility was that a dispute might arise between OPL and Government Holdings, but a dispute of that kind is not expressly provided for at all. As a dispute with a state actor, it could, perhaps be assimilated to a dispute with the President, but Mr. Brindle submitted that any such dispute fell through the cracks of the agreement to be caught by the safety net of Rule 73. It seems to me unlikely that the parties foresaw that possibility and intended to deal with it in such an informal manner, but it is possible that they both simply overlooked it, in which case the safety net might come into play.
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> 17. The dispute in this case does not arise under the PCA. There is a dispute between the parties whether it arises under the JOA or the FOA, to which I shall come in due course, but at this stage of the discussion and in order to assist the analysis of these various provisions I shall assume that it arises under the JOA. It is therefore to the provisions of the JOA that it is necessary to look in order to see what, if anything, the parties

> have agreed about how it should be resolved. I agree with Mr. Hancock that the original parties to the agreement (Government Holdings and OPL) intended to achieve something by Article 17 and thought they had done so. This is where the expression "mutatis mutandis" comes into play. Art. XXVIII provides for ICSID or ICC arbitration in two cases: where there is a dispute between a foreign party and the President and where there is a dispute between foreign parties inter se. In my view the most likely purpose of using the expression "mutatis mutandis" was to enable Government Holdings to be substituted for the President in Art. 28.3, so that for the purposes of the JOA the arbitration agreement extended to disputes between OPL as a foreign working interest owner and Government Holdings as the representative of the state. It thus filled what would otherwise have been a lacuna in Art. 28.3 if it had been applied to the JOA in its original form.

59 So far as the dispute between OMV and OPL was concerned, Moore-Bick LJ concluded that as each were FWIOs and as the claim involved a claim under the JOA, it fell within the provisions of Arts 28.1 and 28.2 of the PCA (*Hashwani* at [25]).

60 In relation to the dispute between OMV and Zaver he made the following remarks:

> 27. The dispute between OMV and Zaver is between a foreign working interest owner and a Pakistani working interest owner. On the face of it, therefore, it is difficult to bring it within the scope of Article 28.3. However, relying on the expression "mutatis mutandis" in Article 17 of the JOA, Mr. Hancock submitted that Article 28.3 is to be read as if it provided that Articles 28.1 and 28.2 are to apply to a dispute of that kind. At the moment when Zaver became a party to the JOA Article XXVIII of the PCA applied to disputes between OMV and Government Holdings, the former being a foreign working interest owner and the latter a Pakistani working interest owner. That was sufficient, he submitted, to demonstrate an intention on the part of the parties to the JOA (and, if necessary, the parties to the PCA) that disputes involving foreign working interest owners should be referred to ICSID or the ICC, as the case might be. The purpose of using the expression "mutatis mutandis" in Article 17 of the JOA was to ensure that the principles embodied in Article XXVIII applied to disputes between parties to the JOA. One of those principles was that

disputes involving a foreign working interest owner should be referred to arbitration outside Pakistan.

28. Whereas it was possible to make a relatively simple linguistic alteration to Article 28.3 to enable it to accommodate the relationship between OPL and Government Holdings under the JOA, it is more difficult to make linguistic changes of a kind that would bring about the position for which Mr. Hancock contended. Since Zaver is a Pakistani working interest owner, any dispute it may have with Government Holdings must be referred to arbitration in Pakistan, simply as a result of reading "the President" as referring to Government Holdings. However, Article XXVIII makes no express provision for disputes arising between foreign working interest owners and Pakistani working interest owners. There are therefore only two possibilities: either such disputes fall outside the provisions of art XXVIII and are caught by the safety net of Rule 73, or they have to be assimilated to another class of disputes that do fall within Article XXVIII.

29. Article XXVIII, read together with Article 17 of the JOA contemplates three kinds of claims: those between foreign parties alone, those between Pakistani parties alone and those between foreign parties and emanations of the Pakistani state. Given the fact that the PCA, the JOA and the OMV Deed of Assignment all provided for arbitration in accordance with Article XXVIII of the PCA and that on becoming parties to the Concession Documents Zaver formally ratified and confirmed them, I find it difficult to accept that the parties intended disputes between Zaver and OMV to fall outside the terms of Article XXVIII altogether. If they had intended that such disputes should be referred to arbitration in Pakistan, they would surely have said so in terms, rather than simply leaving the matter to be determined in accordance with the Rules.

30. I agree with Mr. Hancock that one matter that emerges clearly from Article XXVIII as a whole is an intention to resolve disputes involving foreign working interest owners by arbitration outside Pakistan. If that is so, effect can be given to the expression "mutatis mutandis" by substituting "a Pakistani working interest owner" for "the President" in Article 28.3. The result would be that disputes between Zaver and a foreign working interest owner would be referred to arbitration abroad and disputes between Zaver and another Pakistani working interest owner would be referred to arbitration in Pakistan. Mr. Brindle submitted that the expression "mutatis mutandis" could not bear the weight which Mr. Hancock sought to put on it, but in my view, once the parties' intention has been identified from the documents as a whole, a simple substitution of one name for another, which is well within what that expression contemplates, can easily be made. For these reasons I am

> satisfied that OMV is also entitled to pursue a claim for sums due under the JOA in arbitration against Zaver under the rules of the ICC.

