Neutral Citation Number: [2018] EWHC 1503 (Comm)

Case No: CL-2017-000658

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2018

Before :

SIR RICHARD FIELD
(sitting as a Deputy High Court Judge)

- -

Between :

China Export & Credit Insurance Corporation	**Claimant**
- and -	
Emerald Energy Resources Limited	**Defendant**

- -
- -

Jamie Goldsmith (instructed by **Simmons & Simmons LLP**) for the **Claimant/Respondent**
Duncan Bagshaw (instructed by **Stephenson Harwood LLP**) for the **Defendant/Applicant**

Hearing dates: 21, 22 May 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR RICHARD FIELD (SITTING AS A DEPUTY HIGH COURT JUDGE)

Sir Richard Field :

Introduction

1. The Defendant ("Emerald") applies for a declaration that the High Court of England and Wales has no jurisdiction or should in its discretion decline to exercise jurisdiction to determine the claim of the Claimant ("Sinosure") on a promissory note ("the Note") given by Emerald in the principal amount of US$66,500,000.

2. Emerald's principal contention is that the proceedings are covered by an arbitration agreement made between the parties and should therefore be stayed pursuant to section 9 of the Arbitration Act 1996 ("the 1996 Act"). In the alternative, Emerald submits that Sinosure's claim should be stayed under the inherent jurisdiction of the Court.

3. The Note contains an English law and non-exclusive jurisdiction clause ("the NEJC") that reads:

> "This Promissory Note shall in all respects be governed by and construed in accordance with the laws of England. The issuer hereby submits to the non-exclusive jurisdiction of the English courts in respect of any legal action or proceedings arising out of or in connection with this Promissory Note."

4. Originally, Sinosure issued two sets of proceedings on the Note, Claim No. CL-2017-000150 ("the First Claim") and Claim No. CL-2017-000658 ("the Second Claim"). In the belief that the permission of the Court was required to serve the Claim Form and the Particulars of Claim out of the jurisdiction, Sinosure issued an application for permission to serve out of the jurisdiction a Claim Form and Particulars of Claim seeking payment of US$54,352,597.38 by way of principal and accrued interest due on the Note. On 11 April 2017, Blair J granted Sinosure's application on the papers.

5. Subsequently, Sinosure came to the view that its claim was covered by Article 25 of the Brussels Recast Regulation ("the BRR") and therefore permission to serve the proceedings out of the jurisdiction was not required. Article 25 provides (in relevant part):

> "If the parties, regardless of their domicile have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to substantive validity under the law of the Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) …or (c)…"

6. Sinosure therefore issued the Second Claim on 27 October 2017 and served the Claim Form and Particulars of Claim pertaining thereto on Emerald at its last known place of business. On 8 February 2018, Emerald filed an Acknowledgement of Service stating that it would contest jurisdiction.

7. Emerald issued separate jurisdiction challenges in respect of each set of proceedings. At the start of the hearing, I directed that the application in respect of the Second Claim should be heard first and, if that failed, the First Claim should be discontinued on such terms as the Court might impose having heard argument on the matter.

The factual background to Emerald's application

8. Emerald is a Nigerian company whose share capital is owned by Nigerian shareholders. Sinosure is a Chinese state-funded insurance company that offers export credit insurance against the risk of financial default.

9. In 2001, together with another Nigerian Company, AMNI Oil and Gas Limited ("AMNI"), Emerald was granted an Oil Prospecting Licence (designated OPL229) to explore for and extract hydrocarbons in a coastal area of Nigeria and to sell the hydrocarbons so found and extracted. On 16 November 2007 OPL229 was converted to OML141.

10. In order to raise funds to cover the extremely high costs of finding and extracting hydrocarbons, the holders of the interests in OML141 (known as the Joint Interest Parties ("the JIPs")), namely Emerald, AMNI and Bluewater Oil and Gas Investments Limited ("BOGI")) entered into a suite of four contracts with Sinosure (known collectively as the 'Farm-In Agreements') by which Sinosure acquired a 38% interest in OML141 in return for a payment of US$30 million, and for providing other commitments principally to do with funding. The four agreements were: the Farm-In Agreement ("the FIA"); the Funding Agreement ("the FA"); the Joint Interests Operating Agreement ("the JIOA") and the Technical Services Agreement ("the TSA"). All of the four contracts were expressed to be governed by Nigerian law.

11. The primary purpose of the FIA was to allocate to Sinosure its share of OML141. This agreement incorporated by reference all the terms of the other three contracts. Clause 2.8 of the FIA provides for each party to indemnify every other party to the extent of its interest for claims by any person not a party arising in or in connection with the operations in OPL 229. Clause 3.2 (B) to (E) obliges Sinosure to lead efforts to raise money on behalf of the Parties to cover the work program on OML141 (including the acquisition of seismic survey data) and to explore, develop and produce OML141 and to provide the guarantees and facilities for Full Funding as defined in the JIOA.

12. The JIOA required Sinosure to "full fund" the costs of the "Work Program" and to provide "certain guarantees and facilities related to Full Funding required for the exploration, development and production of [OML 141]" (see Clause 6.1, Recital L and Clause 6.2(C)). "Full Funding" is defined in Clause 1.46 of the JIOA as "the collaborative combination of Sinosure's credit, credibility and facilities, and the availability of, and access to, Joint Interest assets as collateral to secure such financing as may be required to meet the Work Program and the [authorisation for expenditure ("AFE")] for the exploration, development and production of the Block". Under clause 6.2(D) Sinosure was obliged to "secure from qualified banking, financial and/or other institutions […] confirmed and irrevocable commitment to fund, syndicate, document, and provide all such services as agreed to among the Parties that will enable and facilitate the ongoing funding and future funding requirements for the exploration, development and operation of [OML141]".

