ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. Nil of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE

Plaintiff: **Sabre Asia Pacific Pte Ltd. Through Mr. Ali Almani, Advocate.**

Defendant: **Pakistan International Airlines Corporation Ltd. Through Mr. Rizwan Faiz, Advocate.**

1. For hearing of CMA No.11343/18.
2. Office Objection not complied.

Date of Hearing: 06.09.2018
Date of Order: 06.09.2018

O R D E R

Muhammad Junaid Ghaffar J.- This is a Suit for Injunction and Protective Measures in support of Foreign Arbitration, whereas, through listed application, Plaintiff seeks a restraining order against the Defendant from implementing or migrating to the New Passenger Service System **"PSS"** (as defined in Para-12 of the Plaint) until the Plaintiff has integrated its Global Distribution System **"GDS"** (as defined in Para-1 of the Plaint) with the new PSS.

Learned Counsel for the Plaintiff submits that this is a Suit seeking only an injunction for restraining the Defendant from breaching the Joint Venture Agreement (JVA) dated 24.08.2004, and subsequent arrangements, whereby, the Defendant has agreed to exclusively use the Plaintiff's GDS for distribution of its products and services in Pakistan and Asia Pacific Region, whereas, on 06.08.2018, the Defendant has

informed its travel agents and distributors that by 14.08.2018 they intend to migrate to a new internal reservation system (PSS) which is not compatible with the Plaintiff's GDS and this amounts an anticipatory breach of the JVA. He further submits that the JVA was to operate as a national marketing company to distribute GDS through Sub Distribution Agreement, whereas, admittedly as per Clause 2.3.1, the Defendant has agreed for the exclusive use of Plaintiff's GDS and for such purposes, the Defendant has also entered into a separate Airline Participation Agreement. According to the learned Counsel as per Clause 3.2.5 the Defendant has further agreed not to operate, market, license or provide any other GDS within Pakistan except with the prior written consent of the Plaintiff. He further submits that the initial term of the Agreement was 9 years, which was extendable for a successive terms of 3 years as per Clause 11.2 and under a Term Sheet dated 26.6.2009 the JVA stands extended until 23.08.2030. Per learned Counsel similarly on 24.09.2004 the Plaintiff and Defendant entered into Abacus Airline Participation Agreement for using of GDS by the Defendant and according to the terms of this Agreement, the Defendant is to participate exclusively with the Plaintiff and no other GDS in Pakistan and the Asia Pacific Region, whereas, in return the Plaintiff agreed to offer a very highly discounted fees. Per learned Counsel, the Defendant has its own reservation system known as PSS, which is currently being run, provided and managed by an Affiliate Company of the Plaintiff, known as *Sabre GLBL Inc.* under a separate Agreement; however, on 14.04.2018 after a fresh Tender, the

Defendant has executed an Agreement with HITIT Computer Services for providing a new PSS for internal reservation. He submits that as per the agreement(s) it is provided that for such migration to a new PSS, a clear notice of 90 days is to be given to the Plaintiff so that it can integrate its GDS with the new PSS; however, per learned Counsel despite full assurance and assistance by its Affiliate Company, and issuance of a Work Order for such purposes, no positive response has been received from the Defendant's side, whereas, the Defendant intends to switchover to the new PSS, which would resultantly cause heavy losses to the Plaintiff, if it is not integrated as required in the System. Learned Counsel had read out various clauses of the agreements in question and submits that as to the facts there is no dispute, but despite best efforts on the part of the Plaintiff and without resolving the core issues for such integration, the Defendant is proceeding further to the switchover which in the given facts must not be permitted. Learned Counsel has referred to a Press Release as well as other material and exchange of E-Mails with the travel agents by the Defendant and has contended that they have even shown their intention to switchover without proper integration and so also even changing the GDS, which amounts to violation of the JVA, which is valid up to 2030. According to the learned Counsel though there are Arbitration Clauses in the Agreement; however, due to the peculiar facts and exigency involved in this matter, the Plaintiff has approached this Court seeking merely an injunction to the extent that the Defendant be restrained from switching over to the new PSS without proper integration. If not granted, this would cause

