HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Civil Revision No. 76 of 2025

Federal Government Employees Housing Authority through its Director Legal Affairs
Versus
Granite Enterprises (Pvt.) Ltd. through its CEO and others

Petitioner by	**:**	**M/s Ali Nawaz Kharal, Hassan Muneeb Zia and Malik Qamar Abbas**
Respondents by	**:**	**M/s Umer Ijaz Gillani, Naeem Ali Gujjar, Jehanzaib Durrani, Muhammad Alee and Syed Hussain Abuzar Ahmed, Advocates for respondent No.1.** **Mr. Muhammad Nadeem Raja, Advocate for respondent No.3**
Date of Hearing	**:**	**16.04.2025**

Babar Sattar, J:- The petitioner is aggrieved by order dated 06.02.2025, pursuant to which ad-interim injunction has been granted against termination of Joint Venture Agreement **("JV Agreement")** executed between the petitioner and respondent No.2, while hearing an application filed by respondent No.1, in terms of Section 20 of the Arbitration Act, 1940 **("Arbitration Act")**.

Arguments of the Petitioner

2. Learned counsel for the petitioner stated that respondent No.1 filed an application under Section 20 of the Arbitration Act **("Section 20 application")** to stay termination of JV Agreement executed by and between the petitioner and respondent No.2. He stated that the petitioner had decided after

issuance of notices pursuant to a decision of its Executive Board that the JV Agreement be terminated for various reasons, including, *inter alia*, delay in the execution of the project for financing, designing, engineering, construction, and supervision of residential apartments **("Project")** being undertaken by the Joint Venture through incorporation of respondent No.3 and further, because respondent No.2 had transferred its shares to individuals, who were members of respondent No.1, against provisions of the JV Agreement. He stated that while the petitioner and respondent No.1 had no privity of contract, a Section 20 application was filed by respondent No.1 and an injunction against termination of the JV Agreement had been granted. He further stated that the matter was fixed for 06.03.2025 for decision on the injunction application. However, on such date, no order was passed due to a transfer application having been filed by respondent No. 1 before the District Judge, who is also yet to pass an order in relation to the transfer application. Consequently, no decision has been rendered by the Senior Civil Judge seized of the matter, while the injunctive order remains in the field.

3. Learned counsel for the petitioner submitted that the instant revision petition was maintainable in terms of section 115 of the Code of Civil Procedure, 1908 **("CPC")** as the impugned decision related to assumption of jurisdiction in terms of section 20 of the Arbitration Act, which affected the rights of the petitioner. He submitted that the High Court could exercise its revisional jurisdiction to correct an error, illegality or irregularity in a decision of the subordinate court. On the question of

maintainability, he relied on ***Umar Dad Khan vs. Tila Muhammad Khan*** **(PLD 1970 SC 288),** ***Messrs National Security Insurance Company Ltd. vs. Messrs Hoechst Pakistan Limited*** **(1992 SCMR 718),** ***Haji Rehmdil vs. The Province of Balochistan*** **(1999 SCMR 1060) and** ***Mst. Banori vs. Jilani through legal heirs*** **(PLD 2010 SC 1186).** He also relied on ***Excel Techno Solutions FZE, UAE through Sole Proprietor vs. Oil and Gas Development Company Limited*** **(2019 CLC 416)**, where this Court had held that an injunction granted in terms of section 20 of the Arbitration Act could not be challenged in appeal, but could be scrutinized in exercise of revisional jurisdiction by the High Court. He then submitted that while exercising powers under section 41 read with section 20 of the Arbitration Act, the principles for grant of injunction in terms of Order XXXIX, Rules 1 and 2 were fully applicable. Such injunction could not be granted without determining that the three ingredients for grant of injunction (i.e. prima facie case, balance of convenience and irreparable loss) simultaneously co-existed in favour of the applicant. He submitted that it was settled law that where the grant of damages as compensation was an adequate remedy, it could not be assumed that not granting an injunction would cause irreparable loss. He further submitted that a contract that was not specifically enforceable in terms of sections 21 and 56 of the Specific Relief Act, 1877 **("Specific Relief Act")**, could also not be negatively enforced through the issuance of an injunction. He contended that the contract in question was a contract for provision of construction services, which could not be specifically

enforced and consequently an injunction against its termination could also not be issued. For these propositions he relied on ***Dewan Petroleum (Pvt.) Ltd. vs. Oil and Gas Investment Limited*** **(2019 CLC 1486)** and ***Pakistan Real Estate Investment and Management Company (Pvt.) Ltd. vs. Messrs Sky Blue Builders*** **(2021 CLC 488)**. Learned counsel for the petitioner then submitted that in terms of section 20 of the Arbitration Act, it was only a person who was a party to an arbitration agreement that could file an application to have the arbitration agreement filed. He submitted that the Civil Court admitted the application filed by respondent No.1 under section 20 of the Arbitration Act and had issued an ad-interim injunction prohibiting the petitioner from terminating the JV Agreement that was executed by and between the petitioner and respondent No. 2. And respondent No.1, who filed the Section 20 application before the Civil Court was not a party to the JV Agreement. A plain reading of Section 20 of the Arbitration Act made it evident that the application was not maintainable, having been filed by a person who was not a party to the JV Agreement, and consequently the arbitration agreement that formed clause 16 of the JV Agreement. For this proposition he relied on ***Inayatullah Khan vs. Obaidullah Khan*** **(1999 SCMR 2702)** and ***Messrs K&N International vs. Messrs Motorway Operations and Rehabilitation Engineering (Pvt.) Ltd.*** **(2019 CLC 1613).** He submitted that arguments with regard to the maintainability of the Section 20 application were raised before the Civil Court which, notwithstanding such arguments, continued to extend the ad-interim injunction. This was despite the fact that attention of

the court was drawn to clause 14.3 of the JV Agreement, which explicitly provided that a variation of the JV Agreement could only be made in writing and signed by each party to the JV Agreement. This was most relevant in a backdrop where the Section 20 application itself stated that the applicant was not a signatory to the JV Agreement, but ought to be treated as a party to the JV Agreement by virtue of the doctrine of alteration of contract through conduct. He submitted that the doctrine had never been acknowledged by the superior courts in Pakistan. And any evidence in support of such implied alteration of a written contract was inadmissible in view of Article 102 and 103 of the Qanun-e-Shahadat Order, 1984, as held by the Sindh High Court in ***Genesis Aviation Services (Pvt.) Ltd. vs. Gulf Air Company G.S.C.*** **(PLD 2015 Sindh 341).** Learned counsel for the petitioner submitted that the petitioner had impugned order dated 06.02.2025, granting injunctive relief while admitting an application in terms of section 20 of the Arbitration Act, which order was not sustainable in the eyes of the law. He submitted that the petitioner had also challenged the assumption of jurisdiction by the District Judge in relation to a transfer application filed on behalf of respondent No.1 by Mr. Naeem Ali Gujjar, Advocate (and President, District Bar Association Islamabad), by superseding the previously appointed counsel, after arguments on the maintainability and merit of the Section 20 application had already been heard by the Senior Civil Judge. While he filed his power of attorney at such belated stage and sought an adjournment to be able to argue the matter, on the very next day a transfer application was filed which was

tantamount to abusing the process of the court and preempt the rendering of any decision by the Civil Court in relation to the Section 20 application. Upon receipt of such application, the District Judge summoned the record of the Civil Court thereby preventing the Civil Court from hearing arguments or passing an order to decide the Section 20 application.