13. Clause 1.63 of the JIOA defines "Net Revenue" as the Proceeds from the sale of Hydrocarbons, less all costs and expenses of Production and Sale of Hydrocarbons including … Principal and Interest on borrowed funds …". Clause 10.4 (B) provides that "[t]he Operator and Foreign Technical Partner [viz Sinosure] shall be entitled to reimbursement of all verified initial operational expenditure toward the establishment

and implementation of the Joint Interest Operations from the Joint Interests Operations Account and related fees within 30 days of the commencement of operations."

14. The primary purpose of the TSA was to provide for Sinosure's obligation to provide technical services required for the exploration of the OML141.

15. The FIA (cl. 18), JIOA (cl. 18.2) and TSA (cl. 10) contain identical dispute resolution clauses ("the Arbitration Clause") as follows:

> "The Parties agree that their first course of action in the event of a dispute shall be to attempt to resolve the dispute without the intervention of outside parties. Should they be unable to do so, any dispute, controversy, or claim arising out of or in relation to or in connection with this Agreement, including without limitation any dispute as to the construction, validity, interpretation, enforceability, or breach of this Agreement, shall be exclusively and finally settled by arbitration under the Rules of the London Court of International Arbitration (or its successor), which Rules are deemed to be incorporated by reference into this clause. The arbitration shall take place in London, England.
> The tribunal shall consist of five (5) members, of whom each Party shall appoint one (1) member, and the four (4) so appointed shall choose the fifth arbitrator. The fifth arbitrator must be a qualified petroleum engineer, geologist, or physicist. The language of the arbitration shall be English. The decision of the Arbitrators shall be final and binding upon the Parties."

16. Sinosure was required to hold its interest in OML141 through a Nigerian company. For this purpose, AERD Projects Nigeria Limited ("AERD") was incorporated and a formal transfer to AERD of Sinosure's interest in OML141 was completed on or about 17 October 2006.

17. Pursuant to a Share Purchase Agreement dated 27 January 2006 ("the SPA") concluded by the individual shareholders of AERD and Sinosure and CNOOC Africa (a BVI company), Sinosure sold to CNOOC 92% of the shares in AERD.

18. All of the four Farm-In Agreements were expressed to be made by Sinosure for and on behalf of itself and "Sinosure Supported Companies", these being companies defined in Clause 1.91 of the JIOA to mean "any entity or corporation which [Sinosure] may nominate to perform or undertake any of its rights, interests, duties, or obligations under this Agreement, it being understood that such nomination shall not relieve [Sinosure] of its obligations under this Agreement, the FIA, TSA or FA".

19. BGP International Nigeria ("BGP"), a Nigerian company wholly owned by China National Petroleum Corporation, was engaged by Emerald on Sinosure's recommendation to provide 3D seismic data under two contracts dated 2 September 2005. Prior to its substitution by CNOOC, Sinosure issued an insurance policy to BGP in respect of 90% of the debt owed by Emerald to BGP ("the BGP Debt"). As of 1 June 2008, the fees due to BGP for this work amounted to approximately US$ 56 million, 90% of which was due to be paid on this date. However, there were no funds available from hydrocarbon production to discharge this liability. The following refinancing package was therefore put in place.

20. First, there was a letter agreement dated 24 June 2008 between BGP and Sino Black Gold 2008 ("SBG"), under which the BGP Debt was sold at par value to SBG (a special

purpose vehicle used for the refinancing) (the "First Letter Agreement"). The First Letter Agreement was governed by English law and included a non-exclusive English jurisdiction clause.

21. Second, there was a letter agreement also dated 24 June 2008 between Emerald, BGP, Sinosure and SBG, under which Emerald acknowledged that it was liable to pay the BGP Debt (and had no set-off, defence or counterclaim) and agreed: (a) to make a payment to extend its maturity to 30 June 2011; and (b) to issue a Promissory Note in the total amount of US$66.5m (i.e. the principal amount of the debt and extension payment) to replace the BGP debt (the "Second Letter Agreement"). The Second Letter Agreement was also governed by English law and included a non-exclusive English jurisdiction clause.

22. Third**,** a term loan facility ("the Loan Facility") dated 24 June 2008 was concluded between: (i) Standard Chartered (Hong Kong) Ltd ("Standard Chartered") (as Lead Arranger, Agent, Security Trustee and Insured); (ii) ING Bank NV and Standard Chartered (as the Original Lenders); and (iii) SBG (as Borrower), under which the lenders agreed to advance US$66.5m to SBG on the security of a Promissory Note to be assigned to Standard Chartered. Clause 22.1 of the Loan Facility provided that the lenders could assign any of their rights to Sinosure without the consent of SBG and that "assignment of the Lender's rights to Sinosure pursuant to the Insurance Policy…shall be effected by executing a Sinosure Transfer Certificate" (a pro forma version of which was attached at Schedule 5 to the Loan Facility). The Loan Facility was also governed by English law and included a non-exclusive English jurisdiction clause.