colossal loss and irreparable damage, which will not be compensated subsequently. Per learned Counsel this is the only relief which the Plaintiff is seeking and the reason being the inordinate delay in approaching the Arbitration Tribunal and seeking any injunctive relief, as it involves a complex procedure and fulfillment of requisite conditions; therefore, the relief as sought be temporarily granted failing which the Plaintiff will be left with no other remedy. As to the office objection (regarding maintainability of a Suit for injunction without a declaratory relief), learned Counsel submits that a Suit for mere injunction is maintainable without a declaratory relief as it is an independent relief and there are precedents to this effect, and therefore, the office objection be overruled. Finally, he lastly submitted that again there is no prohibition or restriction in seeking and or granting a relief at the injunction stage, which may be a final relief in a Suit, and again he has relied upon various precedents of the Apex Court as well this Court, including the cases reported as ***Mst. Zainab through Attorney V. Mst. Muni and others*** **(2004 S C M R 1786),** ***Government of Pakistan through Ministry of Finance V. M.I. Cheema, Dy. Registrar, Federal Shariat Court and others*** **(1992 S C M R 1852),** ***Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others V. Muhammad Zaman Khan and others*** **(1997 S C M R 1508),** ***Messrs H. A. Rahim & Sons (Pvt.) Ltd. V. Province of Sindh and another*** **(2003 C L C 649),** ***Arif Majeed Mali and others V. Board of Governors Karachi, Grammar School*** **(2004 C L C 1029),** ***Muhammad Ilyas Hussain V. Cantonment Board, Rawalpindi*** **(P L D 1976**

SC 785), ***Arbab Munir Ahmad and 2 others V. Pakistan Electric Power Company (Pvt.) Ltd. through Managing Director and 7 others*** **(2016 C L C (C.S.) 502),** ***Mrs. Nawab Begum V. Dr. M. A. Mahboob and 2 others*** **(1989 C L C 2252),** ***Messrs. Shaheen Construction Company Vs. Pakistan Defence Officers Housing Authority*** **PLD 2012 Sindh 434, Deoraj Vs. State of Maharashtra AIR 2004 Supreme Court 1975.**

On the other hand, learned Counsel for the Defendant has at the very outset made a submission that the Defendant in view of the Arbitration Clauses available in the Agreement(s) has not filed any counter affidavit to the listed application and do not intends to do so, for the reasons that it might create a hindrance in seeking the remedy of Arbitration and the participation in these proceedings would hamper and prejudice their case on merits. However, he is ready to assist the Court on this application as urgency was pleaded on behalf of the Plaintiff. He has submitted that the Plaintiff and its sister concern or the affiliate company namely Sabre GLBL Inc., which is presently owned wholly by the Plaintiff after their worldwide acquisition and merger are making attempts to keep the Defendant as a hostage in the present circumstances. According to the learned Counsel the present PSS is being run by the affiliate company under an agreement which is about to expire on 14.09.2018, whereas, in the fresh tender floated by the Defendant they also participated; but were technically disqualified, and against that disqualification, they have filed a Civil Suit bearing

No.835/2018 before this Court, in which no interim injunction has been granted except that the Award of Tender to the other successful bidder / company HITIT would be subject to final outcome of the Suit, and on the basis of such order, they are black mailing the Defendant, whereas, their primary intention appears to be that Defendant must not proceed with its new PSS. Per learned Counsel, the Defendant as per the Agreements has already intimated through Email on 17.04.2018, that the new tender has been awarded to HITIT for the PSS, and therefore, the Plaintiff may initiate necessary action on its part for proper integration within time and according to the learned Counsel the period of 90 days has already expired, whereas, the Plaintiff and its affiliate Company are creating hurdles in the smooth integration of the system. He submits that a Work Order was issued, wherein, they have stated such facts regarding filing of their Suit and the Orders passed by the Court and they want the Defendant to sign the Work Order, wherein, again they have raised certain objections and qualifications so that the agreement with them expires on 14.09.2018, and at the same time due to non-integration within time, Defendant must face damages and breach of contract with HITIT. Per learned Counsel such conduct on the part of the Plaintiff does not qualify for any injunctive relief as they have not come with clean hands, whereas, neither a prima-facie case is made out, nor any irreparable loss would be caused to them and no question of balance of convenience arises, rather, on the other hand, the Defendant would suffer irreparable loss and great inconvenience. He further submits that the affiliate Company

has even refused to give the data history of the Defendants reservations for the past years available with them in their PSS, and the only motive appears to be to take revenge for their technical disqualification in the new tender, whereas, Plaintiff and its sister Company have colluded and are acting with hands in gloves, therefore, no relief should be granted to them. According to the learned Counsel the Defendant has already initiated several proceedings in the Islamabad jurisdiction for breach of contract by the Plaintiff and its affiliate Company, whereas, in presence of Arbitration Clause, they cannot be seek any such relief from this Court.