Arguments of the Respondents

4. Mr. Umer Ijaz Gilani, learned counsel for respondent No.1 appeared along with Mr. Naeem Ali Gujjar, Advocate. Mr. Gujjar submitted that he had only filed an application seeking transfer of the case as the Civil Judge had shown his displeasure over his filing of the power of attorney in the matter. He submitted that he was not abusing his office as the President of District Bar Association and that the District Judge had also not passed any order on the transfer application.

5. Mr. Umer Ijaz Gilani, learned counsel for respondent No.1 submitted that the instant petition was not maintainable in terms of section 7(3) of the Federal Government Employees Housing Authority Act, 2020, for not being duly authorized. He further submitted that the revision was not maintainable as the impugned order suffered from no jurisdictional defect. And the High Court did not ordinarily interfere with interlocutory orders in its revisional jurisdiction. He submitted that the petitioner had also concealed the fact that there were two civil suits pending before the civil court that had a bearing on the transfer application. And despite the issuance of an injunctive order, the petitioner had not abided by the injunctive order. Learned counsel for respondent No.1 submitted that Section 20

application filed by respondent No.1 was maintainable as the JV Agreement stood altered in terms of section 62 of the Contract Act, 1872 **("Contract Act")** by implication by virtue of the conduct of the parties. He submitted that where the question of whether the JV Agreement stood altered by novation was a mixed question of law and fact and it was proper for the civil court to consider the record, and evidence produced by the parties in relation to the question of fact. He submitted that the JV Agreement had been executed by the petitioner and respondent No.2 for financing, designing, engineering, construction, supervision and execution of the Project, and the parties agreed to the formation of new Joint Venture Company as a Special Purpose Vehicle **("SPV")**. The petitioner provided land for the Project and it was the responsibility of respondent No.2 to provide financing and other services. Clause 5 of the Agreement specified the manner in which management fee was to be distributed between the Joint Venture Partners. And after payment of management fee, profit from the Project was to be split up fifty-fifty. Clause 6.2 of the Agreement specified the Board of Directors of the Joint Venture Company (i.e. SPV) and that the CEO of the SPV would be nominated by respondent No.2. He relied on third proviso to the JV Agreement, which provided that respondent No.2 would have a right to nominate a partner with whom it would jointly carry out the implementation and supervision of the Project. He submitted that it was in terms of the said proviso that respondent No.1 was appointed as the implementation partner. Pursuant to the JV Agreement, the SPV called EHFPRO (Pvt.) Limited (Respondent No. 3) was

incorporated. As respondent No.2 lacked the financial ability to finance the Project, respondent No.1 was inducted as implementation partner pursuant to an agreement dated 19.08.2010, between respondent No.1 and respondent No.2. Respondent No.2 agreed to finance the Project subject to being treated as 25% beneficiary owner of the SPV. This agreement was then followed by a loan agreement also executed between respondent No.1 and respondent No.2 dated 19.08.2010. Whereas the Joint Venture Agreement granted respondent No.2 the right to nominate the CEO of the SPV, the Board of Directors of SPV in their meeting dated 19.08.2010 approved the agreement between respondent No.1 and respondent No.2 dated 19.08.2010. Further, by virtue of agreement dated 19.10.2012 it was agreed between respondent No.1 and respondent No.2 that the beneficial ownership of shares owned by respondent No. 2 in the SPV would not be on equal basis between respondent No.1 and respondent No.2, but that respondent No.1 would have the benefit of 80% of the shares and respondent No.2 would have the benefit of 20% of the shares within the pool of shares due to respondent No.2 under the JV Agreement. The second agreement dated 19.10.2012 was also approved by the Board of SPV in its meeting dated 19.11.2012. The Board also approved the transfer of shares of the SPV from respondent No.1 to respondent No.2. He submitted that it was also a matter of record that CEO of respondent No.1 had remained the CEO of the SPV. He submitted that in view of the aforementioned agreements and actions, it was evident that the petitioner in its capacity as a shareholder of the SPV, while being part of the Board of the SPV, had

acquiesced to the inclusion of respondent No.1 as party to the JV Agreement. Respondent No.1 had a stake in the Project by virtue of being a member of the SPV as well as by virtue of the agreements executed between respondent No.1 and respondent No.2, that had been approved by the Board of SPV, and continued to draw management fee in terms of provisions of the JV Agreement. Thus, in view of all these facts it was evident that respondent No.1 had been treated as member of the JV Agreement and the JV Agreement, thus, stood altered in view of subsequent conduct of the parties. It was therefore entitled to rely on the dispute resolution clauses of the JV Agreement, which it did by filing the Section 20 application. The civil court while admitting such application and passing an ad-interim injunction, thus did not commit any illegality.

6. On behalf of respondent No.2, a power of attorney was filed, but no argument was addressed to the court. Mr. Muhammad Nadeem Raja, Advocate appeared on behalf of respondent No.3. Learned counsel for the petitioner contested his authorization that he had been authorized by the CEO of the SPV and not the Board of Directors. And that the CEO of respondent No.1, was also the CEO of respondent No.3. That without due board authorization, the learned counsel could not be deemed to be representing respondent No.3. Learned counsel for respondent No.3 merely submitted that there had previously been an arbitration in terms of clause 16 of the JV Agreement which was concluded by award dated 17.10.2012 and was made rule of the court by judgment dated 23.10.2012 in *Civil Suit No.40/2012* titled *Progressive Motels and Resorts (Pvt.) Ltd. vs. The Federal*

Government Employees Foundation. He submitted that in the said award respondent No. 1 had been treated as a party to the JV Agreement.

Arguments of the Petitioner in Rebuttal

7. In rebuttal, learned counsel for the petitioner submitted that the JV Agreement was never altered or amended explicitly or by implication. He submitted that clause 14.3 of the JV agreement clearly provided that in case of any conflict between provisions of the JV Agreement and the Memorandum and Articles of the SPV, the provisions of the JV Agreement would prevail and that the provisions of the Memorandum and Articles of the SPV would be altered accordingly. He submitted that the agreement dated 19-08-2010 between respondent No.1 and respondent No.2 that had been relied on by respondent No.1 itself provided in clause 1.3 that respondent No.1 would not be made a party to the JV Agreement and would not become a legal owner of any shares in the SPV. He submitted that this was consistent with the definition of parties in the JV Agreement, which clearly named the petitioner and respondent No.2 as parties. Clause 2.1(b) of the JV Agreement also provided without ambiguity that 50% of the shares, each would be issued to the petitioner and respondent No.2. Similarly, clause 13 of the JV Agreement provided that none of the parties to the JV Agreement would transfer any shares or create or dispose of any right or interest in the shares. He submitted that in view of these unequivocal provisions, which were consistent with the provisions of the Agreement between respondent No.1 and respondent No.2 dated 19-08-2010, the question of any implied amendment of

the JV Agreement resulting in the inclusion of respondent No.1 did not arise. He then submitted that the SPV was created pursuant to provisions of the JV Agreement and any agreement endorsed by the board of the SPV could not have the effect of amending the JV Agreement. Likewise, any decision rendered by the Board of the SPV, where the petitioner was represented as a shareholder or board member could also not have the effect of amending the JV Agreement, which could only have been amended in writing through an addendum signed by the petitioner as the legal entity.

