THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

Claim No. NEVHCV2015/0122

Between:

SOUTH EAST ASIA ENERGY HOLDING AG

Claimant

And

HYCARBEX AMERICAN ENERGY INC

Defendant

Before:
Master Fidela Corbin Lincoln

Appearances:
Dia Forrester with Jomokie Phillips for the Claimant
Midge Morton with Maurisha Robinson for the Defendant

2016: July 11
September 26

JUDGMENT

[1] **CORBIN LINCOLN M** :The claimant commenced this claim against the defendant for , *inter alia*, payment of the sum of US$20,325,462.00 plus interest payable pursuant to a written loan agreement dated 13th April 2012 ("**the 2012 loan agreement**") entered into between the claimant, the defendant and Hycarbex Asia and/or the Settlement Agreement between the claimant, the defendant and Hycarbex Asia dated 16th January 2013 (" **the settlement agreement**"). Alternatively, the claimant seeks a declaration that it is entitled, pursuant to Article 3 of the 2012 loan agreement to all of the defendant's rights and obligations in its 70% working interest in the Yasin Petroleum Concession in Pakistan.

[2] The defendant has applied for an order staying the proceedings and a declaration that the court should decline jurisdiction.

[3] The application states that the defendant is seeking:

(1) an order declaring that the court should not exercise its jurisdiction and an order staying the proceedings pursuant to Part 9.7 (A) (1) of the Civil Procedure Rules 2000 ("**CPR**").

(2) Alternatively, an order staying the proceedings under the inherent jurisdiction of the court.

[4] The grounds state, among other things, that the claimant instituted proceedings in the High Court of Islamabad, Pakistan against the defendant based on the loan agreement which is the subject matter of this claim. A settlement agreement was entered into by the claimant and the defendant and a joint application was filed seeking a consent decree in the terms of the settlement agreement. The consent decree was suspended by an order of the Islamabad High Court dated 4th April 2013 following an application by American Energy Group. The defendant states that the claimant *"is seeking, having chosen to institute its claim for the security of the alleged debt in the Republic of Pakistan, to carry out parallel proceedings for the alleged money debt and security interest within the jurisdiction of this Honourable Court."*

[5] The claimant opposes the application and contends that the application is otiose and should not be adjudicated upon.

Issues

[6] The issues arising for consideration are :

(1) Is the application otiose?

(2) If no, should the court grant a stay?

ISSUE 1 - IS THE APPLICATION OTOISE?

[7] The claimant submits that the application filed by the defendant was in relation to the claim filed in October 2015 and since the claim was subsequently amended the application is otiose, no new application has been filed and the court should not adjudicate on the application.

[8] Given the chronology of events and the order made by the court I am unable to agree that the application is otiose and that there is no application before the court with respect to the claim as amended.

[9] The relevant chronology of events is as follows:

(1) The defendant filed its application on 1st December 2015.

(2) On 8th January 2016 the claimant filed an affidavit in answer.

(3) On 26th February 2016 the defendant filed an affidavit in reply.

(4) On 29th February 2016 when the matter came up for hearing the court of its own motion raised the issue of whether the claim should be stayed on the basis that clause 14.1 of the loan agreement which forms the basis of the claim contains an arbitration clause. The parties were directed to file submissions including submissions on the issue raised by the court. The matter was adjourned to 11th April 2016 for hearing.

(5) On 4th March 2016 the claimant filed an amended claim and statement of claim. The only substantive amendment to the claim was the insertion of the words *"and or the Settlement Agreement between the Claimant, Hycarbex and Hycarbex Asia dated 16th January 2013."* The only substantive amendment to the statement of claim was to the prayer to read " *and or the breach the Settlement Agreement between the Claimant, Hycarbex and Hycarbex Asia dated 16th January 2013.*

(6) On 23rd March 2016 the defendant filed submissions.

(7) On 5th April 2016 the claimant filed submissions.

(8) On 11th April 2016 the matter came up for hearing of the defendant's application. The court noted the amended statement of case. The court considered that the defendant's application was not withdrawn or dismissed and was, in the court's view, extant.

(9) The court, having regard to:

(a) the minor amendments to the claimant's statement of case which did not alter the basis of the application or the issue raised of the court's own motion in relation to the arbitration clause;

(b) the extant application in relation to which evidence and submissions had already been filed; and

(c) the overriding objective:

informed the parties that the court would proceed with the hearing of the application in relation to the amended statement of claim but would give the defendant an opportunity to amend its application and file further submissions, *if deemed necessary*, in light of the minor amendments to the statement of case.

(10) It was therefore clear to all parties at the hearing on 11th April 2016 that the court was treating the application as extant and intended to consider the application in relation to the claim as amended. There was no objection by either party.