I have heard both the learned Counsel and perused the record. The facts have been briefly stated hereinabove and it appears that the Plaintiff has two agreements with the Defendant, one, the Joint Venture, and the other, the Airline Participation Agreement dated 24.08.2004 and 24.09.2004 respectively. As to the Joint Venture and the Participation Agreement perhaps for the present purposes there appears to be no dispute except the integration of the GDS with PSS. The Defendant presently is using PSS for its internal reservation through an affiliate Company of the Plaintiff namely Sabre GLDL Inc. by virtue of a separate agreement which is not a matter of record or contention before this Court. The Plaintiffs' concern as stated is to the effect that they need sufficient time and cooperation for a meaningful and successful integration of their GDS with the new PSS of the Defendant procured through a fresh Tender which has been awarded to HITIT. Counsel has made a candid submission that as to the entering of the defendant into a new Agreement for PSS is not a matter

of concern for the present Plaintiff; but is subject matter of another Suit and pertains to and is with their affiliate Company, whereas, the Plaintiff is only concerned with the proper and timely integration of their GDS with the new PSS, and if not, then their customers worldwide would lose their business by denial of access to the internal reservation system of the defendant, and in turn they (Customers of Plaintiff) may shift to another GDS to procure and continue their business options. However, at the present stage, this Court cannot delve into finer and deeper appreciation of the complex arrangement between the parties, and has to decide the injunction application on a tentative assessment of the material placed before it. It appears that in the two agreements there are certain clauses, which are relevant for deciding the controversy in hand, as apparently, as to the existence of the agreement and modalities provided therein, there is no serious dispute. In Clause 16 of the JVA the mode and mechanism of issuing notice by both the parties is provided which reads as under:-

> "16. **NOTICES**
>
> 16.1 Any notice required to be given hereunder shall be in writing in the English language and shall be sent by courier or prepaid registered airmail or facsimile or email by delivery to the other Party at the address specified in Clause 16.2 hereof or to such other address as such Party shall designate in writing for that purpose. A notice shall be deemed to have been received by the other Party upon receipt of delivery by courier or within seven (7) days of posting of 24 hours if sent by facsimile or email will be deemed given when confirmed."

Similar provision is available in the Participation Agreement in Clause-23 and reads as under:-

> "23. **NOTICES**

> All notices, requests, demands or other communications hereunder shall be in writing in the English language, and shall be sent by prepaid registered mail or facsimile or by telex or by delivery to the other party at its address as sent tout below or to such other address as such party shall designate in wiring for that purpose. Such notices or communications shall be deemed to have been received by the other party within seventy two (72) hours of posting or twenty four (24) hours if sent by facsimile or by telex (with correct answerback)."

Perusal of the above two clause in both the agreements reflects that notices shall be in writing in the English language and shall be sent by courier or prepaid registered airmail or facsimile or email by delivery to the other Party at the address specified in Clause 16.2 (of JVA) hereof, or to such other address as such Party shall designate in writing for that purpose. It further provides that a notice shall be deemed to have been received by the other Party upon receipt of delivery by courier or within seven (7) days of posting of 24 hours if sent by facsimile or email will be deemed given when confirmed.

As to the integration of the GDS in the Participation Agreement under the head of responsibilities of the participants in Clause 3.7 it has been provided as under:-

> "3.7 **PARTICIPANT** agrees to give Abacus at least ninety (90) day's written notice of any change to the program in the Participant's System which affects the Direct Connect Sell facility. Should these modifications involve changes in the Direct Connect Sell service, PARTICIPANT shall reimburse Abacus at a reasonable commercial rate."

Again in Schedule-5, which is a supplemental Agreement, the responsibility of the Participant in Clause 3.3 reads as under:-

> "3.3. PARTICIPANT agrees to give Abacus at least ninety (90) days' written notice of any change to the program in PARTICIPANT's System which affects the Direct Connect Availability facility. Should such modifications involve changes in the Direct Connect Availability service,

> PARTICIPANT shall reimburse Abacus at a reasonable commercial rate."