The parties' cases

FHL

61 FHL in its written submissions contends that the intention of the parties to refer their disputes to international arbitration is supported by four propositions. First, it is undisputed that the "*mutatis mutandis*" language in Art 17 of the JOAs required a construction of Art 28 of the PCAs and under Pakistani law the object of such an exercise is to ascertain the intention of the parties. Second, it is undisputed that Art 17 of the JOAs is ambiguous and, in these circumstances, Pakistani law permits consideration of extrinsic evidence to adopt a construction which best effectuates the parties' intentions. Third, consideration of such extrinsic evidence which is relevant – here, prior and subsequent versions of Art 28 of the PCA – reveals that the true intention of the parties was that all disputes under the PCAs and JOAs fell within the scope of ICC arbitration. Fourth, the construction adopted by the majority of the tribunal leads to inconsistency and absurdity. FHL submits that in such circumstances, Pakistani law permits a reasonable construction to effect the parties' true intentions. FHL submits that its proposed construction of Art 17 of the JOAs avoids what it described as the manifest difficulties of the Tribunal majority's construction of that article.[52]

62 In dealing with the legal principles relevant to the dispute, FHL first points out that the application is an application under s 10(3) of the International Arbitration Act 1994 ("IAA"), is a hearing *de novo* and is one in which the

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[52] Applicant's Submissions dated 12 September 2024 ("Applicant's Submissions") at paras 5–9.

parties are entitled to introduce evidence which was not before the arbitral tribunal (see *AQZ v ARA* [2015] 2 SLR 972 at [58]–[59]; *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd and another matter* [2016] 4 SLR 1336 at [53]; *CLQ v CLR* [2022] 3 SLR 145 at [26]–[28]). As a matter of general principle, this does not seem to be in dispute between the parties, although PEL takes issue with the admissibility and relevance of emanations of Art 28 in existence prior to and subsequent to the Article 28.3 that is the subject of the present proceedings.[53]

63 FHL notes that the legal experts retained by each party agree that the ordinary principles of Pakistani law concerning contractual interpretation apply to the construction of arbitration agreements and that the relevant principles are set out in *HBFC* (see [25] above). It submits that where contractual language results in ambiguity, Pakistani law strives to adopt a reasonable construction by looking at the parties' commercial purposes, the factual background against which the agreement is made as well as preceding and subsequent circumstances.[54]

64 In its submission, FHL notes the opinion expressed by the Respondent's expert, Justice (retired) Ijaz ul Ahsan ("Justice Ijaz") to the effect that any ambiguity in the language of a contract is to be resolved, in the first instance, by reference to the parties' intentions and a reasonable construction of the contract (if that can be gathered from the contract itself). Justice Ijaz opines that it is only when an ambiguity cannot be resolved from the express language of

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53 Applicant's Submissions at paras 61–65; Respondent's Written Submissions dated 12 September 2024 ("Respondent's Written Submissions") at paras 17–22.

54 Applicant's Submissions at paras 70–72.

the contract that the courts can examine evidence outside the contract. FHL submits that this is an unjustifiably narrow reading of *HBFC*.[55]

65 It seems to me with respect that Justice Ijaz's approach in so far as it requires any question of ambiguity to first be resolved by reference to the text of the agreement is consistent with *HBFC*. The principles in *HBFC* give primacy to the text considered as a whole, although not necessarily to individual words. It is only where the ambiguity cannot be resolved by reference to the text as a whole that courts can consider extrinsic circumstances to resolve any remaining ambiguity. Whether that is consistent with the approach to contractual construction as adopted in other jurisdictions is immaterial.

66 Finally, FHL notes that both experts agree that even where the contractual language is apparently clear and ambiguous, Pakistani law permits the court to depart from the plain and ordinary contractual language where such language may lead to inconsistency with other expressions in the agreement or absurdity.[56]

67 FHL accepts that the tribunal was correct in concluding that the expression "*mutatis mutandis*" when applied to a contractual provision generally means making necessary modifications and adjustments to the provision so that it makes sense in the new context. FHL also submits that the tribunal was correct in considering that the phrase "*mutatis mutandis*" essentially imports the scheme in Art 28 of the PCAs into Art 17 of the JOAs. It submits that it follows that to properly construe the arbitration agreement

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55 Affidavit of Justice (retired) Ijaz ul Ahsan dated 19 August 2024 ("JIUA") at p 9; Appellant's Submissions at para 73.

