EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2016/0015

BETWEEN:

SOUTH EAST ASIA ENERGY HOLDING AG

Appellant

and

HYCARBEX-AMERICAN ENERGY INC

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Ms. Dia Forrester and Mr. Jomokie Phillips for the Appellant
Ms. Midge Morton and Ms. Maurisha Robinson for the Respondent

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2017: March 15;
December 4.

Interlocutory proceedings – Application for stay of proceedings – Application made pursuant to incorrect civil procedure rule – Whether learned master erred in considering application against rule 9.7 of the Civil Procedure Rules 2000 ("CPR") where application was made pursuant to CPR 9.7A – Stay granted based on forum non conveniens but issue of forum non conveniens not pleaded or raised in submissions – Whether master erred in exercise of her discretion by ordering stay on that basis – Stay granted based alternatively on arbitration clause in loan agreement – Whether master erred in so ordering

South East Asia Energy Holding AG ("South East Asia"), Hycarbex-American Energy Inc ("Hycarbex") and Hycarbex Asia Pte Ltd are parties to a loan agreement dated 13th April 2012 ("Loan Agreement"). Articles 2.1 to 3.4 set out the subject matter of the Loan Agreement and the security for the obligations of that agreement. Article 14.1 sets out the governing law, being the laws of Pakistan and the arbitration clause for dealing with disputes. Hycarbex is alleged to have breached the Loan Agreement having failed to repay the debt owed and or assign the concession interests as per the terms of the Loan

Agreement. South East Asia applied under section 20 of the Arbitration Act, 1940[1] for the Pakistan court to place the arbitration agreement on the record and to pass orders accordingly for referring the matter to arbitration ("the Arbitration Petition").

Thereafter, in Pakistan, the parties entered into a Settlement Agreement where Hycarbex and Hycarbex Asia Pte agreed with South East Asia that based on the facts and circumstances set out in the Arbitration Petition, South East Asia is entitled to enforce the security interest in accordance with the Loan Agreement pursuant to the terms of that Settlement Agreement. Subsequently, the parties filed a joint application in the Arbitration Petition which gave rise to a consent decree ("the Consent Decree"). The effect of the Consent Decree on the Arbitration Petition is disputed and consequent applications have been made for the recall and suspension of the Consent Decree. The Consent Decree is currently suspended by the Pakistan Court; however, the status of the matter is unknown. It is alleged that at the time of those applications the Settlement Agreement took effect and stood as a binding legal document.

Meanwhile, South East Asia filed a claim in the High Court of Saint Kitts and Nevis seeking declarations against Hycarbex based on the Loan Agreement. It later amended its statement of claim to include the Settlement Agreement. Hycarbex filed a notice of application for the court to stay proceedings or decline jurisdiction pursuant to CPR 9.7A(1), or for a stay of proceedings pursuant to the inherent jurisdiction of the court. The matter came before learned master Corbin-Lincoln who stayed the proceedings on the ground of forum non conveniens and based on the arbitration clause contained in article 14.1 of the Loan Agreement. South East Asia is dissatisfied with the learned master's decision and has appealed on several grounds. The issues for this Court to determine are: firstly, whether the master erred in considering the application against CPR 9.7 where the application was made pursuant to CPR 9.7A(1); secondly, whether the learned master erred in the exercise of her discretion by ordering a stay of proceedings based on forum non conveniens, and thirdly, whether the learned master erred in the exercise of her discretion by ordering a stay of proceedings based clause on 14.1 in the Loan Agreement.

Held: allowing the appeal in part on the ground of forum non conveniens, dismissing the appeal on the remaining two grounds and awarding costs to Hycarbex of two thirds of two thirds of the costs assessed in the court below, that:

1. Hycarbex, by bringing the application under rule 9.7A(1) of the **Civil Procedure Rules 2000** ("CPR") as opposed to CPR 9.7 committed a procedural error. Nonetheless, the master cannot be faulted for refusing to accede to South East Asia's request to dismiss the stay application on a mere technicality such as the reference to an incorrect rule. It is accepted that the failure to refer to the specific rule under which an application is brought is not necessarily fatal to the application. Even though the master considered the application under CPR 9.7 and not under CPR 9.7A(1), this could not have prejudiced South East Asia since it was able to advocate all of the relevant points in opposition to the grant of the stay on the basis of CPR 9.7. In any event, it is unfair to criticise the master on the