(11) Accordingly, on 11th April 2016, the court ordered that the defendant was at liberty to amend the application and file further submissions in light of the amended claim. The claimant was

also given leave to file an affidavit in answer and further submissions. The hearing of the application was adjourned to 13th June 2016.

(12) On 13th June 2016 the defendant sought an adjournment of the hearing on the ground that new counsel had recently been retained. The court adjourned the matter to 11th July 2016 and made an order in similar terms to that made on 11th April 2016.

(13) The defendant opted not to amend its application but filed a further affidavit on 24th June 2016. On 5th July 2016 the claimant filed a further affidavit and further submissions. It is in these submissions that the claimant for the first time sought to raise the issue that there is no application before the court in light of the amendment of the claim.

[10] The defendant's application was filed prior to the claim being amended. However, the court on 11th April 2016 directed that the application would be considered in relation to the amended statement of claim. There was no objection by the claimant to the order at the time the order was made. More importantly, the claimant has not appealed the order.

[11] In the circumstance, it is my view that the claimant cannot now seek, in effect, to challenge by way of submissions the order made by the court that the application filed by the defendant before the claim was amended will be considered in relation to the claim as amended.

[12] I am therefore unable to agree with the claimant that the defendant's application is otiose and should not be adjudicated upon.

ISSUE 2 – SHOULD THE PROCEEDINGS BE STAYED?

[13] The issues arising for consideration are whether the court should stay the proceedings under its inherent jurisdiction, on the basis of the arbitration clause in the 2012 loan agreement or under **CPR** 9.7.

Stay of Proceedings - the Court's Inherent Jurisdiction

[14] In **Enzo Addari v Edy Gay Addari** [1] Rawlins J.A, delivering the judgment of the Court, stated that the court has always had an inherent jurisdiction to grant a stay of proceedings on grounds of *forum non conveniens*. He stated that this inherent jurisdiction:

(a) is discretionary;
(b) is exercisable where the court thinks that it is just and convenient in order to prevent undue prejudice to the parties or is an abuse of the process of the court;
(c) The jurisdiction is concurrent with but mutually exclusive from the powers conferred under CPR 9.7; and
(d) is exercisable upon such terms as the court determines.

[15] In **Spiliada Martime Corporation v Cansulex Ltd**.[2] Lord Goff of Chieveley summarised the law with respect to granting a stay on the ground of *forum non conveniens* as follows:[3]

> *" (a) The basic principle is that a stay will only be granted on the ground of forum non-convenience where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action i.e in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*
>
> *(b) As Lord Kinnear's formulation of the principal indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay... It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favor, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the*

[1] BVIHCVAP2005/0021
[2] [1987] A.C 460
[3] ibid pages 476-478

burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country...

(c)... It is significant that in all leading English cases where a stay has been granted, there has been another clearly more appropriate forum... In my opinion the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country) it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum... I respectfully consider that maybe more desirable... to adopt the expression used by my noble and learned friend Lord Keith of Kinkel, in The Abidin Daver... when he referred to the "natural forum" as being "that with which the action that had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses) but also other factors such as the law governing the relevant transaction... and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, It will ordinarily refuse a stay...

(f) If however the court concludes at that stage fact there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all circumstances of the case, including circumstances which go beyond those taken into account when the considering connecting factors with other jurisdictions. One such factor can be the fact, if

established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction.

[16] In general, the burden of proof is on the defendant to persuade the court that it should exercise its discretion and grant a stay. If the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden shifts to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.

The Natural Forum

[17] The claimant has invoked this court's jurisdiction to determine the claim. In determining whether there is some other forum which is clearly more appropriate for the trial of the action, the court is required to consider which forum the action has its most real and substantial connection.

(1) **The Domicile of the parties**

[18] The claimant is a company incorporated in Switzerland. The defendant is a company incorporated in Nevis. In **SFC Swiss Forfaiting Company Ltd. v Swiss Forfaiting Ltd,** it was held that :

"...it is trite law that the fact that the Fund is domiciled in the BVI founds jurisdiction to the extent that the BVI court is an available forum. However, a court that applies the test in Spiliada Maritime Corporation v Cansulex Ltd must go on to determine in light of the other connecting factors, which forum is clearly or distinctly the appropriate forum for the trial. ▯

[19] Thus while Nevis is an available forum having regard to the fact the defendant is a company registered in this jurisdiction, the court is required to examine the other connecting factors to determine the most appropriate forum.

(2) The Subject Matter of the Claim

<u>The 2012 Loan Agreement</u>

[20] The claim concerns the alleged breach of the 2012 loan agreement entered into by the claimant, the defendant and Hycarbex Asia Pte. Ltd ("**HAPL**") in Islamabad, Pakistan on 13th April 2012. The loan agreement is secured by the defendant pledging 70% of its working interest in a petroleum concession in Pakistan.