Preliminary Matters

8. With regard to the authority of the learned counsel purporting to represent respondent No.3, a perusal of the comments filed by respondent No.3 reflects that they have been filed by the Chief Executive of respondent No.3, who, as asserted by respondent No.1, is the CEO of respondent No.1. The provisions of the JV Agreement state that the SPV will have four board members, two members being nominated by the petitioner and two members being nominated by respondent No.2. And further that the Chairman of the SPV would be a board member nominated by the petitioner, who would have a casting vote in case of any difference of opinion in the board. This Court has noted that there is no board resolution appended with the comments filed by respondent No.3 or the power of attorney filed by the counsel purporting to represent respondent No.3. Consequently, this Court finds that the counsel appearing on behalf of respondent No.3 is not duly authorized. On the question of authorization of the instant petition, the objection of the

learned counsel for respondent No.1 is without merit. It has been contended by him that the petition could only have been filed by the Director General FGEHA (**"DG FGEHA"**) himself or by an officer appointed by the Executive Board in view of section 7(3) of the Federal Government Employees Housing Authority Act, 2020 (**"FGEHA Act"**). It was further submitted that the DG FGEHA could only delegate his powers under section 7 of the FGEHA Act to an officer of FGEHA with the approval of the Executive Board. Section 7 of the FGEHA Act deals with the powers and functions of the DG FGEHA and vests in him all executive powers of FGEHA. Section 7(2) specifies the functions of the DG FGEHA. Section 7(3) then vests authority in the DG or an officer appointed by the Executive Board of FGEHA to institute petitions in court. Section 7(4), that respondent No.1 relied on, provides that, *"the Director General may, with the approval of the Executive Board, delegate any of his powers specified in sub-section (2) to an officer of the Authority."* The approval required in terms of section 7(4) of the FGEHA Act only relates to powers of the DG FGEHA specified in section 7(2) of the FGEHA Act. The power to institute a petition is vested in the DG FGEHA in terms of section 7(3) of the FGEHA Act. And in view of section 9 of the FGEHA Act such power could be delegated by the DG FGEHA to an officer of FGEHA without seeking the approval of the Executive Board. Thus, the instant petition filed by the Assistant Director (Law) of FGEHA by virtue of powers delegated to him by the DG FGEHA in terms of section 7(3) read with section 9 of the FGEHA Act does not suffer from legal infirmity.

9. This Court has also taken note of order dated 23.10.2012, referred to by the counsel purportedly representing respondent No. 3, passed in Civil Suit No. 40 of 2012 by this Court. A perusal of the application filed by Progressive Motels and Resorts (Pvt.) Ltd. (i.e. respondent No.2) in terms of section 20 of the Arbitration Act reflects that the only parties to the application were respondent No.2, as plaintiff in the said application, and the petitioner as respondent. It was therefore the application of respondent No.2, as party to the JV Agreement, that was entertained by this Court and while the award does mention the role of respondent No.1 in the execution of the Project, the suit itself did not include respondent No.1 as a party, and therefore, it cannot be claimed in view of the proceedings in such matter that this Court treated respondent No.1 as a party to the JV Agreement. The said arbitral award and the decision declaring it to be rule of court need not be discussed any further for our present purposes.

Questions to be adjudicated

10. The primary legal questions that need to be answered to adjudicate the controversy at hand are: (i) whether respondent No.1 made out a prima facie case that it was a party to the JV Agreement and consequently a party to the arbitration agreement contained within the JV Agreement and was, therefore, competent to file an application in terms of Section 20 of the Arbitration Act, (ii) whether the test for the grant of an ad-interim injunction was satisfied in the facts and circumstances of the instant case, in view of which the civil court could have exercised authority in terms of Section 41 of the Arbitration Act

read with Order XXXIX Rules 1 and 2 of CPC to grant the ad-interim injunction that has been impugned before this Court, and (iii) does the manner in which the transfer application was filed and proceedings conducted by the District Judge suffer from legal infirmity?

Transfer Application and its Legality

11. This Court summoned the record in relation to the transfer application, which reveals that the District Judge is yet to adjudicate the transfer application filed by respondent No.1. This Court would not, therefore, pass any observations on the matter as that could prejudice the adjudication of the transfer application that is yet to be decided. Mr. Naeem Ali Gujjar, Advocate (who appeared in the civil court on behalf of respondent No. 1 and sought an adjournment on 05.03.2025, and then filed a transfer application before the District Judge), appeared before this Court and sought to dispel the impression that the said application was filed to capitalize on his position as President, District Bar Association. It is a settled and respected convention amongst lawyers that one counsel does not accept a brief that would have the effect of superseding a previous counsel, who is holding such brief, unless of course the litigant exercises his right to appoint a fresh counsel in view of the performance of the existing counsel. In such cases too, the established convention is that the superseding counsel brings the matter to the attention of the original counsel before superseding him/her in order to maintain comity within the Bar. An equally respected convention is that lawyers who are elected as representatives of the Bar, are loath, during their term in office,

to file a power of attorney in an ongoing case to supersede previously appointed counsel, in order to preserve the integrity of the office they hold and to exercise due care in not cultivating an impression that representative positions are sought for the purpose of, or that have the effect of, influencing the outcome in judicial matters. Mr. Naeem Ali Gujjar, Advocate acknowledged these revered traditions and stated that he seeks to uphold them during his term as President. In these circumstances, the third question articulated in para. 10 above need not be addressed any further, and it would remain for the District Judge to decide the transfer application pending before him in accordance with law.

Maintainability of Section 20 Application

12. Let us first consider the test for maintainability of an application filed under section 20 of the Arbitration Act. Section 20 of the Arbitration Act states the following:

> ***20. Application to file in court arbitration agreement****.—(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in the Court.*
>
> *(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.*
>
> *(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the*

time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

13. The plain language of the Section 20 identifies at least three key preconditions for the competence of an application filed pursuant to it. One, there must be an arbitration agreement entered into by the parties before institution of a suit. Two, the subject matter of the dispute must fall within the domain of the arbitration agreement. And three, the party seeking the filing of the arbitration agreement and referral of the dispute to arbitration must be a party to the arbitration agreement. The Lahore High Court in ***Manzoor Construction Co. Ltd. vs. University of Engineering and Technology Taxila*** **(1984 CLC 3347)** held that:

"[B]efore a person can make an application under that provision for a prayer that an agreement be filed in the court, following four conditions have to be satisfied:

(i) That there is an agreement between the parties containing arbitration clause.

(ii) That the agreement had been entered into before institution of the suit with respect to the subject-matter of the agreement.

(iii) That a difference has arisen between the parties to which the agreement applies.

> *(iv) That the Court to which application is made has jurisdiction in the matter to which the agreement relates.*
>
> *It appears that if anyone of these conditions is absent, no one can file an application under that section. Further, when these conditions are not satisfied, Civil Court cannot pass an order to the effect that agreement be filed in Court and matter be referred to arbitration."*

14. In ***Muhammad Umar vs. Yar Muhammad*** ***(2009 CLC 348)*** and ***A.J. Corporation vs. Fauji Fertilizer Bin Qasim Limited*** **(2013 CLD 636)** the Sindh High Court also reiterated the conditions prescribed in section 20 of the Arbitration Act as a pre-requisite for referring a matter to arbitration. In ***Inayatullah vs. Obaidullah*** **(1999 SCMR 2702)** the High Court had ordered that an award with regard to partition of property be made rule of court. The Supreme Court accepted an appeal against the judgment of the High Court on the basis that one of the parties whose property was affected by the award was not a party to the arbitration agreement, and consequently the reference to arbitration and the award itself were held to be void. While relying on this judgment as well as ***Ali Khan versus Barat Khan*** **(PLD 2005 Lahore 340),** this Court in ***K&N International vs. Motorway Operations and Rehabilitation Engineering Pvt. Ltd. 2019*** **(2019 CLC 1613)** emphasized that arbitrators derived their jurisdiction to undertake dispute resolution *"from the consent of the parties as recorded in the arbitration agreement, and that the arbitrators lack jurisdiction to adjudicate upon the rights of a person who is not a party to the arbitration agreement. By the same analogy, it can safely be held that a person who is not a party to an arbitration agreement*

cannot enforce the same by filing an application under section 20" of the Arbitration Act.