[1] Laws of Pakistan.

basis that she allegedly utilised CPR 9.7 which was not pleaded or relied on by Hycarbex in grounding its stay application and very little turns on this point since this was not the basis upon which the learned master granted the stay. The proceedings were not stayed based on CPR 9.7. Cognizance must be taken of the fact that the learned master stayed the proceedings on two bases namely (a) on the ground of forum non conveniens; and (b) alternatively, the proceedings are stayed pursuant to section 4 of the **UK Arbitration Act 1950**.

Texan Management Ltd. et al v Pacific Electric Wire and Cable [2009] UKPC 46 applied.

2. The plank which the learned master used to launch the forum non conveniens examination was the inherent jurisdiction of the court. Insofar as there was no issue of forum non conveniens raised on the pleadings or in the submissions before the master, it was not open to her to resolve the application for the stay on this basis. Further, it is undesirable for a judicial officer to seek to resolve an issue that was not raised by the parties and without the benefit of arguments on the point.

3. South East Asia's claim was originally based on the Loan Agreement. In its amended statement of claim, it included the alternative claim for damages based on the Settlement Agreement. It is notable that the amended statement of claim was based on the Loan Agreement and the Settlement Agreement. The learned master's judgment indicates that she considered the Settlement Agreement and analysed all the relevant circumstances in relation to the Settlement Agreement. The learned master understood that South East Asia was contending that the Settlement Agreement was a compromise position and in the absence of an arbitration clause in the Settlement Agreement, there was no basis for staying the claim. However, she made it clear that since the amended claim was primarily based on the Loan Agreement it was open to her to stay the claim on that basis. The master properly exercised her discretion taking into account all the relevant factors while omitting irrelevant factors and attaching the appropriate weight to those factors. Thus, there are no grounds for this Court to interfere with the learned master's exercise of her discretion.

Michael Dufour v Helenair Corporation Ltd and others (1996) 52 WIR 188 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is an interlocutory appeal against the judgment of learned master Corbin-Lincoln in which she granted a stay of South East Asia Energy Holding AG's ("South East Asia") claim based on the principle of forum non

conveniens and based on the arbitration clause which is contained in a loan agreement between the parties, the latter on which the claim is based. The claim was amended to include a reference to a Settlement Agreement into which the parties had entered. In granting the stay, the learned master ruled in favour of Hycarbex – American Energy Inc ("Hycarbex"). South East Asia is dissatisfied with the learned master's decision and has appealed on several grounds.

Background

[2] I propose to address the background in some detail in order to provide the requisite context.

[3] For the sake of convenience only, the background is taken from South East Asia's chronology without the Court necessarily accepting the correctness of the assertions herein.

[4] South East Asia, Hycarbex and Hycarbex Asia Pte Ltd are parties to a Loan Agreement dated 13th April 2012 ("Loan Agreement"). Articles 2.1 to 3.4 set out the subject matter of the Loan Agreement and the security for the obligations of that agreement.

[5] Article 14.1 sets out the governing law and arbitration clause of the Loan Agreement and is expressed as follows:

> "14.1 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 conjunction 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 thirty (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. The language to be used in all arbitral proceedings shall be English. All arbitrators shall be fluent in the English language and their award shall be rendered in English. Any such award shall be made in Dollars..."

[6] Hycarbex is alleged to have breached the Loan Agreement having failed to repay the debt owed and/or assign the concession interests as per the terms of the Loan Agreement. Due to the alleged default by Hycarbex in repaying the loan, South East Asia Holding AG (" South East Asia") , named as the plaintiff, filed a claim in the Islamabad High Court under section 20 of the **Arbitration Act, 1940**[2] after serving a notice of default, seeking the following:

> "In view of the above, it is most respectfully prayed that this Hon'ble [sic] Court may be pleased to place the Arbitration Agreement filed herewith on the record of this Hon'ble [sic] Court and pass orders accordingly for referring the matter to arbitration."