The Settlement Agreement

[21] The claim, in the alternative, is based on a settlement agreement dated 16th January 2012 made between the claimant on the one hand and the defendant and HAPL on the other hand. The settlement agreement , dated 16th January 2012, was made following the institution of Civil Suit No. 105 of 2012 in the Islamabad High Court in Islamabad, Pakistan ("**the Pakistan Suit**") by the claimant against the defendant and HAPL *"to enforce the terms of the 2012 loan Agreement."*[4]

[22] The defendant submits that the settlement agreement has no force and effect until the Pakistan Suit is disposed of by the Islamabad High Court.

[23] Clauses 13 and 14 of the settlement agreement state:

> *" Upon execution of this Agreement, the parties shall jointly file an application for the disposal of the Suit pending in the Hon'ble [sic] Islamabad High Court, Islamabad with prejudice in terms of this Agreement. Each party shall bear its own attorney's fees and costs of the suit.*
>
> *...This agreement shall be of no force or effect until so executed by all the Parties and the disposal of the Suit as set forth hereinabove shall have been entered by the Islamabad High Court."*

[24] Clause E of the settlement agreement defines "**Suit"** as the application filed by the claimant under Section 20 of the Arbitration Act 1940 registered as Civil Suit No. 105 of 2012 in the Islamabad

[4] Paragraph 13 of the affidavit of Manfred Welser filed on 8th January 2016.

High Court seeking referral of the dispute to arbitration in accordance with Article 14 of the Loan agreement.

[25] Clause 14 of the settlement agreement states that the agreement is of no force and effect until the filing of a joint application for the disposal of the Suit and the disposal of the Suit "*shall have been entered by the Islamabad High Court.*" The evidence before the court is that on the basis of the settlement agreement the parties filed a joint application to the Islamabad High Court seeking a decree by consent in the terms of the settlement agreement .[5] A consent decree was entered by the Islamabad High Court in the Suit on 18th January 2013 but was suspended by the said court on 4thApril 2013.

[26] In view of the suspension of the consent decree I find that the Suit cannot be said to have been disposed of by the Islamabad High Court. Consequently, pursuant to Clause 14, the settlement agreement has no force and effect.

(3) **Governing Law of the 2012 Loan Agreement and the Settlement Agreement**

[27] Clause 14.1 of the 2012 loan agreement states that the governing law is the law of Pakistan.

(4) Multiplicity of Proceedings

[28] In **The Abidin Daver** Lord Brandon stated:[6]

> *" Similarly, the mere disadvantage of multiplicity of suits cannot of itself be decisive in tilting the scales: but multiplicity of suits involving serious consequences with regard to expense or other matters, may well do so. In this connection it is right to point out that, if concurrent actions in respect of the same subject matter proceed together in two different countries, as seems likely if a stay is refused in the present case, one or the other of two undesirable consequences may follow: first, there may be two conflicting judgments of two*

[5] Paragraph 13 of the affidavit of Pierce Onthank filed on 1st December 2015.
[6] [1984] A.C 398 at 423-424

courts concerned; or secondly, there may be an ugly rush to get one action decided ahead of the other, in order to create a situation of res judicata or issue estoppels in the latter."

[29] In **Texan Management Ltd. and Ors v Pacific Electric Wire and Cable Company Ltd.**[7] the Privy Council set aside the decision of the Court of Appeal and restored the decision of Hariprashad-Charles J to stay the proceedings. The Privy Council, applying the dicta of Lord Brandon in **The Abidin Daver,** held that:

> *"[A]lthough there was no direct overlap between the formal relief sought in the prayers in the Hong Kong and BVI actions, it was plain that the ownership of the shares ...was effectively in dispute in the Hong Kong proceedings. Further, it was clear that if both actions went further, and if the principal allegations were contested, there would be many common issues..."*

[30] It is not in dispute that the claimant commenced the Pakistan Suit against the defendant and HAPL to enforce the terms of the 2012 loan agreement.[8] The defendant describes the Suit as an "Arbitration Petition".[9]

[31] The evidence of the claimant is that the Pakistan Suit was:[10]

> *" concluded by a Consent Decree of the Islamabad High Court dated 18th January 2013) ...in accordance with the terms of a Settlement Agreement between the parties to that suite dated 16th January. The Settlement Agreement provided that the claimant herein is entitled to enforce the security interest as provided for in the Loan Agreement."*

[32] On 18th January 2013 American Energy Group Ltd., (**"AEGL"**) which was not a party to the Pakistan suit, filed an application in the Pakistan Suit for an order recalling the consent decree on the grounds of fraud and misrepresentation. On 4th April 2013 the Islamabad High Court suspended the consent decree on an interim basis. These facts are not in dispute.