23. Fourth, the Note (dated 30 June 2008) was issued by Emerald in which it irrevocably and unconditionally promised to pay to the order of SBG the sum of US$66.5m ("without deduction, set-off or withholding of any nature whatsoever, present or future") together with interest and costs. The Note stated that it constituted Emerald's "legal, valid and binding obligations enforceable in accordance with its terms" and that "[a]ll or any right, title and interest in this Promissory Note" was "freely transferable in whole to any person". The Promissory Note is governed by English law and contained the NEJC whose terms are set out in paragraph 3 above. As envisaged, the Note was immediately assigned and endorsed to Standard Chartered by SBG as security for the Loan Facility.

24. Fifth, a deed of assignment dated 24 June 2008 was executed by SBG and Standard Chartered, under which SBG duly assigned the Promissory Note to Standard Chartered as security for the loan (the "Deed of Assignment"). The Deed of Assignment is governed by English law.

25. Sixth, a notice of assignment dated 24 June 2008 was executed by SBG, Standard Chartered and Emerald, under which Emerald acknowledged that it did "not have and will not claim or exercise any set-off or counterclaim in respect of the Promissory Note" (the "Notice of Assignment"). This notice is also governed by English law.

26. Seventh, an insurance policy dated 25 June 2008 ("the Policy") was issued by Sinosure under which Sinosure provided coverage in respect of Standard Chartered's right to receive the proceeds of the Note. Article 15(1) provided that, once Sinosure had paid out under the policy and at Sinosure's request, Standard Chartered would assign to Sinosure "all rights and interests under the Financing (including its security interest) in

compliance with proper legal procedures". Attachment 3 to the Policy was the "Sinosure Transfer Certificate" referred to in Clause 22.1 of the Loan Facility and attached as Schedule 5. This attachment is governed by English law. The rest of the policy, however, is governed by Chinese law and provides for arbitration in China.

27. On 4 August 2008, there were executed a Deed of Agreement for Withdrawal and Reassignment of Interest (the "Withdrawal Agreement") and a Deed of Release of the same date (the "Deed of Release") (collectively the "2008 Exit Agreements"). In return for the re-assignment to Emerald and AMNI of the 38% working interest in the project and the US$10m payment by CNOOC, AERD was released from "all associated and related costs, expenses, duties, obligations and liabilities (whether actual or contingent, whether foreseeable or unforeseeable, whether before or after the date of this Agreement" (clause 8(a) of the Withdrawal Agreement) and CNOOC was released from any further loan obligations.

28. Sinosure contended that the commercial purpose of the 2008 Exit Agreements was clearly to effect a clean break after which AERD and CNOOC would have no further interest in the project and no further obligations in respect of it, with the consequence that, if Sinosure had not already been released from further obligations under the Farm-In Agreements, it was so released. Emerald denied that this was the effect of the 2008 Exit Agreements. It is not entirely clear to me whether Sinosure was submitting that not only was it released from all future funding obligations by virtue of the 2008 Exit Agreements, it was also released from being subject to the Arbitration Clause. To the extent that this was part of Sinosure's submissions, I propose to assume, without deciding the point, that Sinosure was not released from the Arbitration Clause in consequence of the 2008 Exit Agreements.

29. On 30 June 2011, the debt to SBG matured and fell due. Sinosure paid Standard Chartered under the Policy and the Note became payable. Emerald protested that under the Farm-In Agreements, Sinosure was only entitled to be paid on the Note out of "Net Revenue" (i.e. the net proceeds of production of hydrocarbons), and no such production had yet started. However, albeit reluctantly on Emerald's part, there followed discussions between Emerald and Sinosure over a fairly lengthy payment schedule. Four letters were written, two from Emerald and two from Sinosure. Emerald contends that the outcome of the first three of these letters was a compromise agreement that displaces Emerald's liability on the Note, with the result that Sinosure cannot bring its case within Article 25 of the BRR and any claim for the outstanding sum due must be brought on the compromise agreement and by arbitration pursuant to the Arbitration Clause in the Farm-In Agreements. It is accordingly necessary to set out the pertinent wording of each letter.

30. The first letter in time was dated 7 July 2013 and was from Emerald to Sinosure.

> Ladies and Gentlemen:
>
> A. With respect to your demand dated May 6, 2013, and in the interest of achieving amicable settlement of this matter we are pleased to proposed payment of the seismic debt according to the following schedule:
>
> 1. Pay $15 million within the next 60 days.

2. Pay the balance in 4 equal instalments in approximate intervals of 9 months with a proviso to pay it off earlier if the resources become available sooner."

B. We make this payment proposal mindful of the following facts:

1…

2…

3. Notwithstanding, we remain committed to repaying the seismic debt because we derived benefits from the good job done by the Chinese company, BGP International. Our business ethics impel our resolve that repaying the cost is the honourable and right thing to do.

C…

D…

E… Guarantee of the Promissory Note was part performance of Sinosure's obligations under [the 2004 Farm-in agreement] and this preclusion applies. Accordingly we propose that the charges added by Sinosure to BGP's invoice for the seismic contract should be deducted, and the late interest beyond that amount that was already accrued and stated on the Note be cut-off from the date of Sinosure's paying off Standard and Chartered Bank.

31. Sinosure replied by letter dated 9 September 2013.

We preliminarily agree that you discharge in full your debt to us under the Promissory Note in accordance with the following repayment plan:

1. You will pay USD 15 million within 60 days after we have reached agreement on the repayment plan;

2. The remaining balance will be paid in four equal instalments with each instalment is paid 9 months after the previous installment payment. If you have sufficient funds, early prepayment will be allowed.

With regard to the amount of the debt owed to us, we paid USD60,730,697.57 to Standard Chartered … and have become the assigned beneficiary under the Promissory Note… We therefore are entitled to claim from you the sum of USD60,730,697.57 together with interest accrued from the date we made the payment to Standard Chartered based on our rights under the Promissory Note.