[7] South East Asia, Hycarbex and Hycarbex Asia Pte Ltd entered into a settlement agreement ("the Settlement Agreement") where Hycarbex and Hycarbex Asia Pte Ltd jointly and severally agreed with South East Asia that based on the facts and circumstances set out and described in the Arbitration Petition, South East Asia is entitled to enforce the security interest in accordance with the Loan Agreement pursuant to the terms of that Settlement Agreement. Consequently, Hycarbex and Hycarbex Asia Pte Ltd jointly and severally covenanted with South East Asia that they will take or cause to be taken all such steps and measures as may be necessary to ensure that South East Asia is able to exercise its exclusive right to retain and take control of the security interest amongst other terms.

[8] The following articles of the Settlement Agreement are noteworthy:

(a) Clause 6 provides that:

> "the Parties shall forthwith do all acts and things proper and necessary to procure the discontinuance of the proceedings commenced in the Islamabad High Court, Islamabad [that is, the Petition to Arbitrate] by Energy Holding [that is the Appellant] and in the meantime, not in any way to prosecute the same. The

[2] Laws of Pakistan.

Parties hereto shall jointly make an application to court seeking an order in terms of this Agreement."

(b) Clause 8 provides that:

"This Agreement contains the entire agreement of the Parties and supersedes and replaces all prior communications or representations between them relating to the subject matter of this Agreement. Any oral representations, understandings, modifications or evidence contradicting what is said in this Agreement is inadmissible and shall be of no force and effect unless contained in a subsequent written modification signed by the Party to be charged."

(c) Clause 10 provides that:

"This Agreement in all respects has been voluntarily and knowingly executed by the Parties hereto on advice and approval of their respective board of directors. Each party has full and complete corporate authority to enter into this Agreement."

(d) Clause 12 provides that:

"If any portion, word, clause, phrase, sentence or paragraph or clause of this Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected. In case this Agreement as a whole is declared void or unenforceable, the legal relationship between the parties shall be governed as per the terms and conditions of Loan Agreement and it shall be deemed that this Agreement has never been entered into between the parties."

(e) Clause 13 provides that:

"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."

(f) Clause 14 provides that:

"This Agreement may be executed in several counterparts and as executed shall continue on agreement binding on the Parties hereto. This Agreement shall be of no force or effect until so executed by all the Parties and the disposal of the Suit [the Arbitration Petition] as set forth hereinabove shall have been entered by the Islamabad High Court."

[9] The parties to the Settlement Agreement filed a joint application in the Arbitration Petition on 18th January 2013 which gave rise to a Consent Decree ("the Consent Decree"). There is some dispute as to whether the Consent Decree disposed of the Arbitration Petition. The following are noteworthy paragraphs of the joint application:

(a) Paragraph 2 '…the defendants were summoned, they admitted claim of the plaintiff [sic] and in that respect settlement agreement was executed [sic]. The same has been produced before the Court, which is Mark-A.'

(b) Paragraph 3 '…In the circumstances, decree in terms of settlement is passed in favour of plaintiff and against the defendants. Parties are however left to bear their own costs.'

(c) Paragraph 4: "Accordingly, C.M. stands disposed of."

[10] On 27th February 2013, the American Energy Group Ltd filed an application for recall of the Consent Decree dated 18th January 2013 ("AEG Application 1") on grounds of fraud and misrepresentation, under section 12(2) of the **Civil Procedure Code 1908** – CM No.63 of 2013 in the Arbitration Petition.

[11] On 29th February 2013, the American Energy Group Ltd filed an application for suspension of the Consent Decree ("AEG Application 2") and a temporary injunction and other orders in AEG Application 1 in the Arbitration Petition. The American Energy Group Ltd sought the following prayer therein:

> "Wherefore it is most respectfully prayed that this Honourable Court may be pleased to suspend the operation of the Consent Decree dated 18-01-2013 during the pendency of the afore-titled Application for Recall.
>
> It is further prayed that the Respondents may all be restrained from directly or indirectly, alienating, liquidating, transferring, assigning or encumbering the working interests the Yasin Concession Block, Sanjawi Concession Block or Zamzama North Concessions Block and the shares and assets of the Respondent No.1…".

[12] The American Energy Group Ltd is the sole shareholder of Hycarbex as confirmed in the affidavits of Pierce Onthank. It is alleged that at the time AEG Application 1 and AEG Application 2 were made, the Settlement Agreement took effect and stood as a binding legal document for over a month.