56 Applicant's Submissions at para 74.

contained in Art 17 of the JOAs, it is first necessary to construe Art 28 of the PCAs.[57]

68 FHL also accepts that the tribunal was correct in concluding that FWIO-PWIO disputes are matters within the scope of Art 17.[58]

69 FHL states that the majority of the tribunal was correct in concluding that Art 17 of the JOAs and Art 28 of the PCAs were ambiguous. However, FHL states that the majority erred in focusing its attention on Art 28.3 of the PCAs and downplayed the relevance of Arts 28.1 and 28.2 of the PCAs in interpreting Art 17 of the JOAs. FHL also contends that the majority erred in relying on Art 29.6 of the PCAs.[59]

70 FHL refers to Justice Ijaz's conclusion that the only ambiguity which requires interpretation is the correct meaning and application of *mutatis mutandis* in Art 17 of the JOAs, whilst Art 28 of the PCAs, on its own literal terms, is clear and unambiguous. FHL submits first that Art 28 of the PCAs (and Art 17 of the JOAs, which seeks to import Art 28 into the JOAs) is a complicated and unclear provision. Second, it submits that Justice Ijaz drew a false dichotomy between Art 28 of the PCAs and Art 17 of the JOAs, as Art 17 has no independent existence outside Art 28. FHL also contends that Art 28 of the PCAs on its own is not clear and unambiguous. It submits that although Art 28 clearly is intended to apply to a FWIO-PWIO dispute, it does not expressly state this to be the case and its reference to an ICSID arbitration is an arbitration which is not apposite to a FWIO-PWIO dispute.[60]

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57 Applicant's Submissions at paras 84–86.

58 Applicant's Submissions at paras 87–89.

59 Applicant's Submissions at paras 90–92.

60 Applicant's Submissions at paras 93–99.

71 FHL also submits that as Art 17 of the JOAs imports Art 28 of the PCAs, a construction of the former depends on the construction of the latter, which means it is necessary to consider not only the intentions of FHL and PEL but also the intentions of the President.[61]

72 FHL refers to the provisions of Art 28 of the PCAs in the immediately preceding version of the PCA to that presently under consideration (*ie*, the 1994 version) as well as the subsequent version (*ie*, the 2013 version). It submits that the fact that these provisions in their express terms provide for FWIO-PWIO disputes to be referred to international arbitration indicates that the true intention of the parties was that the same position would apply to the version of Art 28 under consideration here (*ie*, the 2001 version).[62]

73 FHL has set out the 1994 and 2013 versions of Art 28 in its written submissions and there is no need to set them out here. Whilst it may be accepted that the 1994 and 2013 versions on their terms do refer FWIO-PWIO disputes to international arbitration, in my view, that provides no assistance to the construction of the 2001 version. So far as the 1994 version is concerned, even if admissible in evidence, it says nothing as to the intention of the parties to an agreement which contained a provision with different wording, particularly when there is no evidence that FHL or PEL were aware of the previous version which appears to have ceased to have any operation some five years prior to their entering into the agreements. That there was no awareness of the 2013 version goes without saying. Further, the different choice of words in the various versions, rather than indicating a consistency of intention, could equally well demonstrate that the drafter by using different language intended different

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61 Applicant's Submissions at para 101.

62 Applicant's Submissions at paras 102–121.

results. Thus, the 1994 and 2013 versions of Art 28 do not provide any assistance in construing the 2001 version of Art 28.

74 FHL next submits that its construction is consistent with the construction placed on the identical provisions in *Hashwani*. It refers to the statement at [25] of *Hashwani* that it was wholly unlikely that a dispute between a FWIO and a PWIO would be assimilated to a dispute between PWIOs and the statement at [30] that one matter which emerges clearly from Art 28 as a whole is an intention to refer disputes involving FWIOs to arbitrations outside Pakistan. FHL also refers to the statement by its expert, Mr Rana Sajjad Ahmad ("Mr Ahmad"), that he was not aware of any Pakistani court expressing disagreement with the reasoning or decision in *Hashwani*.[63]

75 As I indicated (see [61] above), FHL submits that the construction preferred by the majority of the tribunal leads to inconsistency and absurdity. It submits first that the majority's construction is inconsistent with the express words in Art 17 of the JOAs because it requires reading Art 17 as providing that FWIO-PWIO disputes are not to be dealt with in accordance with Art 28 of the PCAs, but in accordance with Art 29.6 of the PCAs in conjunction with Rule 74 of the Rules. It submits that that is not what Art 17 says. It submits that the majority's construction is also internally inconsistent, since the majority first accepted that if GHPL (*ie*, a PWIO) becomes a party to the concession agreement, FWIO-GHPL disputes under the PCAs would be referred to ICC arbitration (see [31] above). FHL then notes that the majority considered that a FWIO-PWIO dispute could arise under both the PCAs and the JOAs, in which case, on its construction of Art 28 of the PCAs and Art 17 of the JOAs, the dispute would be referred to domestic arbitration. FHL submits on this basis a

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63 Applicant's Submissions at para 124–127; RSA at p 23.