If you strictly repay according to the plan referred to above, we may consider waiving the interest referred to above.

In the meantime, we would like to reiterate that:-

The relationship between us is not an investor relationship, rather a creditor-debtor relationship based on Promissory Note.

We may not, for the time being, consider taking any legal action if you strictly comply with the repayment schedule referred to above. However, if you cannot agree with us as to the debt amount or there is any failure in payment when due and payable in accordance with the plan referred to above, either relating to the time or the amount of the payment, we reserve our rights

to 1) charge you the full amount of interest accrued and payable in accordance with the terms of the Promissory Note and 2) take legal actions.

Our proposal will expire in three months from the date of issuance of this letter. We look forward to hearing from you within the above mentioned three-month period.

32. Emerald, acting by Dr Ken Okorie, replied by letter dated 27 September 2013.

I acknowledge and thank you for your mail of September 9, 2013 accepting our offer to repay the OML-141 Seismic Debt evidenced by the Promissory Note of June 30 30, 2008.

OUR AGREEMENT

To be clear our understanding of the substance and key elements of the agreement is as follows:

1. Emerald will on behalf of the OML-141 Joint Interests pay $15 million within sixty days after the payment plan is agreed to;

2. The balance will be paid in four equal instalments, each instalment to be paid approximately 9 months after the preceding instalment is paid. The Joint Interest may prepay the balance without penalty if the funds are available.

3. Upon complying with number 1 and 2 above, additional interest or charges will not apply.

While mutually respecting our differing views on the nature and character of this debt, we maintain that it does not constitute a reason not to pursue the constructive and amicable resolution such as is provided by our current agreement.

Accordingly, we are ready to remit $ 15 million to the account and benefit of Sinosure as of Monday, September 30, 2013 …

33. The last of the four letters was from Sinosure to Emerald dated September 29 2013.

Dear Dr Ken Okorie,

1. Thank you for your letter of 27 September 2013 …

2. We are pleased to know that you are remitting USD15 million on 30 September 2013 to our account as part of your repayment of the principal amount of your total debt US60,730,697.57…

3. In the meantime, we would reiterate that our claim to you is based on our payment to Standard Chartered of USD 60,730,697.57 on 9 November 2011 …

4. As also mentioned in our last letter, we preliminarily agree that you discharge in full your debt to us under the Promissory Note in accordance with the following repayment plan:

> 1) You will pay USD 15 million within 60 days after we have reached agreement on the repayment plan;
>
> 2) The remaining balance will be paid in four equal instalments with each instalment is paid 9 months after the previous installment payment. If you have sufficient funds, early prepayment will be allowed.

> 3) If you strictly repay according to the plan referred to above, we may consider waiving the interest referred to in paragraph 3 above.
>
> 5. However, if you cannot agree with us as to the debt amount or there is any failure in payment when due and payable in accordance with the plan referred to above, either relating to the time or the amount of the payment, we reserve our rights to 1) charge you the full amount of interest accrued and payable in accordance with the terms of the Promissory Note and 2) take legal actions.
>
> 6 Again, our above proposal will expire in three months from the date of issuance of this letter.

34. On 30 September 2013, Emerald paid Sinosure US$15 million but thereafter, it made no further payments in respect of its liability under the Note.

35. On 31 May 2016, Emerald began proceedings in the High Court of Lagos State, Nigeria seeking: (i) a declaration that the Note was null and void on the basis that it had been procured under economic duress; (ii) recovery of approximately US$20 million paid to Sinosure under the Note; (iii) an injunction preventing Sinosure from bringing winding up proceedings against Emerald; and (iv) an order restraining winding up proceedings before any Court of law in furtherance of the enforcement of the Note. However, these proceedings were not served.

36. On 28 April 2017, Emerald reissued an identical claim in Nigeria. In paragraph 83 of his first witness statement, Dr Okorie says that this step was taken because Sinosure continued to press Emerald for immediate payment of the sum due on the Note. The Statement of Claim was served on 12 May 2017.

Was a binding compromise agreement concluded between Emerald and Sinosure that extinguished Emerald's liability under the Note?

37. Mr Bagshaw for Emerald submitted that the dispute over whether a binding compromise had been concluded was a dispute covered by the Arbitration Clause because the letters were exchanged in the context of a contention from Emerald that under the Farm-In Agreements Sinosure was only entitled to be paid out of "Net Revenue" and no such revenue had yet been achieved because no hydrocarbons had yet been produced. He also submitted that in consequence of the alleged compromise, Article 25 of the BRR did not apply and invited the Court when determining that issue not to apply the test of good arguable case but to come to its own final conclusion on the question.

38. The issue as to whether the first three of the letters constitute a binding compromise raises a question of law and/or construction and there is high authority for the proposition that where the applicability of a jurisdiction gateway "depends on a question of law or construction, there is no room for the application of the test of good arguable case: the court must decide the question on the application to set aside" (see the last sentence of para 11-147 of *Dicey, Morris and Collins The Conflict of Laws* (15 ed) and the following observation of Lord Collins himself in para 81 of *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.

> "But if the applicability of PD6B, para 3.1 [an English jurisdiction gateway] depends on a question of law or construction, there is no room for the application of the test of good arguable case: the court must decide the question on the application to set aside."