[13] AEG Application 1 came on for hearing on 4th April 2013 and the Islamabad High Court ordered as follows 'adjourned to a date, in office; however, in the meanwhile operation of the impugned decree dated 18-1-2013 is suspended till the next date of hearing'. Apparently, there has been no further hearing date since that date in April 2013. South East Asia has not provided this Court with any information on the status of the matter.

[14] South East Asia filed a claim in the High Court of Saint Kitts and Nevis seeking declarations against Hycarbex based on the Loan agreement. It later amended its statement of claim so as to include the Settlement Agreement.

[15] Hycarbex filed a notice of application for the court to stay proceedings or decline jurisdiction pursuant to rule 9.7A(1) of the **Eastern Caribbean Civil Procedure Rules 2000**, as amended ("CPR"), or for a stay of proceedings pursuant to the inherent jurisdiction of the court. Hycarbex's stay application was supported by an affidavit of even date sworn by Pierce Onthank. South East Asia resisted the stay application.

[16] The learned master rendered a written judgment ("the judgment") and made the following orders:

> "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"

[17] It is against the above orders of the learned master that South East Asia has launched its appeal. I turn now to the grounds of appeal.

Grounds of Appeal

[18] South East Asia has filed several grounds of appeal against the learned master's decision. In my view, there is no need to repeat them since I have distilled the issues from them.

[19] **Issues to be determined on appeal**

(a) Whether or not the learned master erred in considering the application against CPR 9.7, where the application for the stay was made pursuant to CPR 9.7A.

(b) Whether the learned master erred in the exercise of her discretion by ordering a stay of proceedings on the basis of forum non conveniens.

(c) Whether or not the learned master erred in the exercise of her discretion by ordering a stay of proceedings based on the presence of clause 14.1 in the Loan Agreement.

[20] Learned counsel Ms. Forrester's main complaint is that the learned master erred by failing to consider the issues raised by South East Asia in response to the application of Hycarbex by giving too much weight to irrelevant factors. Ms. Forrester asserts that Hycarbex's stay application before the learned master was for the Court to stay proceedings or decline jurisdiction pursuant to CPR 9.7A or for a stay of proceedings pursuant to the inherent jurisdiction of the Court. This position is reaffirmed at paragraph 3 of the Hycarbex's skeleton arguments. Ms. Forrester acknowledged that based on the learned masbter's order of 29th February 2016, a further issue which was being considered was whether or not proceedings should be stayed in light of the arbitration clause in the Loan Agreement.

[21] South East Asia's skeleton arguments in the court below dated 5th April 2016 clearly stated the issues that it raised in response to Hycarbex's stay application. Those issues are as set out below:

> "1. Whether or not the Defendant can seek to have the Court decline jurisdiction and stay proceedings until further Order of the Court pursuant to Rule 9.7A(1)?
>
> 2. Whether or not the court ought, in its inherent jurisdiction, to order a stay of proceedings?
>
> 3. Whether or not the Court should stay proceedings in light of the arbitration clause in the Loan Agreement dated 13th April 2012?"

CPR 9.7

[22] In this appeal, one of the main complaints that South East Asia makes against the learned master is that on the stay application specific issues were joined between the parties and despite this, the learned master proceeded to determine the stay application on issues that were not raised by Hycarbex. The gravamen of the South East Asia's appeal is that Hycarbex applied for a stay of its claim pursuant to CPR 9.7A(1). Indeed, Hycarbex sought an order declaring that (a) the court should not exercise its jurisdiction in the proceedings herein and (b) an order staying the said proceeding until further order of this Court. South East Asia argued that even though the learned master, at paragraph 3 of the judgment, recognised that the application was brought pursuant to CPR 9.7A(1), at paragraph 13, the master stated that the issue that arose for consideration is 'whether the court should stay the proceedings under its inherent jurisdiction on the basis of the arbitration clause in the Loan Agreement or under CPR 9.7'. Learned counsel Ms. Forrester disagreed that the master was entitled to treat the application as one that was brought under CPR 9.7 in circumstances where it was brought under CPR 9.7A(1).

[23] Learned counsel Ms. Morton argued that it was clearly open to the learned master to address the application under CPR 9.7. She submitted that South East Asia was in no way prejudiced by the master having done so.