FWIO-GHPL dispute would be referred to both international and domestic arbitration, an absurd and inconsistent result.[64]

76 FHL also submits that the construction which the majority sought to place on Art 29.6 of the PCAs gives it a weight it cannot bear and leads to absurd consequences. In support of this submission, FHL proffers four reasons. First, FHL submits that the opening words of Art 29.6 make it clear that, among other things, it seeks to ensure the PCAs form the entire agreement between the WIOs and the President (see [19] above). FHL submits that the majority did not explain how in light of that purpose and intention, Art 29.6 was able to provide a dispute resolution process for a FWIO-PWIO dispute under the JOAs, agreements to which the President was not a party.[65]

77 Second, FHL submits that the purpose of Art 29.6 is not to provide for a fall back dispute resolution mechanism. In that context, it refers to the evidence of Mr Ahmad that Art 29.6 (particularly the second sentence of that subparagraph) is in substance a freezing or stabilisation clause seeking to ensure that the general statutory or public laws of Pakistan in force on the effective date of the PCAs are applicable notwithstanding subsequent changes in the law. FHL submits this freezing or stabilising function is consistent with Art 29.5 of the PCAs.[66]

78 Third, FHL submits that the Rules referred to in Art 29.6 are not relevant to private law disputes between the WIOs. In that context, FHL refers to the evidence of Mr Ahmad that the Rules were made pursuant to s 2 of the Mineral

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64 Applicant's Submissions at paras 136–145.

65 Applicant's Submissions at paras 146– 151.

66 Applicant's Submissions at paras 152–156; RSA at p 10.

Developments (Government Control) Act 1948 (the "1948 Act") which provides that the purpose of the Rules is to prescribe various details as to the application for the grant or renewal of an exploration or prospecting licence, a mining lease or other mining concession. It also refers to the evidence of Mr Ahmad that the fact that the Rules govern the public law relationship between the government of Pakistan and the applicant for the relevant lease, licence or concession is made clear by s 3 of the 1948 Act, which empowers the government to punish any breach of the Rules with a fine, imprisonment or both. It is submitted that in that context, the purpose of Rule 74 is to provide that any disputes arising out of that relationship are to be resolved by arbitration in Pakistan unless otherwise agreed. FHL points out that under Art 28 of the PCAs, an alternative dispute resolution mechanism had been agreed for a FWIO-President dispute (*ie*, ICSID or ICC arbitration). In those circumstances, FHL submits that Rule 74 is irrelevant to a dispute between WIOs.[67]

79 Fourth, FHL refers to the statement by PEL's expert witness, Justice Ijaz, that Rule 74 does not stipulate that only public disputes with the government of Pakistan will be resolved by domestic arbitration. In reaching that conclusion, Justice Ijaz emphasises the use of the words "any matter or thing connected therewith" in Rule 74. FHL contends that this is not a sufficient reason, first, because it ignores the obvious purpose and intention of the Rule. And second, Rule 74's operation is explained by Annexure 6 of the Government of Pakistan, Petroleum Exploration and Production Policy 2009, para 5 of which provides that the bidding and award process for the grant of petroleum licences is governed by the law of Pakistan and that any "dispute regarding grant of a Petroleum Right or any matter or thing connected therewith shall be resolved by arbitration in Pakistan and in accordance with Pakistan laws" as per the

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[67] Applicant's Submissions at paras 157–162; RSA at pp 11–12.

applicable rules. FHL submits that this shows that the Rules are meant to govern the public law relationship between the Pakistani government and the WIO regarding the grant, renewal or revocation of petroleum licences, and that Rule 74 cannot be divorced from its public law context.[68]

80 FHL further submits that the conclusion of the majority of the tribunal that FWIO-PWIO disputes were intended to be resolved by domestic arbitration leads to absurdity. It raises the following matters. First, despite the presence of an arbitration clause intended to deal with any dispute, one is instead directed to look to a clause dealing with miscellaneous matters. Second, notwithstanding the fact that the dispute is a private law dispute, one looks to Art 29.6 of the PCAs, a clause dealing with the relationship between WIOs and the President. Third, one then arbitrarily selects Rule 74 of the Rules, despite the fact that Arts 29.5 and 29.6 of the PCAs contain a wide reference to all the laws, rules and regulations of Pakistan, and other laws might provide potential dispute resolution mechanisms. Fourth, the majority's own conclusion accepts that FWIO-GHPL disputes were intended to be resolved by international arbitration.[69]

81 FHL also points to the following comments in Justice Ijaz's report:[70]

> 41 … a Pakistani court is unlikely to find any unreasonableness, let alone absurdity, on account of disputes between FWIO and PWIO being made subject to domestic arbitration. A robust arbitration mechanism in Pakistan is available under the 1940 Act, reference to which would not be considered "*absurd*" by any Pakistan Court.
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68 Applicant's Submissions at paras 163–164; JIUA at p 27; BA at p 352.