The above provision clearly provides that the participants i.e. Defendant agrees to give Abacus, the plaintiff, at least ninety (90) days' written notice of any change to the program in Participant's System which affects the Direct Connect Availability Facility and should such modifications involve changes in the Direct Connect Availability service, Participant shall reimburse Abacus at a reasonable commercial rate. It is not in dispute that Defendant was always at liberty to either use the PSS provided by the Affiliate Company or procure it from any other Company as there is no restriction in the two Agreements i.e. JVA and Participation Agreement to that effect, neither this is the case of the Plaintiff. Therefore, keeping in view such position, the Defendant floated a fresh Tender for a new PSS, in which the Affiliate Company of the Plaintiff stands technically disqualified, whereas, admittedly it has been awarded to HITIT, and therefore, in line with the agreement in question, it is a matter of record (which has been placed by the Plaintiff itself) that the first correspondence to this effect was made known way back on 17.04.2018 through Email correspondence available at Page 449 of instant Suit, relevant part of which reads as under:-

> "Dear Team,
> We are pleased to inform you that Pakistan International Airlines (PK-214) will migrate from its Passenger Services System (PSS) - SABRE to HITIT Crane/PAX Reservation, Ticketing and DCS system.
> Hitit Crane/PAX system and it's provider HITIT Computer Services based in Istanbul, has many integration projects with your system and already has hub link in place for Type B and Type A messages.
> We kindly request you to connect us with your concerned team in order for to get the integration/configuration project and for further coordination & implementation.
> This integration is planned to be completed before August 2018.
> Following are the contact information from PIA and HITIT side."

This is the first email initiated by and on behalf of the defendant and on a careful examination of the same, it transpires that it has not only been addressed to the plaintiff's concerned person (Sam.Ho@abacus.com.sg; Muhammad.amin@abacus.com.pk) but so also to the concerned person with the affiliate company in question (Hanif.Akuly@sabre.com;). This has been followed by a series of email(s) by the defendant well as by HITIT, the new PSS Company awaiting for necessary assistance in integration, showing its concern to do the same before expiry of the current agreement on 14.9.2018. All other person(s) are also in continued loop in the subsequent emails placed on record by the plaintiff itself. If 90 days are counted from above Email(s), the same expired on 16.07.2018, whereas, the Plaintiff has approached this Court on 13.08.2018 seeking injunctive relief against the Defendant. The case as setup on behalf of the Plaintiff is that for the first time a proper notice was issued to them by the Defendant on 26.07.2018, and therefore they were before the Court within time of 90 days, which has not expired as yet, hence, the Defendant be restrained from starting the new PSS without proper integration. However, I am not convinced with such line of argument; firstly, for the fact that proper notice was addressed within reasonable time and in accordance with the mandate of the Agreement(s) immediately upon awarding the new Tender to HITIT. The Plaintiff as per Agreement had enough time of 90 days to make such integration. Secondly, I have not been assisted in any manner as to whether in the Agreements

in question there was any modality of doing such integration as it is simplicitor a provision with sufficient time and cost if any. It has not been provided that the Plaintiff would be in need of any further modalities or technical issues as are being raised now before the Court as to the Work Order in question. I may observe that even otherwise the Work Order is not a matter of dispute between the Plaintiff and the Defendant for the present moment as it pertains to the Affiliate Company of the Plaintiff who has issued the same to the Defendant and has got nothing to do with the Plaintiff's case, therefore, I need not embroil myself into the said issue. It is exacting and far-fetched to believe that plaintiff and its affiliate company were not in the loop while all this was going on. As to the arguments of the learned Counsel for the Defendant regarding the alleged collusion between the Plaintiff and its Affiliate Company in making the Defendant as a hostage in this process of integration, again it would not be appropriate to discuss the said issue and give any finding, lest it may prejudice the case of any of the parties before the appropriate forums. In my view, simplicitor, the Plaintiff has not been able to make out a case for grant of any injunction, at this moment and in the given facts and circumstances of this case. On the contrary, if any injunction is granted this would expose the Defendant to irreparable loss and great inconvenience as they have already entered into a separate Agreement with HITIT for a new PSS. The challenge to such award is again a matter sub-judice in another Suit, wherein, there is no injunctive order in favor of the Affiliate Company of the Plaintiff and is only to the extent that the Award of the Tender would be subject to final outcome

of the proceedings, which are yet to be decided. A mere pendency of such proceedings, with which the Plaintiff as per its own stance, has no concern, cannot be made a ground to exercise any discretion in favor of the plaintiff. All in all, I am of the view that the ingredients for grant of an injunction are clearly missing in this case.