[24] In my view, very little turns on the learned master's statement in paragraph 13 insofar as the learned master stayed South East Asia's claim on the basis of the court's inherent jurisdiction and alternatively based on clause 14.1, that is, the arbitration clause in the Loan Agreement.

[25] It must be borne in mind that the plank which the learned master used to launch the forum non conveniens examination was the inherent jurisdiction of the court. At paragraph 48 of the judgment, the learned master clearly indicated that the claim is stayed on the ground of forum non conveniens (which is part of the inherent jurisdiction of the court). Equally noteworthy is the fact that at paragraphs 68 to 70 of the judgment, the learned master acknowledged that South East Asia was taking issue with the fact that Hycarbex had grounded its claim on the CPR 9.7(A)(1) and South East Asia was asserting that that rule was inapplicable. The learned master clearly indicated as follows, 'however, I do not find it necessary to consider and make a finding on this issue having regard to the findings that the proceedings should be stayed on the grounds of forum non conveniens or alternatively pursuant to section 4 of the UK Arbitration Act'. In view of this indication or ruling by the learned master, it may not be fair to criticise the master on the basis that she allegedly utilised CPR 9.7 which was not pleaded or relied on by Hycarbex in grounding its stay application.

[26] In my view, even if the master had dealt with the latter application under CPR 9.7 and not under CPR 9.7(A)(1), this could not have prejudiced South East Asia since it was able to advocate all of the relevant points in opposition to the grant of the stay. In this regard, I am guided by the very helpful principles that were enunciated in **Texan Management Ltd. et al v Pacific Electric Wire and Cable**[3] at paragraph 79:

> "In any event the High Court had a discretion to treat the notice as sufficient and put matters right if there had been a failure to comply with a rule. Although the judge did not indicate under which rule she was proceeding she plainly had a discretion to cure the defect in service, and the exercise of her discretion cannot be faulted".

[3] [2009] UKPC 46.

[27] The learned master was at all times alive to the appropriate rule, namely 9.7 under which the stay application should have been brought. Applying the above principles to the case at bar, I accept learned counsel Ms. Morton's submissions that the learned master ought not to be faulted for considering the stay application under CPR 9.7. It is clear that Hycarbex had committed a procedural error by bringing the application under CPR 9.7A.

[28] Insofar as the main thrust of South East Asia's complaint is that the learned master improperly determined the stay application on the basis of CPR 9.7 when what was pleaded by Hycarbex clearly indicated that it was seeking a stay pursuant to CPR 9.7(A)(1), the learned master cannot be faulted for refusing to accede to South East Asia's request to dismiss the stay application on a mere technicality such as the reference to an incorrect civil procedure rule. To do so would not have been in keeping with the overriding objective of the Rules. In addition, this Court has in several decisions consistently held that otherwise viable claims or applications should not be dismissed on mere technicalities. The Rules are there to facilitate litigation and ought not to be thwarted. Litigants should have their claims or applications determined on their merit rather than being summarily dismissed based on failure to state the relevant rules. In fact, it is accepted that the failure to refer to the specific rule under which an application is brought is not necessarily fatal and is no basis for the dismissal of the application.

[29] However, cognizance must be taken of the fact that the learned master stayed the proceedings on two bases namely, (a) on the ground of forum non conveniens; and (b) alternatively, pursuant to section 4 of the **UK Arbitration Act** 1950 and not CPR 9.7 as alleged by South East Asia. It is plain to me that what the learned master did is cognizable under the **Texan Management** principle and cannot properly be assailed. This ground of appeal therefore fails.

[30] I will now address the learned master's grant of the stay on the basis of forum non conveniens.

Forum Non Conveniens

[31] South East Asia contends that in light of the basis of Hycarbex's stay application, the learned master impermissibly proceeded to determine the stay application on the basis of forum non conveniens principles which were not pleaded and in relation to which no submissions were advanced.

[32] During the course of the hearing of this appeal and in reply to the submissions from learned counsel Ms. Dia Forrester, and after much pressing from this Court, learned counsel Ms. Morton quite properly conceded that forum non conveniens was not raised before the learned master. This is in contradistinction to the position that was adopted in Hycarbex's written submission. It is therefore clear that since this issue was not before the court it was not open to the learned master to seek to utilise forum non conveniens as a basis for granting the application.