69 Applicant's Submissions at para 165.

70 JIUA at pp 22 and 28.

> 54 … Mr Sajjad finds it "*an implausible outcome*" that the parties would have chosen Rule 74 as the fall-back provision, and believes a Pakistani court would not adopt such an approach. I do not agree with Mr Sajjad's argument in view of the fact that, as implausible as the Tribunal's reliance on Article 29.6 seems to be, its language is clear and unambiguous, and therefore no interpretative exercise is warranted by law…

FHL argues that the issue is not whether domestic arbitration between the parties as a form of dispute resolution is absurd. Rather, the question is whether the parties could truly have intended domestic arbitration as the intended means of dispute resolution; this would have involved attributing the parties with absurd and illogical intentions.[71]

82 FHL finally refers in its written submissions to the statement by Justice Ijaz that if the question whether or not the parties consented to an ICC arbitration is finely balanced, the agreement is void for uncertainty. It notes that this argument was rejected by the tribunal and states that Art 28 of the PCAs and Art 17 of the JOAs are "capable of being made certain" and demonstrate an intention to refer FWIO-PWIO disputes to ICC arbitration.[72]

83 At the hearing, counsel for FHL, Mr Colin Liew ("Mr Liew"), submitted that the relevant principle surrounding the construction of the provisions is as set out in FHL's written submissions. He submitted that under Pakistani law the focus is not on the specific words. He submitted the focus is on what the parties truly intended when they entered into the agreement. He submitted that if the court reaches the conclusion that it was intended by Art 28 of the PCAs to refer FWIO-PWIO disputes to international arbitration, the court should give effect to that intention, with the term "*mutatis mutandis*" in Art 17 of the JOAs

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71 Applicant's Submissions at paras 166–167.

72 JIUA at p 23; Applicant's Submissions at paras 178–182.

carrying that intention over into the JOAs. He stated he was not suggesting that the term "*mutatis mutandis*" in and of itself transforms the meaning of Art 28 into a meaning it would not otherwise have had.[73]

84 Mr Liew further submitted during the hearing that what Art 17 of the JOAs does is to make clear that what the parties were seeking to do was resolve disputes under the JOAs consistently in accordance with Art 28 of the PCAs. He submitted that in relying on Art 29.6 of the PCAs, the Tribunal was dealing with Art 17 of the JOAs in a way which was not consistent with the actual words of Art 17. He added that one also had to work out what exactly in Art 29.6 was to be referred to in order to resolve the disputes. He stated that what the tribunal was broadly doing was saying that notwithstanding the dispute between the two WIOs under the JOAs, one considered Art 29.6 of the PCAs, which has everything to do with the relationship between the WIOs and the President. He also submitted that what the tribunal did was to cherry pick the rules in Art 29.6 of the PCAs when Art 29.6 in fact refers to all the laws, rules and regulations of Pakistan at the time of the PCA.[74]

85 Mr Liew accepted at the hearing that as a matter of Pakistani law, if the literal meaning of the words of the contract are unambiguous, it is impermissible to go outside those words and look at surrounding circumstances. At the same time, he submitted that Art 28 of the PCAs *was* ambiguous. He submitted the ambiguity arose in determining how Art 28 applies when Art 17 refers back to it but there is no specific provision concerning what is to be done in relation to a dispute between a FWIO and a PWIO.[75]

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73 Notes of Evidence ("NE") dated 17 September 2024 at 14:13–28 and 19:27 to 20:5.

74 NE dated 17 September 2024 at 16:26 to 19:25.

75 NE dated 17 September 2024 at 21:13 to 23:26.

86 But Mr Liew also submitted that Art 28 of the PCAs itself was ambiguous because of the way it was drafted and the number of disputes it sought to cover. He referred to the opening words of Art 28.3, stating that if all Art 28.3 was intended to cover were disputes between FWIOs *inter se* or between FWIOs and the President, the proviso on the tribunal's construction would be unnecessary as on its construction, any other disputes involving Pakistani parties would already be dealt with in accordance with Art 29.6. He also submitted it was not clear that in relation to disputes between FWIOs why any reference was made to ICSID Arbitration.[76]

87 He submitted that similarly in *Hashwani*, the EWCA considered that there was ambiguity surrounding the dispute resolution clause and it was not immediately clear and obvious what the parties were intending to do. He submitted that as in the *Hashwani* case, it was not possible that the parties intended to deal with the dispute resolution mechanism "in the casual manner" which the tribunal had found. He accepted that the EWCA in that case relied on the expression "*mutatis mutandis*" to give effect to the parties' intention but stated his primary submission was that it was necessary to start with what the parties were intending to do under the PCAs (notwithstanding its literal meaning), and then look to Art 17 of the JOAs to understand how the parties were intending to deal with that class of dispute under the JOAs. He submitted that if in fact the parties intended to deal with such disputes by reference to international arbitration that intention should be giving effect to if necessary by using the words "*mutatis mutandis*". He also submitted it would be unusual that the parties agreed that disputes under the FIAs would be subject to ICC

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76 NE dated 17 September 2024 at 25:20 to 26:22.

arbitration whereas disputes under the JOAs would be subject to domestic arbitration in Pakistan.[77]

88 As in the written submissions, Mr Liew sought to place reliance on the 1994 and 2013 versions of Art 28.[78] As I have indicated (see [73] above), I do not think they provide any assistance on the construction issue.

PEL

89 In its written submissions, PEL submits that the 1994 and 2020 versions of Art 28 of the PCAs have no bearing on the issues in the present case.[79] Although I referred to the 2013 version rather than the 2020 version (see [73] above), I agree that the earlier and later versions of Art 28 provide no assistance on the question of construction.