39. In my judgment, no binding agreement resulted from the exchange of the first three of the above cited letters, or indeed from the exchange of all four of the letters. I say this for the following reasons. First, Sinosure's letter of 9 September 2013 was not an acceptance of an offer made by Emerald in its letter of 7 July 2013, as stated in the first paragraph of Emerald's letter of 27 September 2013, but a counter offer. Second, there was no agreement as to the total sum to be paid. Emerald refers to the "seismic debt" in paragraphs A and E of its letter of 27 September 2013 which I hold to be a reference to the US$51,208,715.01 stated in BGP's invoice[1], whereas Sinosure's figure for the sum due in both of its letters is US$60,730,697.57. Third, Sinosure stated that interest continues to accrue but it *may* consider waiving this interest, whereas Emerald's position is that no additional interest will be due if the principal amount is paid. Fourth, Emerald did not accept Sinosure's stipulation that if Emerald did not agree with Sinosure as to the amount of the debt due or there was any failure in payment in accordance with the proposed payment, Sinosure reserved the right to charge the full amount of interest accrued and "take legal actions".

40. In the alternative, even if an agreement was the outcome of the first three letters, I am firmly of the view that the words "take legal actions" in Sinosure's letters does not mean, "take legal action to sue on the compromise agreement" as submitted by Mr Bagshaw, but means "take legal action to sue on the Note", with the result that Emerald's failure to pay in accordance with the agreed timetable revived Emerald's liability on the Note. In my judgment, in the context in which the letters are to be construed, Mr Bagshaw's proposed construction is wholly uncommercial and fanciful.

Is Sinosure's claim on the Note covered by the Arbitration Clause and therefore liable to be stayed under section 9 of the 1996 Act?

41. Section 9 of the 1996 Act provides in relevant part:

> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
>
> (3) …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
>
> (5) …

42. Mr Bagshaw submitted that the Court could be well satisfied that there existed an arbitration agreement between Emerald and Sinosure, and that it was enough for Emerald to be entitled to a stay for it to show that it was arguable that the arbitration agreement encompassed the claim and/or that the agreement had not been rendered "inoperable" as provided for in section 9(4). Mr Bagshaw further submitted that

[1] See para 3 of the letter dated 24 June 2008 from BGP to Emerald at Bundle C4, tab 32. Under the contract between BGP and Emerald, 10% of the sum due was to be paid in advance. The US$51,208,715.01 represents the remaining 90% of the overall sum due.

Sinosure's claim was brought in respect of a matter which under the arbitration agreement is to be referred to arbitration because the claim was brought in breach of the Farm-In Agreements, Emerald having been obliged under those agreements to refinance the BGP debt with a right of reimbursement that was limited to recoupment out of Net Revenue. Mr Bagshaw went on to contend that since the issue of whether the claim was encompassed by the arbitration agreement went to the scope of the agreement which was intimately tied up with the construction of the Farm-In Agreements, the Court should defer the decision on that issue to an arbitral panel. In support of this latter submission, Mr Bagshaw relied on the approval given by the Court of Appeal in *Ahmad Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 at 525 to the observations of Judge Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd* [1999] BLR 194, including the proposition that where the scope and ingredients of the agreement have to be determined on a s. 9 application, it may be appropriate for the Court to leave that issue to be determined on a reference under the agreement.

43. I do not accept Mr Bagshaw's contentions. I respectfully adopt the reasoning of Lightman J in *Albon (trading as NA Carriage Co) v Naza Motor Trading SDN BHD et al* [2007] 2 All ER 1075 where he held that section 9 (1) of the 1996 Act provides for two jurisdictional thresholds which are to be decided by the Court before a stay can be granted: (1) Is the Court satisfied that there has been concluded an arbitration agreement; and (2) Is the Court satisfied that the issue in the proceedings is a matter which under the arbitration agreement is to be referred to arbitration. In *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamengorsk Hydropower Plant JSC* [2013] UKSC 35 at [52], Lord Mance stated that Lightman J in Albon had correctly held the court, rather than the tribunal, rules in the first instance on arbitral jurisdiction, and does so bindingly.

44. Further, in my judgment, where the issue is whether an arbitration agreement has been effectively superseded in respect of a particular matter by a subsequent consensual contractual process, this is not a matter falling within the word "inoperative" in s. 9 (4), but is part of the second threshold condition provided for in s. 9 (1). As Andrew Smith J said in *Lombard North Central v GATX Corporation* [2012] 2 All ER 1119 at [24], "[a]n arbitration clause is not "inoperative" simply because a dispute does not fall within its scope." Instead, as Andrew Smith J went on to say, bearing in mind that s. 9(4) is in similar terms to the New York Convention and is based on the Model Law, "operative" covers circumstances "in which the party seeking to invoke the arbitration agreement is not entitled to do so: one example is where the party has waived the right to invoke it (see AED Oil Ltd v Puffin FSPO Ltd, (no 2) [2009] VSC 534) or otherwise lost the right to make reference. Other circumstances in which an arbitration agreement is inoperative are described by Prof. Merkin in Arbitration Law (2011) at para 8.33.2 and include cases where the arbitration agreement has been terminated by an accepted repudiation, cases where the dispute is incapable of being determined by arbitration, and cases where the arbitration will not be enforced by the court (for example because a named arbitrator is actually or apparently biased). See too Prof. Margaret L Moses, The Principles and Practice of Commercial Arbitration (2nd Ed, 2012) at p.34."

45. Is the issue in the proceedings a matter which under the arbitration agreement is to be referred to arbitration? In my judgment this question is to be answered by adopting the approach articulated by Thomas LJ (as he then was) in *Deutsche Bank v Sebastian*

Holdings (No2) [2011] 2 All ER 245 paras [39] – [49], a case concerned with clauses in different agreements giving jurisdiction to courts in different countries.