---

[7] [2010] 4 LRC 1

[8] Paragraph 11 of the affidavit of Pierce Onthank filed on 1st December 2015; Paragraph 13 of the affidavit of Manfred Welser filed on 8th January 2016

[9] Paragraph 10 of the affidavit of Pierce Onthank filed on 1st December 2015

[10] Paragraph 13 of the affidavit of Manfred Welser filed on 8th January 2015

[33] In view of the suspension of the consent degree it cannot be said that the Pakistan Suit was "concluded" by the consent decree as contended by the claimant.

[34] The defendant contends that the Pakistan Suit amounts to parallel proceedings. The claimant contends that it is not "*at present pursuing any parallel proceedings in relation to the 2012 loan agreement instead, it is The American Energy Group Limited that is seeking to recall the 18th January 2013 Consent Order which subject matter differs to the Claimant's claim herein.*"[11]

[35] The application by AEGL was made in the Pakistan Suit which was commenced by the claimant. AEGL's application seeks to set aside the consent decree on the grounds of fraud and misrepresentation. The application alleges, among other things, that:

(1) The loan agreement dated 13-04-2012 forming the basis of the Suit was executed in contemptuous and flagrant disregard of an order of the Islamabad High Court, directing that the status quo be maintained by the injunctive relief therein. The Applicant, on account of its dispute with defendants No. 1[12] and No. 2 had instituted Civil Suit (Arbitration) with the same being an Arbitration Petition under Section 20 of the Arbitration Act 1940 seeking reference of the dispute to the Arbitrator. Such dispute concerned the Working Interest in the Yasin Concession Block and the Overriding Royalty Interest there over. By order dated 27-03-2012 the Islamabad High Court directed the parties to the Arbitration and ordered that the status quo over the subject matter of the dispute be maintained. This order was well within the notice of Defendants No. 1 and No.2 when they executed the 2012 Loan Agreement and pledged 70% of the Working Interest, at the minimum, of the Yasin Concession Block. This is made evident by the fact that a mere one day later at the latest the defendants No. 1 and No. 2 instituted an Intra Court Appeal No. 146 of 2012 before the Division Bench of the Honourable Islamabad High Court impugning the order dated 27-03-2012. As such at the time of the execution of the loan agreement the order dated 27-03-2012 was categorically within the notice and knowledge of the defendants No. 1 and No. 2. Therefore the very execution of the loan agreement which formed the basis of Civil Suit No. 105 of 2012 from which the consent decree dated 18-01-

[11] Paragraph 14 of the affidavit of Manfred Welser filed on 8th January 2016.
[12] The defendant in these proceedings.

2013 was obtained was fraudulent rendering all proceedings consequent thereto similarly fraudulent and orders obtained to be so obtained by fraud and misrepresentation.

(2) Order dated 16-04-2012 in Intra Court of Appeal No. 148 of 2012, instituted by the applicant, again directed for the status quo to be maintained. This order dated 16-04-2012 is still in the field. Therefore any actions consequent to or to effect the Loan Agreement dated 13-04-2012 were patently with the intent to thwart the operation of the order dated 16-04-2012.

(3) Civil Suit No. 105 of 2012 was further instituted to frustrate the relief sought by the Applicant before the International Court of Arbitration of the ICC. The relief sought by the Applicant includes a finding that the Stock Purchase Agreement and its subsequent amendments were void and consequently Defendant No. 2 is still a wholly owned subsidiary of the Applicant. Through the Consent Decree the Defendants collusively seek to alienate the Working Interest held in the Yasin Concession Block which is the core asset of the Defendant No. 2 and consequently that of the Applicant.

(4) The Pakistan Suit was in itself patently collusive as made evident from the roles played by the officers of the plaintiff and defendants in each others companies. The Pakistan Suit was instituted by an authorized attorney who was granted power from Mr. Manfred Welser, director of the Plaintiff. Concealed from the Honourable Court was the fact that Mr. Manfred Welser is also the Chief Financial Officer and Chairman of Defendant No 2 and also a major shareholder.

(5) Mr. Welser was also the very director who signed the loan agreement on behalf of the Plaintiff with the Defendants No. 1 and No. 2. As such the very basis of the dispute between the parties which the Plaintiff brought before the Honourable Court was entirely fabricated from the outset thereby making evident the fraudulent nature of the Pakistan Suit.

(6) The Settlement Agreement was executed through an authorised attorney who was granted such power by Mr. Manfred Welser. Given the collusive relationship of Mr. Welser the very execution of the settlement agreement was fraudulent and a breach of fiduciary duty at the

least. It was on this basis of such settlement agreement that the consent decree was obtained from the court.

(7) In instituting Civil Suit No. 105 of 2012 the plaintiff and the defendants No. 1 and No. 2 failed to disclose to this Honourable Court the vested rights and interests of the Applicant over the subject matter i.e the Yasin Concession Block which was deemed in the same Civil Suit No. 105 of 2012 as a "Security Interest". Such rights and interests of the Applicant stem from the fact that the Applicant holds Working Interest in the Yasin Concession Block on account of an admitted minimum 18% Overriding Royalty Interest from the entirety of the same Concession Block. However, the said Civil Suit, the Loan Agreement and the settlement agreement describe the Defendants No. 1 and No. 2's working interest at 95%. Other than being patently false, given the circumstances such averments and representations are patently fraudulent made with the intent to alienate the Applicant from its admitted rights and interests in the Yasin Concession Block.