90 PEL refers to the fact that the dispute between FHL and PEL is a matter or thing connected with a petroleum right and in those circumstances, the Pakistani government's policy at the time the PCAs and JOAs were executed was that FWIO-PWIO disputes were carved out of Art 28 of the PCAs and were to be resolved in accordance with Art 29.6 of the PCAs and Rule 74 of the Rules.[80]

91 PEL submits that the factors which led the EWCA to its decision in *Hashwani* were not present in this case. It submits that at the outset the parties to the Badin concessions here were the Government of Pakistan and PEL, a

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77 NE dated 17 September 2024 at 27:26 to 37:2.

78 NE dated 17 September 2024 at 29:4 to 32:20.

79 Respondent's Written Submissions at para 17.

80 Respondent's Written Submissions at paras 21–22.

PWIO. It submits that the concern confronting the EWCA in *Hashwani* was that OPL as a FWIO would have wished to have the comfort of a dispute resolution provision insulated from the country in which it was investing. By contrast, at its inception, the PCAs here only involved Pakistani parties and any dispute would have been subject to domestic arbitration.[81]

92 PEL submits that in these circumstances, PEL was under no obligation to submit itself to international arbitration let alone an ICC arbitration. It submits if FHL had wanted for itself the comfort of arbitrating in a neutral forum, it should have negotiated for the PCAs to specifically reflect this.[82]

93 PEL also submits that because the question of FWIO-PWIO disputes did not arise at the inception of the PCAs, this was clearly a matter that was not specifically dealt with and the Rules must thus apply to fill the gap. It submits that the concerns expressed in *Hashwani* that the parties could not have intended to leave such a matter to the fallback provision in Art 29.6 of the PCAs simply did not arise here.[83]

94 PEL submits that FHL's contention that Art 29.6 of the PCAs is a freezing clause disregards the plain and ordinary meaning of that article, which it contends fills the gap in the PCAs in relation to FWIO-PWIO disputes, by falling back on the default position in the Rules. It submits that there is nothing to suggest that Rule 74 is only confined to disputes with the Government of Pakistan.[84]

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81 Respondent's Written Submissions at para 31.

82 Respondent's Written Submissions at para 33.

83 Respondent's Written Submissions at para 35.

84 Respondent's Written Submissions at para 37–38.

95 PEL also submits that the provisions of Arts 1 and 18 of the JOA (see [15] and [17] above) negate any argument that *mutatis mutandis* could modify the scope of Art 28 of the PCAs as the EWCA did in *Hashwani*. It submitted Arts 1 and 18 of the JOAs were not referred to in *Hashwani* and concluded that that decision should not be followed here.[85]

96 At the hearing, counsel for PEL, Mr Kelvin Poon SC ("Mr Poon"), submitted that Art 18.1 of the JOAs is important because it gives flesh to the idea that the JOAs are ultimately subsidiary to the PCAs. He submitted that what the parties to the JOAs envisaged was that any dispute arising out of the JOAs shall be dealt with in accordance with what the PCAs say in Art 28. He submitted, however, that if one looks at Art 28.3 of the PCAs, there is no room for the present arbitration to proceed before the ICC because it is not provided for in Art 28.3.[86]

97 Mr Poon submitted at the hearing that it was important to bear in mind that the JOAs could have been negotiated. He also submitted there was nothing odd in the FIAs containing an ICC arbitration clause, noting that the FIAs were governed by English law whereas the PCAs and JOAs were governed by Pakistani law. He also noted that FHL had not pointed to any provision other than Rule 74 to fill what he described as a gap in how the parties intended to resolve FWIO-PWIO disputes. He submitted that the text of Art 29.6 showed that it is meant to fill gaps where they have not been specifically dealt with.[87]

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85 Respondent's Written Submissions at paras 40–41.

86 NE dated 17 September 2024 at 38:5 to 39:5.

87 NE dated 17 September 2024 at 40:1 to 41:19 and 45:8–11.

98 In answer to the proposition that Art 29.6 of the PCAs should not be used given the express reference to Art 28 of the PCAs and Art 17 of the JOAs, Mr Poon referred to the fact that Art 18.1 of the JOAs provides that if the JOAs are found to be inconsistent with or contrary to the terms of the PCAs, the JOAs should be regarded as modified to conform thereto. He submitted that if Arts 17.1 and 18 of the JOAs are read together, the effect is that because Art 28.3 of the PCAs has a gap, Art 29.6 of the PCAs is triggered and the only way for the JOAs to be read consistently with the PCAs is for Art 17 to be modified to alter its application to cover Art 29.6. At the very least, Art 17 could not be used *mutatis mutandis* to provide for international arbitration to govern FWIO-PWIO disputes because that would be inconsistent with what Art 29.6 read with Art 28.3 provides.[88]

99 In relation to *Hashwani*, Mr Poon consistently with his written submissions emphasised the fact that it was important that a FWIO was a party to the concession agreement when it was first entered into. He accepted it was possible that a FWIO might join in later, saying that the specific dispute resolution mechanisms could be renegotiated at that point of time. He submitted that *Hashwani* was wrongly decided because the Court did not consider Art 18.1 of the JOAs.[89]

100 In relation to the position of GHPL, he submitted that although it was a WIO and Pakistani, it was essentially an emanation of the state and is not subject to the same obligations as WIOs so it stood in a completely different position.[90]

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88 NE dated 17 September 2024 at 46:6 to 47:3.