46. In paras [42] and [49], Thomas LJ said:

> [42] "…where there are multiple related agreements, the task of the court in determining whether a dispute falls within the jurisdiction clauses of one or more related agreements, depends on the intention of the parties as revealed by the agreements against these general principles: see Lawrence Collins LJ in Satyam Computer Services Ltd v Unpaid Systems `ltd [2008] EWCA 487 at [93] …
>
> [49] "…The overall task of the court is summarised in the 2010 supplement of *Dicey, Morris and Collins on the Conflict of Laws* (14 ed, 2006) (para 12-094);
>
> But the decision in Fiona Trust has limited application to the questions which arise where the parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction … The same approach to the construction of potentially-overlapping agreements on jurisdiction (but there will, in this respect, be no difference between the construction of agreements on jurisdiction, arbitration agreements and service of suit clauses) was taken in [UBS AG v HSH Nordbank AG [2009] 2 Lloyd's Rep 272]… In the final analysis, the question simply requires the careful and commercially-minded construction of the various agreements providing for the resolution of disputes, the point of departure being that agreements which appear to have been deliberately and professionally drafted are to be given effect so far as it is possible and commercially rational to do so, even where this may result in a degree of fragmentation in the resolution of disputes. It may be necessary to enquire under which of a number of inter-related contractual agreements a dispute actually arises; this may be answered by seeking to locate its centre of gravity.
>
> The same approach, namely to focus on the commercially-rational construction, governs the interpretation of agreements on jurisdiction as exclusive or non-exclusive, and of agreements which specifically provide that the parties will not take objection to the bringing of proceedings if proceedings are brought in more courts than one." [Para 12-110 in the 15th ed of *Dicey, Morris and Collins on The Conflicts of Law* is to similar effect]

47. Thomas LJ's approach was adopted and applied by Blair J in *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and Standard Chartered Bank* [2011] EWHC 1842 (Comm). Here, the first Defendant ("KPC") operated a coal mine in Indonesia and engaged the Claimant ("Theiss") to perform mining services at the mine under an Operating Agreement – Mining Services agreement ("the OAMS") concluded in 2003. Under the OAMS Thiess was remunerated primarily at a rate per tonne of coal produced. The OAMS provided for a mechanism for a review of pricing arrangements every 5 years and in the absence of an agreement for a new pricing structure, the OAMS provided for a mediation, followed by an expert determination, followed by (under Clause 18.3) arbitration.

48. KPC was also party, together with another Indonesian coal company, to a subsequent Cash Distribution Agreement made in 2007 ("the CDA") that Thiess became entitled to enforce. The CDA was concerned with the distribution of the cash proceeds of the sale of coal produced not only under the OAMS but also under other contracts. By

Clause 31.2 of the CDA, the parties (including Theiss) agreed that the English Courts had non-exclusive jurisdiction to settle any disputes in connection with the agreement and submitted to the jurisdiction of the English Courts.

49. Whilst an arbitration was on foot under the OAMS agreement concerned with a new pricing structure, Theiss brought proceedings in an English Court for various declarations and orders to which it claimed to be entitled under the CDA. KPC then applied under s. 9 of the 1996 Act to stay the proceedings brought by Theiss, it being contended by KPC that the English proceedings were parasitic on the dispute that had been referred to arbitration under the OAMS.

50. Blair J cited Thomas LJ's reference to para 12-094 of Dicey, Morris and Collins *The Conflict of Law* (14 ed) in *Sebastian Holdings* and went on to say:

> [43] In my view, the claim in the English action is a claim under the CDA concerned with a procedure whereby the sums in dispute are to be set aside until the dispute is determined. It raises a discrete claim, related to, but distinct from, the underlying dispute arising under the OAMS which is the subject of the arbitration. There is no reason why the parties cannot be taken to have intended that these claims are to be the subject of different jurisdiction clauses (c.f. *UBS UBS AG v HSH Nordbank AG* [2009] 2 Lloyd's Rep 272 at [84] and [95], Lord Collins). As Thiess puts it, the effect of KPC's submission is that there can be no decision as to what goes into the Dispute Account until the dispute is resolved.
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> [44] I have concluded therefore that the submissions of Thiess are correct. In my opinion, the parties have not agreed to refer to arbitration the issue in the English action, which issue arises under the CDA. As a matter of construction of the arbitration clause, the substance of the controversy does not arise under or in connection with the OAMS so as to attract the mandatory stay under s.9 Arbitration Act 1996. Nor do I accept either of KPC's alternative contentions, which are based on the connection between what may have to be decided in the English proceedings, and the issues in the arbitration. My reasons in that regard are as follows. Disputes in connection with the CDA are submitted by the terms of the CDA to the jurisdiction of the English court, and only the English court can decide them. It is possible and commercially rational to do so, even though this may result in a degree of fragmentation in the resolution of the dispute (see the citation from Dicey, Morris and Collins, ibid). In those circumstances, I do not accept the submission that a stay should be imposed under s. 9 because there may be a degree of overlap. For the same reason, this is not a case, in my judgment, for the court to decline to entertain the claim under its inherent jurisdiction. There is a further reason for this conclusion, in that an order of the English court is necessary to bind Standard Chartered Bank, which holds the Dispute Account, and which is not a party to the arbitration agreement.