[33] In my view, this is a very short point. The resolution of this point does not require this Court to condescend into the details of the principles that are applicable to forum non conveniens, for reasons which will become apparent shortly. Insofar as learned counsel Ms. Morton has quite properly conceded that there was no issue of forum non conveniens raised on the pleadings or in the submissions before the master, it was not open to her to resolve the application for the stay on this basis. Accordingly, this ground must be allowed.

[34] For the sake of completeness, it is worthy of mention that it is undesirable for a judicial officer to seek to resolve an issue that did not arise and without the benefit of arguments on the point.

Arbitration Clause

[35] This leaves me now to address the issue of whether the learned master erred in concluding that the presence of the arbitration clause, clause 14.1, in the Loan Agreement warranted the grant of the stay.

[36] In my view, the crux of this appeal lies in this Court's determination of the third

issue – namely whether the learned master erred in staying the claim based on the arbitration clause in the Loan Agreement. Indeed, South East Asia in its written submissions indicated that its principal challenge to the learned master's exercise of discretion to stay the claim is premised on the assertion that South East Asia was suing Hycarbex based on the Settlement Agreement which did not contain the arbitration clause and that the learned master improperly relied on the arbitration clause in the Loan Agreement as the basis for the stay.

[37] However, during oral arguments, learned counsel Ms. Forrester was forced to conclude that South East Asia launched its amended claim against Hycarbex on the basis of the Loan Agreement and in the alternative based on the Settlement Agreement. Ms. Forrester also accepted that, the underlying dispute arose from the Loan Agreement. She also conceded that there was a petition to arbitrate and that there is an overlap between those proceedings and the claim that South East Asia has instituted in the High Court of St. Kitts and Nevis.

[38] However, she maintained that it was the Loan Agreement which contained the arbitration clause whereas the Settlement Agreement did not contain any arbitration clause. Ms. Forrester, however, acknowledged that there is an overlap between the petition to arbitrate that is receiving attention and the claim that is brought in the Islamabad High Court. In fact, learned counsel stated that the two are intertwined.

[39] Nevertheless, Ms. Forrester advocated that the petition to arbitrate has been taken over by the Settlement Agreement, the latter which has been suspended. Learned counsel Ms. Forrester stated that prior to the suspension order the Settlement Agreement was referred to as the final judgment.

[40] Ms. Forrester complained that they did not know the effect of the suspension order. She said that they were not provided with any expert opinion on foreign law and therefore were unaware of the effect of the suspension order.

[41] Moving along, learned counsel Ms. Forrester acknowledged that there were concurrent proceedings, namely that was ongoing in Pakistan and that which is engaging the attention of the High Court. She accepted that the Pakistan proceedings long preceded the St. Kitts and Nevis proceedings yet she argued that the learned master ought not have stayed the High Court claim.

[42] Learned counsel Ms. Forrester also complained that the master should not have stayed South East Asia's claim since it was served as of right.

[43] Learned counsel Ms. Forrester acknowledged that the correct order was the culmination of the Settlement Agreement, nevertheless she indicated that she was uncertain of its status as a consequence of the suspension of the Consent Decree. Ms. Forrester opined that there is need for foreign law in order to explain what "these things mean".

[44] More importantly, learned counsel Ms. Forrester submitted that the learned master exercised her discretion improperly by relying on the arbitration clause in the Loan Agreement in circumstances where the Settlement Agreement does not contain an arbitration clause. She therefore urged this Court to conclude that the learned master erred in granting the stay and therefore this Court should set aside the master's ruling and allow the claim to proceed to trial.

[45] In reply, learned counsel Ms. Morton submitted that the master exercised her discretion properly and therefore this Court should decline to interfere with that exercise of discretion.

[46] Learned counsel Ms. Morton stated that it is very strange for South East Asia to come to this Court to indicate that it was uncertain of the status of the arbitration proceeding in Pakistan. She said that South East Asia was better placed than anyone else to be able to provide this Court with an accurate status report.