[36] Based on the application by AEGL the Islamabad High Court suspended the consent decree on 4th April 2013 on an interim basis".[13]

[37] The defendant in these proceedings have alleged, among other things, that :

(1) It is a wholly owned subsidiary of AEGL;

(2) By a Stock Purchase agreement AEGL transferred 100% of its issued shares in the defendant to a third party who, following an amendment to the Stock Purchase agreement, transferred 100% of its issued shares in the defendant to the claimant;

(3) AEGL discovered that it had been induced by fraud and misrepresentation into executing the Stock Purchase Agreement and hence AEGL proceeded to Arbitration under the ICC Rules. The claimant and the defendant joined the arbitral proceedings. The Arbitral Tribunal declared the Stock Purchase Agreement *void ab initio*.

[13] Paragraph 14 of the affidavit of Manfred Welser filed on 8th January 2016.

(4) The claimant instituted the Pakistan Suit based on the 2012 loan agreement which alleges , *inter alia*, failure to repay the principle amount and interest thereon and further seeks enforcement of the pledged security assets of the Defendant. This was the purpose of the termination of the original loan namely, the reinstitution of the loan to the claimant with the defendant's assets in the oil and gas sector being pledged as security for that loan. These assets include amongst others 70% of the Working Interest in the Yasin Concession Block.

(5) The Claimant and the Defendant, while the latter was under the Claimant's unlawful control, immediately executed a Settlement Agreement dated 16tth January 2013. The consent decree was passed on the basis of a fraudulent settlement agreement which was executed on the basis of a fraudulent loan agreement.

[38] The claimant, in response, asserts that:

(1) It was not a party to the Arbitral Proceedings but admits that the Arbitral Tribunal declared the Stock Purchase Agreement *void ab initio* and of no legal effect on account of fraud and misrepresentation.

(2) The Stock Purchase agreement remained valid until the Arbitral decision. The 2012 loan agreement is one of those agreements that arose during the time the Stock Purchase Agreement was still a valid document

(3) The Arbitral Tribunal, at paragraph 206 of the decision, expressly stated that it makes no conclusions as to the consequences of pledges, hypothecates or mortgages entered into when the Stock Purchase Agreement was in existence which will include the 2012 loan agreement. The Arbitral Tribunal asserted that such issues are for other *fora* as it has no jurisdiction over those issues.

[39] Having considered the issues raised in the Pakistan Suit (which includes the application filed by AEGL) and the issues being raised by the parties in this claim, in my view, the principal allegations in both claims raise common issues. These include:

(1) The validity of the 2012 loan agreement and the settlement agreement.

(i) AEGL's application in the Pakistan Suit alleges that the 2012 loan agreement was entered into in breach of an order of the Islamabad High Court and is *"fraudulent rendering all proceedings consequent thereto similarly fraudulent and orders obtained to be so obtained by fraud and misrepresentation."* The application also alleges that the settlement agreement is fraudulent and in breach of fiduciary duty.

(ii) The defendant in this claim also asserts that the 2012 loan agreement is fraudulent, the settlement agreement was entered into while the defendant was under the unlawful control of the claimant and is fraudulent and that the Pakistan Suit itself was patently collusive and fraudulent.[14]

(2) The effect of the Arbitral Tribunal declaring the stock purchase agreement *void ab initio*.

(i) AEGL's application states that several facts were concealed from the court including the pendency of arbitral proceedings before the ICC. This appears to be a reference to the ICC Arbitration which later resulted in an Arbitral Award on 15th April 2015 in which the stock purchase agreement was declared void.

(ii) The defendant in this claim asserts that the effect of the ICC's finding is that all decisions taken by the defendant since 9th November 2003 including the loan allegedly made by the claimant to the defendant are illegal and void. The claimant denies this and refers the Arbitral Award which specifically stated that no conclusion is made on the effect of agreements (which would include the 2012 loan agreement) entered into when the Stock Purchase Agreement was in existence. The claimant asserts that the

[14] Paragraphs 3,5 and 8 of the affidavit of Mr. Onthank filed on 24th June 2016

Arbitral Tribunal stated that it had no jurisdiction over that issues and that issue is for another *fora.*

(iii) It appears to me that the issue of the effect of the arbitral award on the 2012 loan agreement is live.

[40] In my view, if both actions were to continue there is a risk of conflicting and/or undesirable results for the following reasons:

(1) The claimant and the defendant are both parties to the Pakistan Suit. AEGL has intervened in those proceedings by way of its application to set aside the consent decree which has as its terms the settlement agreement.