51. Mr Bagshaw submitted that what the issue was in the proceedings was a matter that was to be referred to arbitration under the Arbitration Clause. He argued that the NEJC did not displace the Arbitration Clause in respect of Sinosure's claim on the Note because the NEJC only had a positive effect of conferring jurisdiction on the English Courts and did not have the negative effect of depriving other tribunals of the jurisdiction to deal with the matter. He further submitted that the Arbitration Clause should be given a broad construction consistent with the decision of the House of Lords in *Fiona Trust* and, construing the clause in this manner, the Court should find that the claim on the Note is in connection with the Farm-In Agreements and thus governed by the Arbitration Clause. In addition, Mr Bagshaw argued that the fact that the Note was not

issued by Emerald to Sinosure but only became actionable by Sinosure against Emerald by virtue of the assignment from Standard Chartered Bank weighed significantly against the proposition that the NEJC displaced the Arbitration Clause if a claim was brought on the Note in England.

52. I decline to accept Mr Bagshaw's submissions. In my judgment, Sinosure having sued on the Note in an English Court, Emerald is contractually bound by the NECJ to submit to the jurisdiction of the English Court by reason of the assignment of the Note by Standard Chartered to Sinosure, the Note containing specific provisions when it was issued by Emerald that : (a) all or any right, title and interest in the Note shall be freely transferable in whole to any person; and (b) the Note was to be paid "without deduction, set-off or withholding of any nature whatsoever". Also, there can be no doubt that Emerald fully appreciated when it issued the Note that the Note would be assigned to Sinosure once Sinosure had paid Standard Chartered under the Policy.

53. The wording of the NEJC is clear and unambiguous. Sinosure having issued proceedings on the Note in an English court, Emerald is bound to submit to the jurisdiction of that court, an obligation that manifestly involves an implicit promise not to seek to have the proceedings determined by a reference under the Arbitration Clause.

54. Emerald's stay application under s. 9 can also be analysed in terms of the "matter" that arises out of the claim on the Note. Are the defences to the claim that Emerald wishes to run based on the terms of the Farm-In Agreements part of that matter?

55. If this approach is adopted, a helpful case is *Autoridad del Canal de Panama v Sacyr SA et al* [2017] 2 Lloyd's Rep 351, also decided by Blair J. Here, the claimant ("ACP") was the employer under a large project for the widening of the Panama Canal. The contractor ("GUPC"), was a Panamanian company. The main contract between ACP and GUPC was governed by Panamanian law and contained a Miami ICC arbitration clause. There were three separate types of guarantees given by the first to fourth defendants to secure advance payments made by ACP to GUPC. These were all governed by Panamanian law with Miami ICC arbitration clauses. Later, in 2015, there were further advance payments, also secured by guarantees from the defendants, but these guarantees were governed by English law and contained exclusive English jurisdiction clauses. Each time an advance payment was made, it became incorporated into the main contract.

56. Disputes arose between the parties. ACP claimed that the advance payments were repayable because GUPC had failed to obtain letters of credit and sought the sum of US$ 288,275,465.20. GUPC then commenced an ICC arbitration seeking negative declaratory relief and later, in 2016, sought from the tribunal emergency measures under which payments due by GUPC were to be deferred until all disputes had been resolved. In the meantime, ACP brought proceedings in England for summary judgment against the defendants under six English law guarantees on the basis that the guarantees were first demand instruments and ACP was itself entitled conclusively to determine what amounts of principal and interest were due. The court rejected the summary judgment application on the basis that the liability of the guarantor was co-extensive with that of the principal debtor. The defendants then sought a stay of the English proceedings under s. 9 of the 1996 Act, contending that the primary substantive issue in the English proceedings was whether the advance payments were due and payable

by GUPC to ACP under the main contract ("the GUPC Repayment Issue"), an issue that was governed by Panamanian law and subject to arbitration both under the main contract and the arbitration clauses in the guarantee contracts.

57. The defendants accepted that the GUPC Repayment Issue fell within the exclusive jurisdiction clause in the English law guarantees and contended that it arose as a "matter" and that the same "matter" arose within the arbitration agreements. ACP accepted that the GUPC Repayment Issue fell within both the scope of the exclusive jurisdiction clauses and within the arbitration agreements but contended that this issue was not the "matter" in the English proceedings and did not arise as the same "matter" in the arbitration agreements.

58. Adopting the approach articulated by the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, Blair J held in [129] that when considering whether any "matter" is covered by an arbitration clause the court should undertake a practical and common sense enquiry in relation to any reasonably substantial issue that it is not merely peripheral or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or unduly narrow pedantic manner. In most cases, the matter would encompass the claims made in the proceedings. But that is not an absolute or inflexible rule.

59. Blair J went on to find that the essential nature of the claim in the English proceedings was that they were brought under guarantees which were subject to English law and jurisdiction. The substance of the controversy between the parties was the claim on these guarantees and that was the "matter" for the purposes of section 9 (1). The issue of the liability of the principal debtor to repay the advance payments (the GUPC Repayment Issue) was necessarily bound up with the nature of the instrument as a guarantee, but it was not the, or a, "matter" for these purposes, in itself [137 (2) & (3)]. The proceedings were therefore not brought "in respect of a matter which under the agreement is to be referred to arbitration" but were brought in respect of a matter which was referred to in the exclusive jurisdiction clause. This conclusion was consonant with the commercial sense of the transaction. There was nothing unusual in a party holding more than one security for the same transaction. [137] [138].