15. In view of the above, it is settled that in order for an applicant to be competent to file an application under section 20 of the Arbitration Act, it must be a party to an arbitration agreement. It is admitted in the instant case that respondent No.1 is not a signatory to the JV Agreement, which contains an arbitration clause, and its claim to being a party to an arbitration agreement is rooted in its argument that the JV Agreement stood novated in terms of section 62 of the Contract Act by virtue of the conduct of parties to the JV Agreement. The language or import of provisions of the JV Agreement is also not disputed in the instant matter. The JV Agreement explicitly defines "Parties" to mean *"FGEHF (Party-I) and Progressive (Party-II)"*. The JV Agreement in clause 2.1 provides that the parties to the JV Agreement agree to the incorporation of a JVC (i.e. SPV) as a Pakistani Private Limited Company named EHFPRO Private Limited. Clause 2.1 further provides that the share capital of the SPV shall be subscribed in equal parts by FGEHF (Party-I) and Progressive (Party-II) and that the Board of the SPV shall comprise of two Directors nominated by FGEHF and two Directors nominated by Progressive. And further that the Chairman of the SPV would be nominated by FGEHF and the CEO would be nominated by Progressive. Clause 3.1 of the JV Agreement stipulates the role and responsibilities of the shareholders of the SPV and specifically states that *"the land subject matter of this agreement shall remain in the ownership of FGEHF and that, the land and apartments, to be built as part of the Project…would be*

transferred directly by FGEHF to purchasers/allotees." Clause 4 deals with the financing of the Project and prescribes that Progressive (Party-II) would provide working capital to the JVC for purposes of construction of the Project. Clause 5 provides that FGEHF (Party-I) would be entitled to 8% of the Project cost as FGEHF management fee and similarly Progressive (Party-II) would be entitled to 8% of the total Project cost as Progressive management fee. Clause 13 contains a representation of parties with regard to transfer of shares and prohibits both parties from transferring any shares in the SPV or otherwise creating or disposing of any right or interest in the shares of the SPV. Clause 13.2 clarifies that, *"in case any of the two parties feel that it cannot continue in the JVC then the company would be voluntarily wound up and accounts settled in accordance with the Companies Ordinance 1984."* Clause 14.3 is in the nature of a No Oral Modification Clause **("NOM Clause")** and states that *"a variation of this agreement (or any of the documents referred to in it) is valid only if it is in writing and signed by or on behalf of each party."* Further clause 14.11 provides that in case of a conflict between provisions of the JV Agreement and the Memorandum and Articles of the SPV, the provisions of the JV Agreement would prevail and the parties acting as shareholders of the SPV would exercise their voting rights to give effect to the provisions of the JV Agreement and ensure that required amendments are made in the Memorandum and Articles and other constituent documents of the SPV to bring them in consonance with provisions of the JV Agreement. Clause 16 then

provides for settlement of disputes and arbitration in the following terms:

> *16.1 If any dispute between the Parties arises in connection with this Agreement, they shall use all reasonable endeavors to resolve the matter amicably, failing which the dispute shall be referred to arbitration in accordance with clause 16.2.*
>
> *16.2 All disputes, controversies or claims arising out of or in connection with this Agreement, including the breach, termination or invalidity of it shall be referred to a sole arbitrator. It would be finally settled under the Arbitration Act, 1940 or any successor law thereto by the Arbitrator appointed by agreement of the Parties or, failing agreement, by the Court. The seat of the Arbitration shall be Islamabad. The language of the arbitration shall be English*.

16. The provisions of the JV Agreement are unambiguous. The legal question that arises in the present context is whether the provisions of the JV Agreement could be altered or modified through subsequent conduct of parties, notwithstanding clause 14.3, which is a NOM Clause, in the absence of a subsequent written agreement between the petitioner, respondent No.1, and respondent No.2.

Can a Written Agreement be Amended by a Subsequent Oral Agreement or by Conduct?

17. This is a case of first impression within our jurisdiction. The only judgment that has been brought to the attention of this Court and tangentially considers the question of whether an oral agreement can modify a prior written agreement was rendered by the Sindh High Court in the matter of ***Genesis Aviation Services (Pvt.) Ltd. vs. Gulf Air Company G.S.C.*** **(PLD 2015 Sindh 341)**. In the said matter an application under section 20 of the Arbitration Act had been filed to seek ad-interim relief

against the termination of an agreement. The question before the court was whether the parties to the agreement could modify or amend the agreement by a subsequent oral agreement and, if so, how would such subsequent agreement be proved. The agreement in the said matter was governed by English law in view of which the agreement was to be interpreted and construed. However, the manner in which the contract was to be proved depended on *lex fori* i.e., the procedural law applicable in Pakistan. While taking note of English cases including, *inter alia*, *World Online Telecom Ltd. v. I-Way Ltd. [2002] EWCA Civ 413* and *Virulite LLC v. Virulite Distribution Ltd. [2014] EWHC 366 (QB),* Munib Akhtar, J., noted that, *"I accept that as a matter of English law, in appropriate circumstances the court can find and hold that notwithstanding a clause in a contract that only allows amendments and modifications to be in writing, the contract may be amended by a subsequent oral agreement. However, I expressly leave the question open, to be decided in an appropriate case, as to what would be the correct approach and conclusion as a matter of the law of Pakistan…"* On the question of the manner in which subsequent oral agreement is to be proved, the Sindh High Court took note of Articles 102 and 103 of QSO. And in view of the fourth proviso to Article 103 of QSO, it was held that the agreement mentioned in the said proviso must be *"distinct"* and *"it must be shown to refer and apply specifically to one (or more) of the terms of the 'written' agreement and it must also be shown how that (or those) term(s) are being affected, i.e., contradicted, varied, added to or subtracted from. In other words, it is insufficient to simply plead (or prove)*

generally that there is a subsequent oral agreement that affects the earlier written contract." In considering the standard of proof, the Sindh High Court held that in civil cases, there was no doubt that the matter had to be decided on a balance of probability, while noting in view of Article 103 of the QSO that, *"It is only an agreement of a particular type that will be admissible, i.e., one that is not merely oral and subsequent, but is also 'distinct'."*

18. While ***Genesis Aviation Services*** enumerated the requirements of Article 103 of the QSO in the context of its fourth proviso with regard to the nature of an oral agreement that could be admitted in evidence to prove that a prior written agreement had been modified, it left open the question of whether an oral agreement could amend a prior written agreement with a NOM Clause for purposes of the law in Pakistan. This is the question that will need to be addressed in the first instance in the instant matter.