(2) The Pakistan Suit, which also now includes AEGL's application filed in that suit challenging the consent decree made therein, and the claim before this court both have at their core the 2012 loan agreement and the settlement agreement.

(3) The critical issues surrounding the validity of the 2012 loan agreement and the settlement agreement have been raised in the Pakistan Suit. The jurisdiction of the Islamabad High Court has therefore been invoked with respect to a determination of these issues. The Pakistan Suit is still pending as there is no evidence of a final determination or consent order in that suit.

(4) If AEGL's application to set aside the consent decree is successful in that a finding is made by the Islamabad High Court that the 2012 loan agreement and the settlement agreement are vitiated by fraud and/or that the effect of the Arbitral Award is that the 2012 loan agreement is null and void, that is likely to be determinative of the Pakistan Suit which is based on the 2012 loan agreement. If this claim is allowed to proceed the court is likely to also have to determine the issue of the validity of the 2012 loan agreement and the settlement agreement. There is a real risk of conflicting decisions.

(5) If AEGL's application to set aside the consent decree is unsuccessful in that a finding is made by the Islamabad High Court that the 2012 loan agreement and settlement agreement are not vitiated by fraud and/or that the Arbitral Award did not affect the validity of the 2012 loan agreement and consequently the consent decree is restored that is likely to bring an end to the Pakistan Suit - subject of course to any rights of appeal. The claimant would have an enforceable order from the Islamabad High Court in the form of the consent decree and at the same time have either a pending claim in this jurisdiction in relation to the alleged breach of the 2012 loan agreement and the settlement agreement or a judgment from this court on common issues raised in the Pakistan Suit which may conflict with the decision of Islamabad High Court.

Convenience and expense

[41] There is no evidence before the court with respect to potential witnesses, their location or availability. I note however that Mr. Welser a director of the claimant who swore the affidavits in this matter resides in Switzerland while Mr. Onthank, the defendant's president and director resides in the United States of America.

[42] In the absence of any clear evidence on the issue of potential witnesses I am unable to determine where the balance lies with respect to this issue.

[43] It is however evident that resources have already been expended by both parties in dealing with the Pakistan suit and that further resources may have to be expended in relation to those proceedings which remain extant.

[44] Having taken all the above matters into consideration and in particular that the governing law of the 2012 loan agreement is the law of Pakistan, that the security for the said loan is a petroleum concession located in Pakistan, the existence of extant proceedings in Pakistan which raise common principal allegations with the present claim and that fact that the settlement agreement does not take effect until the Pakistan Suit has been disposed of, I am satisfied that Pakistan is, prima facie, the most appropriate forum for the trial of this action.

Are there Circumstances Which Weigh Against the Grant of a Stay?

[45] Having found that Pakistan is, *prima facie*, the most appropriate forum for the trial of the action, I proceed to consider whether there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. The burden shifts to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction.

[46] The claimant states that the last hearing date in the Pakistan Suit with respect to the application filed by AEGL was on 4th April 2013 and there has been no judicial determination with respect to whether the consent decree will be permanently set aside. [15] The claimant alleges that AEGL *"has taken absolutely no steps"* to bring its application to completion. I note that while the application was filed by AEGL, the substantive Pakistan Suit was filed by the claimant. The claimant has not identified what steps it has taken to move the suit along. There is no evidence that the Pakistan Suit has suffered any unusual delay or that the claimant will not obtain justice in Pakistan if the claim is pursued in that jurisdiction.

[47] The evidence before me does not disclose any special circumstances by reason of which justice requires that the trial of the issues should take place in this jurisdiction.

[48] In all the circumstances and having regard to the overriding objective of dealing with cases justly, I find that Pakistan is the appropriate forum in which the issues arising in this claim can suitably be tried for the interests of all parties and the ends of justice. Accordingly I exercise my discretion in favour of granting a stay of these proceedings on the grounds of *forum non conveniens.*

Stay of Proceedings Based on the Arbitration Clause

[49] Notwithstanding that I have exercised my discretion in favour of staying the proceedings on the ground of *forum non conveniens*, I go on to consider, in the alternative, whether the claim should be stayed on the ground that the 2012 loan agreement contains an arbitration clause.

---

[15] Affidavit of Manfred Welser filed on 5th July 2016

Is the Arbitration Clause Null and Void?