89 NE dated 17 September 2024 at 48:11 to 50:4.

90 NE dated 17 September 2024 at 54:11–20.

My decision

101 The parties' cases require me to determine a single issue: did the tribunal constituted under the auspices of the ICC have jurisdiction to hear the dispute between FHL and PEL? The answer to this question turns on a construction of the Concession Documents.

102 Although the language in Art 28 of the PCAs on its face is clear considered in isolation, ambiguity arises in relation to the question of how a FWIO-PWIO dispute under the PCAs is to be dealt with. The first alternative is that Art 28 does not deal with such a dispute at all but leaves it to be dealt with by some other mechanism, such as Art 29.6 of the PCAs read in conjunction with Rule 74. The second alternative is that such a dispute is intended to be dealt with under Art 28, adapted in some way to accommodate a FWIO-PWIO dispute. Even if that is incorrect, there is undoubtedly ambiguity in applying Art 17 of the JOAs to Art 28 of the PCAs. As is apparent from the submissions, there are at least two constructional choices. The first, contended for by FHL, is that Art 28.3 of the PCAs applies, moulded by the use of the words "*mutatis mutandis*", by substituting "Pakistan working interest owner" for "THE PRESIDENT" in Art 28.3. This was the approach which commended itself to the EWCA in *Hashwani*. The alternative is by use of Art 18 of the JOAs to construe Art 17 of the JOAs (notwithstanding the latter's express reference to Art 28 of the PCAs) as providing for FWIO-PWIO disputes to be resolved pursuant to the provisions of Art 29.6 and Rule 74 of the Rules. This was the construction put forward by PEL.

103 In these circumstances, it is appropriate, in my opinion, to ascertain the parties' intention by considering the operation of the provisions in context and

with regard to the surrounding circumstances. The following matters should be noted.

104 First, the PCA viewed in isolation is primarily concerned with the respective rights and obligations of the President and the WIOs, rather than the rights and obligations of WIOs *inter se*. Articles 28.1 and 28.2 of the PCAs reflect this, being confined in their terms to disputes between the President and WIOs. On their face they have no application to disputes between WIOs, something that would more generally arise under the FIAs or the JOAs. In that context, Arts 28.1 and 28.2 of the PCAs refer to disputes involving FWIOs and the President whilst Art 28.3 provides that the disputes between the President and PWIOs will be dealt with in accordance with the Pakistan Arbitration Act, 1940.

105 It is true that Art 28.3 also deals with disputes between FWIOs *inter se* and PWIOs *inter se*. Whilst it does not deal with FWIO-PWIO disputes, Art 28 nonetheless viewed as a whole does indicate an intention that disputes involving FWIOs would be dealt with other than by Pakistani arbitration.

106 Second, it is next important to note that a JOA was annexed to each PCA (see [7] above). The PCAs also envisaged assignments of interests, providing that such assignment was conditional on the assignee ratifying and becoming a party to the JOAs. Thus, from the outset, it was envisaged that further parties (other than the original Pakistani parties) could become parties to the JOAs and become subject to the dispute resolution provision in Art 17.

107 Third, when FHL acquired its interest, it became a party to the PCAs and the JOAs. The Assignment Agreements between the President, PEL and FHL by which FHL's working interest was assigned to it contained in Part B

amendments to the PCA expressly adding FHL as a party. Part C of the Assignment Agreements amended the JOAs by inserting pre-emptive right provisions into the JOAs. Importantly, the Assignment Agreement was an appendix to the FIA which, as I indicated, contained an ICC arbitration clause (see [21] above).[91]

108 It is convenient in that context to turn to the text of Art 17 of the JOAs. Neither party contended that the interpretation placed by the tribunal on the words "*mutatis mutandis*" – namely, making necessary modifications to a given situation so it makes sense in the new context – was incorrect, although PEL submitted it could not be used in the manner suggested by FHL having regard to Arts 1 and 18 of the JOAs (see [95] above).

109 Leaving aside Arts 1 and 18 of the JOAs, the construction contended for by PEL that FWIO-PWIO disputes fall to be determined by Art 29.6 of the PCAs and Rule 74 makes the words "*mutatis mutandis*" in Art 17 of the JOAs unnecessary if not otiose. This is because any adjustments to Art 28 is only necessary in the case of FWIO-PWIO disputes. FWIO and PWIO disputes *inter se* are dealt with by Art 28.3 so no adjustments are necessary to incorporate them. As was pointed out by Moore-Bick LJ in *Hashwani* at [30] (see [60] above), once it is shown that the intention of Art 28 of the PCAs was to resolve disputes involving FWIOs by arbitration outside Pakistan, effect can be given to the expression "*mutatis mutandis*" by substituting "a Pakistan working interest owner" for "THE PRESIDENT". It is my view that Art 28 of the PCAs read in conjunction with Art 17 of the JOAs evinces that intention.