In view of the facts and circumstances, of this case and the discussion made hereinabove, listed application was dismissed by means of a short order on 06.09.2018 and these are the reasons thereof.

2. As to the office objection regarding maintainability of Suit for injunction, without there being any declaratory relief, I may observe, that by now this issue is almost settled through various pronouncements of this Court as well as the Apex Court. In the case reported as ***Muhammad Ilyas Hussain v Cantonment Board Rawalpindi*** (**PLD 1976 SC 785**) the Hon'ble Supreme Court has been pleased to observe that it is not mandatory for a person to always seek a declaratory relief along with an injunctive relief as an injunctive relief can always be sought under Section 54 to 56 of the Specific Relief Act, 1877, which is an independent relief in respect of a breach of contract. The relevant finding is as under;

> In this country declaratory decrees are granted under section 42 of the Specific Relief Act, 1877. It lays down that any person entitled to any legal character, or to any right as to any property, may institute a suit ,against any person denying his title to such character and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not ask for any further relief. Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a declaration of title, omits to do so. On the other hand the specific relief by way of perpetual injunction may be granted by the Court

> in accordance with the provisions contained in sections 54 and 56 under Chapter X of the Specific Relief Act. In this connection section 54 inter alia lays down that a perpetual injunction may be granted to prevent the breach of "obligation" existing in favour of the applicant, whether expressly or by implication. The term "obligation" is defined in section 3 of the Act as "including every duty enforceable by law". So that when a legal duty is imposed on a person in respect of another, that other is invested with the corresponding legal right. In general under the first paragraph of section 54 of the Act, injunction may be granted by the Court to an applicant to prevent the breach of an existing legal right vested in him. In this connection Lord Kingsdown in Imperial Gas Co. v. Broadbent (29 L J Ch. 377) said that after the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case such as laches or where interference with the plaintiff's right is trivial. This in itself necessarily entails an adjudication into the right of the plaintiff before granting the injunction to which he may be entitled. It is not always necessary for him to have sued for the declaration of his title as a substantive relief and asked for the injunction as a consequential relief only. Therefore, we are unable to uphold the view formed by the High Court in this case.

In the case reported as ***Habibur Rehman v Defence Secretary of Government of Sindh Communication & Others*** [**2003 PLC (C.S) 56**], a learned Division Bench of this Court has followed the above view of the Apex Court while dealing with a somewhat similar legal proposition and has been pleased to hold as under;

> 12. The matter, however, does not end here. Under section 54 of the Act, the appellant could always apply for a perpetual injunction to prevent the breach of an obligation existing in his favour. It is well-settled by now that the Government is required to act fairly and, honestly and in accordance with law with respect to rights of and its duties towards citizens irrespective of the question whether a particular person has an enforceable legal right in the strict sense. One may refer to the observations of the Honourable Supreme Court in Shaukat Ali and others v. Government of Pakistan (PLD 1997 SC 342), were their Lordships held that even where a licence is revocable, the Court may interfere with mala fide action of a State functionary. All public powers is .in the nature of a trust and must be exercised strictly in accordance with law and for the purposes for which it was conferred. This in our humble view is an obligation cast upon State functionaries, which is enforceable at law. It may also be added that Articles 4 and 5(2) of the Constitution stipulate that to be treated in accordance with law is the inalienable right and duty to obey the law and the Constitution is the inviolable obligation of every citizen. These provisions would apparently apply to citizens endowed with exercise of public power.
>
> 13. We are, therefore, of the view that even if the appellant is not entitled to any declaratory relief an injunction could always be granted to prevent the breach of an obligation on the part of the respondents. The train fact that the appellant had not asked for an injunction as independent relief but only sought the

> same by way of consequential relief to the declaration prayed for would be of little consequence. In Muhammad Ilyas Hussain v. Cantonment Board Rawalpindi (PLD 1976 SC 785), the Honourable Supreme Court treated a suit for declaration and permanent injunction as one for injunction simplicitor observing that the declaration was merely introductory to the main relief sought and the appellant was, at liberty to drop, the same.

In view of such position I am of the opinion that office objection cannot be sustained in the given facts and is accordingly overruled. Office to assign number to this Suit, whereas, compliance regarding Original Board Resolution be made by the Plaintiff within 4 weeks.

Judge