[50] The first issue raised by the claimant with respect to the arbitration clause is that it is null, void and inoperative as a result of the settlement agreement The claimant submits that:

> "There is no evidence before the Court as to whether or not a Dispute Notice was issued pursuant to the 13th April 2012 Loan Agreement. The evidence before the Court does indicate that the Claimant applied to the High Court in Islamabad for an Order that the breach of 13th April 2012 Loan Agreement between the claimant, the defendant and another be referred to arbitration pursuant to the terms of the Loan Agreement... We submit that having applied to the Islamabad High Court for an order directing the parties to proceed to arbitration, the provisions of clause 14.1 with respect to what step ought to be taken to activate the arbitration clause was in fact, taken, albeit, not in the terms strictly stated in the 13th April 2012 Loan Agreement. In fact, it is evident that the step taken was accepted by the defendant as being acceptable as the defendant entered into a Settlement Agreement dated 13th January 2013 to bring the Claimant's application for the matter to be referred to arbitration to an end.
>
> The existence of the Settlement Agreement is evidence of the Claimant and the Defendant having subsequently compromised on the terms of its position as stated in the Loan Agreement for disputes to be resolved via arbitration, the issue of effect of Clause 14.1 of the 13th April 2012 Loan Agreement is no longer in issue. Consequently there is no basis for this court to stay in the Claimant's claim on the basis that the 13th April 2012 Loan Agreement stipulates that disputes ought to be referred to arbitration."

[51] The essence of the claimant's submission appears to be that because the parties reached a settlement following the institution of the Pakistan Suit: (a) the arbitration clause is no longer in issue and is null, void and inoperative; and (b) there is nothing to refer to arbitration.

[52] The claimant provided no authority for the proposition that an arbitration clause is nullified if the parties reach an agreement following the institution of proceedings to have the dispute referred to arbitration. I am therefore unable to conclude that the effect of the parties entering into the settlement agreement is that the arbitration clause is ineffective, null or void in the absence of an express agreement to this effect. In any event the settlement agreement states that it is of no effect until the Pakistan Suit has been disposed of by the Islamabad High Court. The consent decree that was entered to dispose of the Pakistan Suit has been suspended.

[53] In the circumstance I find no legal basis for a finding that the arbitration clause is null and void.

The Arbitration Act

[54] Section 2 of the **Arbitration Act** Chapter 3:01 of the Laws of Saint Christopher and Nevis ("**the Arbitration Act**") states:

> "The Arbitration Act, 1950 of the Parliament of the United Kingdom, shall be and the same is hereby declared to be henceforth in force in this State, and all the provisions of the said Act, so far as the same are applicable, shall *mutatis mutandis* apply to all proceedings relating to arbitration within the State.

[55] The **UK Arbitration Act 1950** therefore applies in this jurisdiction. I note that counsel for the claimant submitted on the one hand that the **UK Arbitration Act 1950** applies but subsequently suggested that the **UK Arbitration Act 1996** may apply. The claimant submits that " *The provisions* of the *Anguillan Arbitration Act are identical to that of the Arbitration Act of Federation of St. Christopher and Nevis with respect to adopting the 1950 UK Arbitration Act. The Court of Appeal as indicated by the defendant*[16] *has held that the applicable legislation in Anguilla is the 1996 UK Arbitration Act on the basis of the reception of law provision."*

[16] It is unclear what Court of Appeal case the claimant is referring to since the only Anguillan case referred to by the defendant was a first instance decision.

[56] It is not correct that the **Anguillan Arbitration Act** is identical to the **Arbitration Act**. The **Anguillan Arbitration Act** states :

> "The Arbitration Act (14 Geo. 6 c. 27) (UK) **as amended from time to time** shall be, and the same is hereby declared to be henceforth, in force in Anguilla, and all the provisions of the Act, so far as the same are applicable, shall mutatis mutandis apply to all proceedings relating to arbitration within Anguilla." (emphasis mine).

[57] The **Anguillan Arbitration Act**, therefore provides for the reception of the UK Arbitration Act *as amended from time to time*. The **UK Arbitration Act 1950** was repealed by the **UK Arbitration Act 1996** and hence the reason that the **UK Arbitration Act 1996** applies in Anguilla. **The Arbitration Act** in this jurisdiction states that the **UK Arbitration Act 1950** shall apply. There is no similar provision as in the Anguillan Act for future amendments to **UK Arbitration Act 1950** to be applied.

[58] Section 4 of the **UK Arbitration Act 1950** states:

> "If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, **in respect of any matter agreed to be referred,** any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, **if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.**
>
> Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any person claiming through or under him, commences any legal

proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

[59] Clause 14.1 of the 2012 loan agreement states:

" This agreement is governed by and shall be construed in accordance with the laws of Pakistan.

In the event of any dispute, controversy or claim arising out of or in connection with this Agreement (a "Dispute"), the Parties shall use their reasonable efforts to resolve such Dispute within a period of thirty (30) Business Days, commencing from either Party's receipt of a notice from the other Party indicating the existence of a Dispute (a "Dispute Notice"). In the event any such dispute is not so resolved within (30) Business Days after receipt of a Dispute Notice, then such Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. Either party may refer such dispute to be resolved by arbitration as aforesaid.