19. Section 10 of the Contract Act defines contracts and provides the following:

> ***10. What agreements are contracts.*** *All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in Pakistan, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.*

20. Section 10, read together with its proviso, clarifies that contracts, in order to be enforceable in Pakistan, need not be in

writing. The provisions of the Contract Act require that there must be an unambiguous proposal by a party that is unconditionally accepted by the counterparty. There must be lawful consideration i.e., something of value exchanged between the parties. The parties ought to have given their consent to the agreement i.e., there must be a meeting of the minds with regard to the subject-matter of the agreement. The parties must be competent to contract and such contract must not involve an unlawful object. Where the requirements of a valid contract can be proved in accordance with law, it does not matter whether the contract is written or oral in order to be enforceable.

21. The question of whether a written contract with a NOM Clause can be amended through a subsequent oral contract has been answered differently within common law jurisdictions. The underlying premise for the argument that an oral contract can alter or amend a written contract with a NOM Clause is that there are no formal requirements for the validity of a contract at common law. Consequently, the manner in which parties choose to exhibit or express their agreement or meeting of minds cannot be put in a straitjacket, as doing so would fetter the freedom of parties to contract. The most cited rule in this regard is the dictum of Cardozo, J., from the following passage in the judgement of *Beatty v. Guggenheim Exploration Co. (1919) 225 NY 380 at 387*, wherein he noted:

> *"…[t]hose who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which*

> *contradicts it'…What is excluded by one act, is restored by another. You may put it out by the door; it is brought back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again …"*

This dictum of Cardozo, J., has been considered recently by the UK Supreme Court and the Court of Appeals of Singapore in the context of the competence of contracting parties to modify a written agreement with a NOM Clause through a subsequent oral agreement, while the two courts reached different conclusions. Between these two judgments, all relevant legal and policy considerations re the question at hand stand covered.

22. In *Rock Advertising Limited (Respondent) v. MWB Business Exchange Centres Limited* [2018] UKSC 24, the majority opinion rendered by Lord Sumption concluded that an oral variation to a written agreement with a NOM Clause was invalid. The majority opinion cited the passage reproduced above as articulated by Cardozo, J., and noted that the United States Uniform Commercial Code introduced a statutory requirement for writing down contracts of sale above a specified value to give effect to NOM Clauses. It further noted that the rule stated by Cardozo, J., had been applied in Australia, Canada and Germany. It further discussed the findings in *World Online Telecom Ltd. v I-Way Ltd.* [2002] EWCA Civ 413, *Energy Venture Partners Ltd. v Malabu Oil and Gas Ltd*. [2013] EWHC 2118 (Comm) and *Globe Motors Inc. v TRW Lucas Varity Electric Steering Ltd*. [2016] 1 CLC 712 and then declared, while taking a leave from the position that prevailed in view of the said decisions in UK, that, *"law should and does give effect to a contractual provision*

requiring specified formalities to be observed for a variation." While setting aside the decision of the court of appeal, it was noted that a NOM clause *"prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse",* to preempt *"circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes"* and to introduce *"a measure of formality in recording variations"* to make it easier for corporate entities to police the exercise of authority by such entities. In finding that a NOM Clause was to be given effect, it was declared that, *"what the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid."*

23. In the same matter, Lord Briggs rendered a contrary opinion. He stated that in terms of the question of whether parties could orally exclude a NOM Clause from a written agreement, his answer would be in the affirmative. In such case, however, the focus of the court would, as a matter in evidence, be on whether anything was said about the NOM Clause. In other words, the focus would be on proof of the intent of the parties to rescind the NOM Clause. But that, *"such an agreed departure will not lightly be inferred, where the parties merely conduct themselves in a non-compliant manner, for example, by discussing and even reaching a consensus about a variation of the substance of their obligations purely orally, without express reference to the NOM Clause*." Rock Advertising Ltd has now settled for the purposes of UK law that a written agreement with a NOM Clause cannot be orally varied and any such oral variation would be deemed invalid.

24. The same question was recently also considered by the Court of Appeals of Singapore in *Charles Lim Teng Siang v. Hong Choon Hau* [2021] SGCA 43, which noted that there were at least three schools of thought in relation to the effect of a NOM Clause. The first was the majority opinion in *Rock Advertising* treating an oral variation to a written agreement with a NOM Clause as invalid. The second was the opinion by Lord Briggs in *Rock Advertising* holding that an oral agreement modifying a written agreement with a NOM clause would not be lightly inferred where the oral agreement made no express reference to the NOM Clause. And the third was that, *"a NOM Clause merely raises a rebuttable presumption that in the absence of an agreement in writing, there would be no variation*." By holding that there was no reason in law why contracting parties could not orally modify a written agreement, even if it contained a NOM Clause, it was observed that, *"while the autonomy of an individual party may be bound by the terms of the contract, the parties as a collective retain the power and autonomy to vary any aspect of their own agreement so long as they jointly agree to do so."* The Singapore Court of Appeals interpreted the dictum of Cardozo, J., reproduced above, as underlying the principle that, *"the more recent intention of the parties to vary a contract albeit orally notwithstanding their earlier agreement to the contrary"* is to be recognized and given effect. After noting that *Rock Advertising* had granted a NOM Clause the equivalence to a statutory rule, the Singapore Court of Appeals held that, *"NOM Clauses are merely contractual terms between the parties and there is simply no justification to characterise them as mandatory*

rules in the manner that one would with a statute." While also disagreeing with the approach of Lord Briggs in *Rock Advertising*, the Singapore Court of Appeals held that, *"the test should be whether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM Clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not."* It was held that the problem highlighted in cases wherein it was concluded that an oral modification of a written agreement with a NOM Clause to be invalid, *"this perceived difficulty is a question of evidence"*, but that such difficulty ought to be addressed in view of evidential principles and not as a matter of contract law. It held that, *"once the burden of proof is discharged, the NOM will cease to have legal effect because that would be the collective decision of both parties to the contract i.e., a function of the party autonomy principle in contract law."* It also cited *Mathews Capital Partners v. Coal of Queensland Holdings* [2012] NSWSC 462 while observing that Australian law also treated a NOM Clause as serving an evidential function.

25. For purposes of the law in Pakistan, this Court endorses the dictum of Cardozo, J., in *Guggenheim Exploration Co.* as the correct extrapolation of the principle of autonomy of contracting parties that would apply in terms of provisions of the Contract Act. This Court further agrees with the law laid down in *Charles Lim Teng Siang* by the Court of Appeals of Singapore with regard to treatment of a subsequent oral agreement to alter a written agreement with a NOM Clause.

26. Neither section 10 nor any other provision of the Contract Act requires an agreement to be in writing for it to qualify as a valid and enforceable contract. The proviso to section 10 of the Contract Act, on the other hand, acknowledges the validity of an oral contract by reaffirming statutory provisions that require contracts to be made in writing, as an exception to the rule. The requirement of free consent in terms of section 14 of the Contract Act also does not require such consent to be given in writing. The policy considerations in holding that an oral modification of a contract in breach of a NOM Clause to be invalid are indeed attractive. Holding so simplifies the job of adjudicators by laying down a bright-line rule. Such policy considerations, on a conceptual plane, emanate from the desire to introduce certainty in contractual affairs as well as efficiency in deciding contractual disputes. Such considerations, however, do not effectively engage with the principles of freedom and autonomy of contracting parties as correctly highlighted by the Court of Appeals of Singapore in *Charles Lim Teng Siang*. Such approach also disregards the rule against legislation by courts. It is not for a court of law to adopt a policy consideration as a binding and enforceable principle of law. Such function belongs within the domain of the legislature.