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91 1MNF at pp 422, 426–427, 459 and 463–464.

110 It is necessary to consider whether the position is affected by Arts 1 and 18 of the JOAs. Each state that in the event of inconsistency between the PCA and JOA, the provisions of the PCA shall prevail over the JOA. Article 18 goes further, stating that the JOA shall be modified to conform with the PCA.

111 The operation of Art 18 depends on inconsistency. In the present case, that involves the proposition that a construction of Art 17 of the JOAs read in conjunction with Art 28 of the PCAs to the effect that FWIO-PWIO disputes are to be dealt with by ICC arbitration is inconsistent with the default provision in Art 29.6 and Rule 74. But these provisions are default provisions. Once it is concluded that it was the parties' intention for Art 28 to operate in a particular manner to deal with FWIO-PWIO disputes under the JOAs, there is no inconsistency and no basis for the operation of Arts 1 and 18 of the JOAs.

112 Some reliance was placed by PEL on the fact that contrary to the factual matrix in *Hashwani*, the FWIO here (*ie*, FHL) was not a party to the PCAs when they were originally entered into. It would be surprising if the construction of identical provisions depends on the identity of the parties at the time of entering into the agreement. Further, it must be remembered that in *Hashwani*, the party which sought to invoke ICC arbitration, OMV, was not an original party to the PCA. And yet, the EWCA concluded that OMV was entitled to pursue its claim against Zaver through ICC arbitration (*Hashwani* at [30]). I do not think that the fact that FHL was not an original party has any effect on the question of construction of the Concession Documents here.

113 There are two other matters which provide powerful support for the construction contended for by FHL. First, it is to say the least, a strained construction of Art 17 of the JOAs to say that notwithstanding its express incorporation of Art 28 of the PCAs, the resolution of the dispute is not to be

governed by that article but rather by a rule referred to in the default provision, particularly when the rule in question was part of a set of rules designed to regulate the relationships between the Pakistani Government and applicants for or holders of Pakistani petroleum permits, leases or licences. Indeed, cl 5 of the Rules directs the manner in which applications for such permits, leases or licences will be made, cl 49 provides for the provision of annual reports and cl 61 deals with development across joint exploration and development areas. Justice Ijaz, with respect, was correct in describing the construction as not implausible. But contrary to his conclusion that a FWIO-PWIO dispute was to be determined with reference to Art 29.6 of the PCAs and Rule 74 of the Rules, I do not think such a construction is compelled by the express words of Art 28.3 of the PCAs.

114 Further, it is important that the FIAs contain an ICC arbitration clause. Although as PEL submitted the FIAs are governed by the laws of England which provides some explanation for a London-based ICC arbitration, it does provide support for the contention that the parties' intention at the time FHL entered into the PCAs and became a party to the JOAs was that FWIO-PWIO disputes under the JOAs were to be governed by international arbitration.

115 For these reasons I am of the view that the majority of the tribunal was incorrect in contending that the tribunal had no jurisdiction to hear or determine the dispute. In that context, I respectfully agree with the judgment and reasons of the EWCA in *Hashwani*.

116 As I have indicated, FHL in its written submissions refers to the statement by Justice Ijaz that if the question of whether or not the parties consented to an ICC arbitration is finely balanced, the agreement is void for uncertainty (see [82] above). That contention did not appear to be pressed by

PEL. In any event, once the parties' intention and the construction of the provision is determined by use of the ordinary principles of construction, the provision as construed is not void for uncertainty.

Conclusion

117 In conclusion, the tribunal incorrectly held that it did not have jurisdiction to hear the dispute between FHL and PEL. This is because on a proper construction, the PCAs and JOAs evince the parties' intention for FWIO-PWIO disputes to be resolved outside of Pakistan. I thus make the following orders:

(a) that paragraphs 264–342, 343(c), 343(d), 343(e) and 343(f) of the Jurisdictional Ruling issued by the arbitral tribunal in ICC Arbitration Case 27567/AB/CPB be set aside;

(b) that the tribunal has jurisdiction over the arbitration, including the jurisdiction to determine:

(i) the costs of the jurisdictional phase of the arbitration; and

(ii) the merits of the dispute in the arbitration);

(c) that:

(i) the tribunal must continue with the arbitration and make an award(s); and

(ii) in the event that any arbitrator is unable or unwilling to continue with the arbitration, the mandate of that arbitrator will terminate and a substitute arbitrator shall be appointed in accordance with Art 15 of the UNCITRAL Model Law on International Commercial Arbitration;

(d) that the costs of and occasioned by this application be paid by PEL to FHL; and

(e) in the event that the parties are unable to agree on the quantum of costs within a period of 21 days then the parties are to file submissions on the quantum of costs within a further seven days, with such submissions including a schedule of the costs incurred by each of them in respect of the action.

Thomas Bathurst
International Judge

Colin Liew (Colin Liew LLC, Duxton Hill Chambers (Singapore Group Practice)) for the applicant;
Kelvin Poon SC, David Isidore Tan and Chrystal Lee (Rajah & Tann Singapore LLP) for the respondent.