The seat or legal place of arbitration shall be Islamabad, Pakistan..." (emphasis mine)

[60] In **Anzen Limited and Others v Hermes One Limited** [17] the arbitration clause in issue stated:

"*This Agreement shall be construed in accordance with English law, without reference to its conflict of law principles. If a dispute arises out of or relates to this Agreement or its*

[17] [2016] UKPC 1

breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party ***may submit the dispute to binding arbitration****. ..*" (emphasis mine)

[61] The learned trial judge in that case found that the arbitration clause conferred an option upon either party to refer the matter to arbitration. The Court of Appeal upheld the decision of the learned trial judge. The matter was appealed to the Privy Council. The Privy Council appeal was focused on the effect of use of the word "may" as opposed to "shall" or "should" in the arbitration clause. The Privy Council held that the arbitration clause in issue was not a binding agreement to arbitrate but meant, in the first instance, that either party could commence litigation This was subject to an option, exercisable by either party, to submit the dispute to arbitration, whereupon a binding agreement would come into existence and any litigation would have to be stayed. The Privy Council held that the option to "*submit the dispute to binding arbitration*" could be exercised by applying for a stay.

[62] In this case, the arbitration clause in the 2012 loan agreement, unlike the arbitration clause in **Anzen**, does not use the permissive word "may" thus creating an option to arbitrate. It states that disputes "***shall"*** be settled by arbitration.

[63] In **ES UST- Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC** [18] [2013] UKSC 35; [2013] 1 WLR 1889, Lord Mance SCJ stated:

"*An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed.* ***The (often silent) concomitant is that neither party will seek such relief in any other forum. If the other forum is the English court, the remedy for the party aggrieved is to apply for a stay*** *under s 9 of the Arbitration Act 1996"*

[18] [2014] 1 All ER (Comm) 1 cited in Anzen Limited and Others v Hermes One Limited [2016] UKPC 1

[64] In my view the arbitration clause in the 2012 loan agreement creates a binding agreement to arbitrate rather than litigate disputes. It has not been disputed that the issues in dispute fall within the arbitration clause. There is no evidence that the defendant was not, at the time when these proceedings were commenced, or is not ready and willing to arbitrate. I can find no sufficient reason why the matter should not be referred in accordance with the agreement made by the parties.

[65] Further, the claimant has invoked the arbitration clause by commencing the Pakistan Suit for an order referring the matter to arbitration. This in my view a clear recognition by the claimant that there is a valid agreement to arbitrate in the 2012 loan agreement. This application is extant. In my view the extant Pakistan Suit provides further support for staying these proceedings to enable the parties to settle their dispute by arbitration as agreed.

[66] The fact that the claim is also based in the alternative on the settlement agreement which does not contain an arbitration clause is not in my view an obstacle to staying the proceedings on the basis of the arbitration clause in the 2012 loan agreement since, as found, the settlement agreement states that it is of no force and effect until the Pakistan Suit has been disposed of by an entered order of the Islamabad High Court.

[67] In all the circumstances, I am satisfied that this is a matter in which the court should exercise its discretion in favour of granting a stay of the proceedings pursuant to the Section 4 of the **UK Arbitration Act 1950** to enable the parties to submit their dispute to arbitration as agreed.

Stay of Proceedings Under CPR 9.7

[68] The claimant submits[19] that **CPR** 9.7 (A) (1) only relates to situations where the claim has been served out of the jurisdiction and thus is not applicable in circumstances where, as in this case, the claim was served within the jurisdiction. The claimant submits that in the circumstance the application made under this Rule should be dismissed forthwith.

[19] Submissions filed on 5th April 2016.

[69] **CPR** 9.7 (A) is headed ***"Procedure for applying for a stay etc. where defendant served out of jurisdiction."***

[70] It may therefore be arguable that in the circumstance it only applies to case where there was service out of the jurisdiction. However, I do not find it necessary to consider and make a finding on this issue having regard to the finding that the proceedings should be stayed on the grounds of *forum non conveniens* or alternatively pursuant to Section 4 of the **UK Arbitration Act 1950.**

Costs

[71] The application has not been determined at a case management conference, pre-trial review or trial. I award the defendant assessed costs pursuant to **CPR 65.11.**

[72] **CPR** 65.11 (4) states that:

> "In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

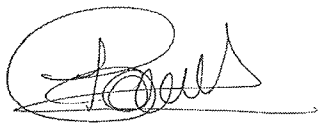
[73] If the parties are unable to agree on costs within 21 days the parties shall make written representations with respect to the quantum of costs that should be awarded to the defendant and the court office shall fix the matter for hearing.

[74] It is therefore ordered that:

(1) The proceedings are stayed on the ground of *forum non conveniens*;

(2) Alternatively, the proceedings are stayed pursuant to Section 4 of the **UK Arbitration Act 1950**.

(3) The claimant shall pay the defendant assessed costs to be agreed within 21 days or to be determined by the court.



Fidela Corbin Lincoln