27. As has been discussed above, the Uniform Commercial Code enforced in the United States makes provision to give effect to NOM Clauses and holds that "*a signed agreement that excludes modification or rescission except by signed in writing cannot be otherwise modified or rescinded*…" Similar statutory requirements are in force in Pakistan as well. For example,

provisions of the Transfer of Property Act, 1882, Registration Act, 1908, Negotiable Instruments Act, 1881, Partnership Act, 1932, Arbitration Act, 1940 and Rent Restriction Statutes require various contracts to be in writing and/or registered. Provisions of the contract law do not prohibit recognition of an oral agreement. Thus, just as a subsequent written agreement can alter, modify or rescind a NOM Clause in a prior written agreement, there is no reason in principle why a subsequent oral agreement should be treated as being incapable of amending a prior written agreement with a NOM Clause. Say for example, a party enters into a contract with another party for supply of goods. The contract takes the form of a written agreement for the supply of ten books. It also includes a NOM Clause. After the supply has been completed, the purchaser requests the supplier to supply five more books. And the supplier supplies them. It would be unthinkable that if this matter were to come to court, the court would refuse to treat the subsequent supply of five books over and above that quantity mentioned in the written agreement as constituting an invalid contract between the parties. It would be for the seller to establish offer and acceptance as well as consent on the part of both parties. However, if such evidentiary burden stood discharged, the court would not treat the subsequent oral contract as being invalid by virtue of the NOM clause in the written agreement. And in giving effect to such subsequent oral contract, the court would not need to rely on the principle of estoppel. It could order enforcement within the domain of contract law.

28. If the policy considerations in favour of upholding NOM Clauses in written agreements are to be given effect, there is nothing preventing the legislature from introducing an appropriate amendment in the Contract Act. In the absence of such statutory requirement, however, it is not for the Court to legislate by judgment. This Court therefore finds that a written agreement with a NOM Clause can be amended through a subsequent oral agreement. Provided that such subsequent oral agreement is proved by the party asserting the existence of such agreement, by establishing that (i) it satisfies the test of being a contract overriding a prior written agreement in terms of the provisions of the Contract Act, and (ii) meets the requirements of being a "distinct subsequent oral agreement" according to the fourth proviso to Article 103 of QSO, as laid down in **Genesis Aviation Services** by the Sindh High Court.

Proof of an Oral Agreement Amending a Written Agreement with a NOM Clause

29. Having found that, as a matter of contract law, an oral agreement can modify a prior written agreement with a NOM Clause, this Court will also immediately acknowledge that proving such alteration as an evidentiary matter though would be extremely difficult if not outrightly impossible, with the onus of proof on the party making such a claim to rebut a presumption in favour of the terms of a written agreement, including the NOM Clause within it. In other words, the starting point for a court in a contractual dispute would be that a written agreement with a NOM Clause is to be given effect unless such presumption is

rebutted by the party claiming that such written agreement has been modified by a subsequent oral agreement.

30. Articles 102 and 103 of the QSO are relevant for our discussion and their relevant parts are being reproduced below:

> *102. Evidence of terms of contracts, grants and other disposition of property reduced to form of document.— When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.*
>
> *103. Exclusion of evidence of oral agreement.— When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last Article, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms:*
>
> *Proviso (4) —The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.*

31. In concluding that a written agreement with a NOM Clause can be amended by a subsequent oral agreement, this Court has taken into account proviso 4 to Article 103 of QSO, as such proviso provides an exception to the rule under Articles 102 and

103 of QSO that no oral evidence is admissible to contradict the terms of a written agreement. The exception itself entertains the possibility of a subsequent oral agreement modifying or rescinding a written contract. Proviso 4 is one of the exceptions to the rule stated in Article 103. Where a contract is reduced to the form of a document, no evidence of any oral agreement between the parties is to be admitted. Proviso 4 then provides an exception to this rule in a case where evidence is being led to establish *"the existence of any distinct subsequent oral agreement to rescind or modify any such contract…"* But the proviso itself then goes on to create a carve-out to the exception by providing that the exception would not apply *"in cases in which such contract… is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents."* The crux of the rule as stated above is that evidence as to the existence of a distinct subsequent oral agreement rescinding or modifying a prior written agreement can be led, except in cases where the written agreement in question is required by law to be in writing or is required to be registered. Thus, any agreement that is required by law to be in writing cannot be modified or rescinded by a subsequent oral agreement, not by virtue of the inability of the contracting parties to reach such agreement, but by virtue of a statutory rule in Article 103 of the QSO stating that any oral evidence to support such claim would not be admissible. What this statutory rule does is extinguish the possibility of a contracting party rebutting the presumption that the provisions of a written contract remain in force by virtue of a subsequent

oral agreement, unless it can be established through a subsequent written agreement that the prior agreement has been amended.

32. In our present context, the fourth proviso to Article 103 of QSO becomes relevant as the question before this Court is whether the JV Agreement, which includes a NOM Clause in terms of clause 14.3 of the JV Agreement, could be modified by subsequent oral agreement or conduct of the parties. The current position in UK has been discussed above, where, in view of the law laid down in *Rock Advertising*, the answer would be a plain no. This Court has however endorsed the law laid down by the Court of Appeals of Singapore in *Charles Lim Teng Siang*, in view of which the answer would be that the question of whether the written agreement in question had been amended by a subsequent oral agreement, is one of evidence. As an evidentiary matter, it would be for the party claiming the modification of the written agreement to rebut the presumption in favour of the provisions of such written agreement by leading evidence in accordance with law. The party would then have to claim that it is entitled to lead such evidence in view of the provisos to Article 103 of QSO, specifying the exceptions to the rule against leading oral evidence to contradict the provisions of a written agreement. It would be allowed to lead such evidence unless, of course, the written agreement in question was required by law to be in writing or has been registered.

33. A written agreement for purposes of section 20 of the Arbitration Act is an arbitration agreement. In order for respondent No.1 to establish that its application in terms of

section 20 of the Arbitration Act is competent, it would need to establish that there exists an arbitration agreement to which it is a party, which binds the petitioner and respondent No.2 to resolve through arbitration a dispute that falls within the domain of such arbitration. An arbitration agreement is defined in section 2(a) of the Arbitration Act to mean, *"a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."* Section 2(a) of the Arbitration Act, therefore, creates a statutory requirement that an arbitration agreement must be in writing. The JV Agreement includes clause 16, which is in the nature of an arbitration clause. The JV Agreement has, however, been executed by and between the petitioner and respondent No.2. For respondent No.1 to claim that there exists a valid arbitration agreement in view of which it can require the petitioner and respondent No.2 to submit to arbitration in relation to a dispute that has arisen under the JV Agreement, it must establish that it is a party to an arbitration agreement which is in writing. This is where respondent No.1's case falls apart in the first instance. Respondent No.1 is admittedly not a signatory to the JV Agreement. The JV agreement also includes clause 14.3, which is a NOM Clause. It is the claim of respondent No.1 that it is a party to the JV Agreement, which has been altered or modified orally, by virtue of the conduct of the parties, subsequent to the execution of the JV Agreement. Respondent No.1 could possibly lead evidence in terms of proviso 4 of Article 103 of QSO to establish that subsequent conduct of the parties satisfied the necessary ingredients of an oral contract and could be allowed to lead such

evidence to rebut the presumption that attaches to the provisions of the JV Agreement as a written contract, but for the carve-out in the fourth proviso, which provides that such exception to the rule is not available where the written contract is required by law to be in writing. And an arbitration agreement is one such agreement that by virtue of section 2(a) of the Arbitration Act is required by law to be in writing.