60. Adopting the approach taken by Blair J in *Sacyr*, in my judgment the relevant "matter" in respect of which proceedings have been brought in this case is whether Emerald is liable in English law on Sinosure's claim on the Note, and this is not altered by the fact that Emerald intends to raise a Nigerian law issue by way of defence arising under a contract or contracts that are quite separate from the contract constituted by the Note. As Professor Merkin says in para 8.20 of his *Arbitration Law*, citing *T & N Ltd v Royal and Sun Alliance* [2002] EWHC 2420 (Ch), if a claim is made under a contract which does not contain an arbitration clause, and the defence is raised that the claim is precluded by a separate contract which does contain an arbitration clause, the claim itself is not one "in respect of a matter agreed to be referred" to arbitration.

Is Emerald entitled to a stay of the proceedings brought by Sinosure in the Court's inherent jurisdiction?

61. As is well known, the Court of Appeal in *Reichold Norway ASA v Goldman Sachs* [2000] 1 WLR 173 confirmed that a court could grant a stay of proceedings under its

inherent jurisdiction on case management grounds but stated that such stays would only be granted in rare and compelling circumstances. It has also been held that the discretion can be exercised notwithstanding that the contract in question contains an exclusive jurisdiction clause (see *Sacyr* at [160]) and nor does a *forum non conveniens* waiver preclude a stay (see *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] 2 Lloyd's Rep 25 at [43]).

62. In *Sacyr* Blair J observed:

> "In circumstances in which an international commercial dispute involves arbitration as well as court proceedings, it makes good commercial sense for the court to have regard, where appropriate, to the orderly resolution of the dispute as a whole, if necessary by granting a temporary stay in favour of arbitration. A coherent system of commercial dispute resolution has to take into account the fact that various different tribunals may be involved, each of which should aim to minimise the risk of inconsistent decisions, and avoid unnecessary duplication and expense. All this is amply supported in the case law." [165]

63. Emerald advance the following submissions in support of its contention that its case for a stay is a rare and compelling one:

(a) The parties entered into a long-term venture to explore for and extract hydrocarbons under a detailed suite of contracts;

(b) Sinosure gave wide-ranging, substantial commitments to fully fund the project and to secure the finance necessary to do so;

(c) The agreed mechanism for the recovery of funds outlaid on the costs of exploration and production, from the revenue from hydrocarbon production, was provided for in the Farm-in;

(d) Sinosure arranged funding for the cost of the BGP survey, carried out by another company also owned wholly by China, and issued an insurance policy for the debt in compliance with the Farm-in;

(e) Emerald issued a PN to the bank because it was required by the bank as part of the security for its finance arrangement;

(f) When it was required to pay under its insurance policy to BGP (which was no more than its obligation to Full-fund required of it) Sinosure took an assignment of the Promissory Note; and

(g) Sinosure has now sought to recover from Emerald its outlay other than from hydrocarbon revenues by suing on the Note, leapfrogging the restrictions on its recovery in its agreement with Emerald.

(h) If Sinosure is permitted to continue with these proceedings, Emerald may be forced to seek an order from an arbitral tribunal prohibiting Sinosure from doing so. However this should not be necessary: Sinosure is the party seeking substantive relief and it should be required to establish its claim in arbitration proceedings so that the disputes raised by Emerald (and the other JIPs) may be resolved by the tribunal.

(i) If Sinosure secures judgment for immediate payment in England, but it turns out that Sinosure is precluded by the Farm-in from demanding immediate payment under the Note, this will have dramatic and negative consequences. The whole scheme of the Farm-in was that the parties' outlay would be recouped from hydrocarbon revenues. Even CNOOC, when it farmed out, agreed to a provision that it would not recover save from hydrocarbon revenues (cl. 4 of the Exit Agreement) Emerald's only option would be to seek damages in separate arbitration proceedings or Nigerian Court proceedings for the consequences of Sinosure demanding immediate payment and bringing this claim (with potentially inconsistent results).

(j) This is a claim for US$60 million. The sums involved are very large and concerns as to proportionality or cost are relatively minor factors. It is appropriate in the particular circumstances of this case to require disputes to be resolved systematically and once and for all, in the proper forum, before Sinosure is permitted to circumvent those disputes by suing on the PN in the English court.

(k)The proceedings should therefore be stayed until Sinosure establishes its entitlement to payment under the PN in arbitration proceedings.

64. In my judgment, there are no good grounds for granting a stay of the English court proceedings under the inherent jurisdiction of the Court thereby causing yet further delay in the prosecution of Sinosure's claim on the Note. There is currently no arbitral tribunal constituted to hear a claim by Emerald for a declaration that Sinosure's claim is in breach of the Farm-In Agreements and such relief would be of no consequence in and therefore not dispositive of the English proceedings. There is also a real possibility that if any arbitral tribunal were convened and decided in favour a claim made by Emerald, the issue would come back to an English court under section 67 and/or section 69 of the 1996 Act. Further, it may be (as suggested by Dr Okorie in paragraph 114 of his first witness statement), that Sinosure has no entitlement to claim on the Note in a reference under the Arbitration Clause. It follows, in my view, that rather than Sinosure's claim being stayed, it should on the contrary be heard expeditiously in proceedings in which Sinosure are sure to seek summary judgment and in which Emerald can advance its contentions that the claim is barred by the Farm-In Agreements.

Conclusion

65. For the reasons given above, Emerald's challenge to the jurisdiction of the Court to determine the Second Claim (CL-2017-000658) and its associated applications for a stay of that claim pursuant to section 9 of the 1996 Act, alternatively under the inherent jurisdiction of the Court, are refused.