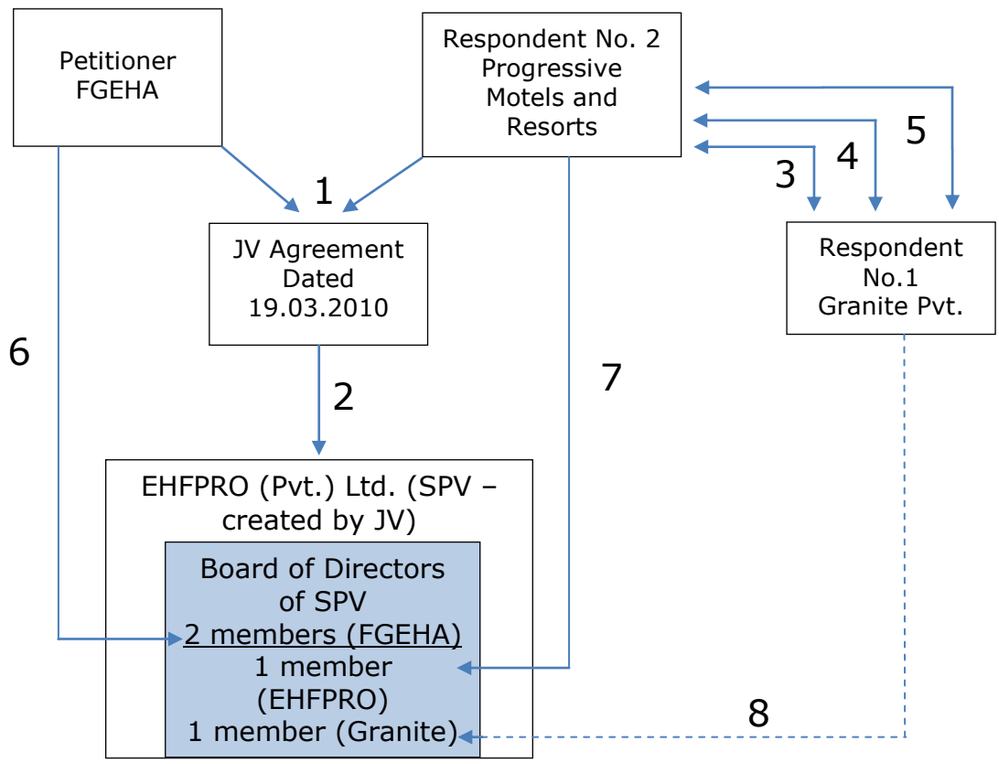
34. Let us assume for a moment that there was no statutory requirement under the Arbitration Act for an arbitration agreement to be in writing. In the facts and circumstances of the present case, once respondent No.1 had filed its Section 20 application along with the JV Agreement, the court would immediately take note of the fact that the written agreement that includes an arbitration agreement has not been executed by respondent No.1. The presumption would then be that respondent No.1 is not a party to the arbitration agreement. Such presumption would be rebuttable to the extent that respondent No.1 brought a claim that the arbitration agreement was subsequently amended by the conduct of the parties. To the extent that there was no requirement for the arbitration agreement to be in writing, and respondent No.1's case did not fall within the carve-out to proviso 4 of Article 103 of QSO, respondent No.1 would be entitled to lead evidence to establish that there did exist *"a distinct subsequent oral agreement"* modifying the JV Agreement and the arbitration agreement within it, such that respondent No.1 was included as a party to the JV Agreement and the arbitration agreement within it, with the consent of the parties to the JV Agreement. Respondent No.1

would then be required to prove that the parties to the JV Agreement (i.e. the petitioner and respondent No.2) gave their consent to respondent No.1 becoming a party to the JV Agreement in the form of an oral agreement by virtue of their conduct. The problem that would immediately arise would then be proof of consent on part of the petitioner and respondent No.2, which are legal entities.

35. The proof of consent by a natural person is a simpler affair. The proof of consent by a legal person is an altogether different matter. An agreement would not bind a legal person unless it has been authorized in accordance with the constituent documents of such legal person. It would be insufficient for a party claiming the existence of an oral agreement with a legal person, which agreement is to be inferred from the conduct of such legal person, to cite the actions of certain individuals within the management of such legal person, when the legal person is only authorized to act through a collegiate decision-making body such as the board of directors. The actions of individual members of the management of a legal person would not bind the legal person as a matter of law (we are not considering here the question of vicarious liability, etc.). It is thus that this Court has noted earlier in this judgment that it would be nearly impossible to establish a person’s consent to an oral agreement altering a prior written agreement where the contracting parties are legal persons.

Scheme of Interaction Between Relevant Entities

36. In the facts of the present case, the contractual engagement between the petitioner and respondent No. 1, and respondent No.2 can be visualized as follows:



Reference Table	
1	JV Agreement entered into between the Petitioner and Respondent No.2 dated 13.03.2010
2	EHFPRO Pvt. Ltd created by virtue of JV
3	First Agreement between Respondents No. 1 and 2 dated 19.08.2010 with regard to beneficial ownership of shares of the SPV issued to Respondent No. 2
4	Loan Agreement between Respondents No. 1 and 2 dated 19.08.2010
5	Second Agreement between Respondents No. 1 and 2 dated 19.10.2012 with regard to beneficial ownership of shares of the SPV issued to Respondent No. 2 (decreasing the beneficial ownership of Respondent No. 2's share in the SPV vis-à-vis the beneficial ownership of Respondent No. 1 in relation to Respondent No. 2's shares)
6	Two members of the board of SPV to be nominated by FGEHA, one of whom is to be the Chairman of the SPV
7	Two members of the board of SPV to be nominated by Respondent No.2, one of whom is to be the CEO of the SPV
8	The CEO of Respondent No. 1 appointed as a Board member of the SPV, being a nominee of Respondent No. 2, while also being nominated as the CEO of the SPV

37. The petitioner and respondent No.2 entered into the JV Agreement. In terms of the JV Agreement, they agreed to create a Joint Venture Company that we have been referring to as the SPV. In terms of the JV Agreement, they also agreed that the petitioner is entitled to nominate two individuals to serve on the Board of the SPV, one of whom would serve as the Chairman of the Board of Directors of the SPV. Likewise, respondent No.2 is entitled to nominate two individuals to the Board of Directors of the SPV, one of whom would serve as the CEO of the SPV. The JV Agreement also permits respondent No.2 to engage an implementing partner to facilitate the discharge of responsibilities of respondent No.2 under the JV Agreement. It, however, prohibits the petitioner as well as respondent No.2 from transferring any shares to any third party, which would include any implementing partner selected by respondent No.2. In exercise of its entitlement to select an implementing partner, respondent No.2 has selected respondent No.1 as the implementing partner and has entered into agreements dated 19.08.2010 and 19.10.2012 with it. These two agreements are by and between respondent No.1 and respondent No.2. And by virtue of such agreements, there is no privity of contract between respondent No.1 and the petitioner.

38. It is respondent No.1's case that these agreements have been endorsed and approved by the Board of Directors of the SPV. What that means is that the Board of Directors of the SPV, which is vested with authority under the Articles and Memorandum of Association of the SPV, has approved and/or endorsed such agreements. Such approval can at best bind the

SPV as the Board of the SPV is only authorized to act on behalf of the SPV. However, the actions of members of the Board of Directors of the SPV cannot bind the parent shareholders of the SPV (i.e. the petitioner and/or respondent No.2). This is a simple matter of company law and needs no elaboration. What has been argued by respondent No.1 is that by virtue of the actions of board members of the SPV, who have been nominated by the petitioner and respondent No.2, it must be inferred that the petitioner and respondent No.2 have granted their consent to respondent No.1 becoming a party to the JV Agreement. The argument does not flow and the flaw in the underlying reasoning becomes apparent when one takes note of the fact that the Board of the SPV cannot bind FGEHA or respondent No. 2. Such legal persons can only grant consent to any contract while acting through their decision-making forums vested with power to bind such entities under their respective constituent documents.

Grant of Ad-Interim Injunction

39. The test for grant of ad-interim injunction is no different from the test that must be satisfied for grant of injunction when both parties are represented. Merely because the contesting party is not before the court does not mean that the court is not under an obligation to satisfy itself that there exists a prima facie case in favour of the claimant, the balance of convenience tilts in favour of the claimant, and the refusal to grant ad-interim injunction will inflict irreparable loss on the claimant. It was settled as half a century back in ***Shahzada Muhammad Umar Beg vs. Sultan Mehmood Khan*** **(PLD 1970 SC 139)** that, *"the well-settled principles for the grant or refusal of temporary*

injunctions in accordance with law, which are, firstly, whether the plaintiff had a prima facie good case, secondly, whether the balance of convenience lies in favour of the grant of injunction and, thirdly, whether the plaintiff would suffer irreparable loss if the injunction is refused." It is also settled law that all three ingredients mentioned herein above must co-exist.

40. It was reiterated in ***Puri Terminal Ltd. vs. Government of Pakistan*** **(2004 SCMR 1092)** that injunction is a form of equitable relief and, *"[f]or grant of such relief, it is mandatory to establish that in order to obtain an interim injunction, the applicant has not only to establish that he has a prima facie case, but he has also to show that the balance of convenience is on his side and that he would suffer irreparable injury/loss unless he is protected during the pendency of suit."*

41. Section 21 of the Specific Relief Act, 1877, specifies the contracts that cannot be specifically enforced. Section 21(a) places within such list *"a contract for the non-performance of which compensation in money is an adequate relief."* Section 21(g) mentions *"a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date."* Section 56 of the Specific Relief Act lists the instances where an injunction cannot be granted. And Sub-clause (f) of section 56 prohibits grant of injunction, *"to prevent the breach of a contract the performance of which would not be specifically enforced."*

42. It was held by the Supreme Court in ***Messrs Malik and Haq vs. Mohammad Shamsul Islam Chaudhry*** **(PLD 1961**

SC 531) that where a contract for personal service cannot be enforced in terms of section 21 of the Specific Relief Act, an injunction to prevent the breach of such contract can also not be issued. This principle was reiterated by the Supreme Court in ***Marghub Siddiqi vs. Hamid Ahmed Khan*** **(1974 SCMR 519)**. In ***Bolan Beverages (Pvt.) Ltd. vs. PEPSICO Inc.*** **(2004 CLD 1530)**, the Supreme Court held that where for the non-performance of a contract compensation in money is an adequate relief, such contract cannot be specifically enforced in view of section 21(a) read with Section 56(f) of the Specific Relief Act. This was reiterated by the Sindh High Court more recently in ***SPEC Energy DMCC vs. Pakistan Petroleum Ltd*** **(2024 CLC 1549)**, while relying on **Bolan Beverages** and holding that, *"where final relief for injunction is barred, no temporary injunction should be granted."*

43. It was held by Islamabad High Court in ***Deewan Petroleum (Pvt) Ltd. vs. Oil and Gas Investment Ltd.*** **(2019 CLC 1486)** that a civil court ought not grant an interim injunction *"without giving any finding regarding the existence of the preconditions necessary for the grant of an interim injunction."* It was further noted that, *"Under Section 41(b) read with the Second Schedule to the 1940 Act, the Court has the power to issue interim injunctions for the purpose and in relation to arbitration proceedings. The principles for the grant of an interim injunction under Section 41(b) read with the second schedule of the 1940 Act are the same as the ones applicable to interim injunctions granted under Order XXXIX, Rules 1 and 2, CPC."* It was also held by Islamabad High Court in ***Pakistan Real***

Estate Investment and Management Company (Pvt.) Ltd. vs. Messer Sky Blue Builders **(2021 CLC 488)**, while considering the legality of grant of an injunction while referring a matter to arbitration, that *"[b]efore a construction contract can be ordered to be enforced, it has to be held that compensation in money is not the adequate relief. It cannot be disputed that a contract, which cannot be enforced by a decree for specific performance, cannot be negatively enforced by issuance of an injunction. In the face of the petitioner's demand for respondent No.1 to vacate the project site, the latter could not seek an injunction which would have the effect to remain on the project site and proceed with the balance works as this would amount to specifically enforcing a contract of construction which is impermissible in law."*

44. In view of the above discussion, this Court finds that the impugned order dated 06-02-2025, granting an ad-interim injunction and restraining the petitioner from terminating the JV Agreement is not sustainable in the eyes of the law and is, therefore, **set aside**. Further, the decision of the Civil Court in proceeding with Section 20 application and continuing to extend the ad-interim injunction without first determining the maintainability of the application, even after an objection had been raised and it had been brought to the attention of the Civil Court that respondent No.1 was not a signatory to the JV Agreement pursuant to which it was seeking the referral of the matter to arbitration, was in excess of the jurisdiction vested in the Civil Court under provisions of the Arbitration Act. In view of the express provisions of the JV Agreement together with the

undisputed fact that respondent No. 1 is not a signatory to such agreement, the presumption remains that respondent No.1 is not a party to the JV Agreement. And consequently, there was no basis for the Civil Court to conclude that respondent No.1 had a prima facie case for purposes of grant of an injunction in terms of section 41 of the Arbitration Act read with Order XXXIX Rules 1 and 2 of CPC. The Civil Court also did not apply itself to whether an injunction could be granted in relation to what essentially is a construction contract, which cannot be specifically enforced and for the breach of which monetary compensation may be adequate relief.

45. With the impugned order dated 06.02.2025 having been set aside, the Section 20 application filed by respondent No.1 would remain pending before the Civil Court. The Court will determine the question of maintainability of such application in view of the law discussed above and then pass a speaking order in relation to the Section 20 Application. With regard to the legality of the transfer application, it has already been noted at the beginning of this judgment that, since the District Court has rendered no decision in relation to the application, this Court leaves the matter to be decided by the District Court in accordance with law. This petition is **allowed** in the above terms.

46. This court is grateful for the valuable assistance provided by the learned counsel for the parties, by highlighting the emerging trends in other common law jurisdictions. The Court would also like to acknowledge the valuable assistance provided

by Mr. Mustafa Sajid Zuberi, Judicial Law Clerk assigned to this Court, in researching the questions of law involved.

(BABAR SATTAR)
JUDGE

Announced in open Court on 19.05.2025.

JUDGE

Approved for Reporting

Saeed