[47] Ms. Morton highlighted the fact that the issue of foreign law was not raised nor pleaded. She quite correctly indicated that in private international law, it is

established that if foreign law is not pleaded nor proved, the local court is obliged to assume that the foreign is the same as the local law. In support of this proposition learned counsel Ms. Morton referred this Court to the well-known case of **Globe X Management Limited et al Clifford Johnson et al**[4] per Gordon JA in which he referred to **Dicey and Morris, The Conflict of Laws**[5] –

> "(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
> (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case"

In **Ertel Bieber and Co v Rio Tinto Co. Ltd**,[6] Lord Dunedin said the following:

> "I am clear that it is for those who say that the German law is different to the English to aver it as fact and to prove it. This they have not done, and that being so the German law must be presumed to be the same as the English".

> "In the circumstances of this case where there was no expert evidence, I have no difficulty in holding that Bahamian law is the same as Anguillan law. In order words, once the petition to wind up was granted an Order made by the Bahamian Court, that Order related back to the time of filing of the petition. It will be recalled that the learned trial judge found as a fact that the winding-up petition had been filed before the re-domicilation was effected. Thus at the time of the winding-up order, the Globe-x companies were in the Bahamas."

[48] Ms. Morton said in the absence of South East Asia even raising any issue of foreign law on its pleadings or more so seeking to prove it, it was open to the learned master to act upon the basis that the foreign law was the same as the law of Saint Kitts and Nevis.

[49] Ms. Morton stated that there is an inherent danger in allowing the claim below to proceed in the face of the earlier ongoing claim in Pakistan in which the self-same South East Asia is litigating Pakistan. Ms. Morton reminded the Court about the undesirability of having potentially conflicting decisions emanating from two courts

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[4] AXAHCVAP2003/0004 (delivered 23rd May 2005, unreported).
[5] 13th Edition at para. 9-001.
[6] [1918] A.C 260.

on the same issue. She said that there was a real danger of this occurring based on Ms. Forrester's belated concession that the issues that arise in the underlying claim overlap with those that are engaging the attention of the Pakistan court.

[50] Also, Ms. Morton stated that it is an unfair criticism to contend that the learned master did not properly consider the Settlement Agreement. She pointed this Court to several paragraphs in the judgment in support of her argument that the master gave deliberate consideration to the Settlement Agreement. Ms. Morton posited that South East Asia finds itself in a difficult position. She asserted that South East Asia did not say that the master's referral of the matter to arbitration could not determine the issues that were raised on the Loan Agreement, neither did it say to this Court that the arbitral tribunal could not address the same issues on the Loan Agreement in relation to which South East Asia seeks to bring its claim in Saint Kitts and Nevis.

[51] Learned counsel Ms. Morton was adamant that the learned master took into account all of the relevant matters including the Settlement Agreement in exercising her discretion to stay the claim on the basis of the arbitration clause in the Loan Agreement. Ms. Morton emphasised that the Loan Agreement was the main basis upon which South East Asia launched its claim in the High Court and therefore it was clearly open to the master to exercise her discretion in the manner in which she did.

[52] Learned counsel Ms. Morton submitted that even in the unlikely event that this Court were to conclude that the master exercise her discretion improperly, she opined that should this Court exercise discretion afresh, it would inevitably arrive at the same decision as the learned master. She therefore urged this Court to dismiss South East Asia's appeal and affirm the decision of the learned master, with costs to be assessed.

[53] The issue may at first sight appear to be a major issue. However, it is apparent that in its original claim, South East Asia sought damages based on Hycarbex's alleged breach of the Loan Agreement. It was in its amended statement of claim

that it included the alternative claim for damages based on the Settlement Agreement between South East Asia, Hycarbex and Hycarbex Asia Pte Ltd. The amended statement of claim is based on the Loan Agreement and the Settlement Agreement.

[54] In my view, it is wrong to suggest, as South East Asia has done, that the learned master was wrong to refer to the Loan Agreement and by extension the arbitration clause in the Loan Agreement. South East Asia ought properly to have indicated to this Court that its claim was originally based on the Loan Agreement. This was expanded in the amended statement of claim so as to include the Settlement Agreement.

[55] Further, contrary to the written submissions that were advanced on behalf of South East Asia that the question of whether to stay the proceedings on the basis of the arbitrary clause was not a live issue, South East Asia in its written submissions before this Court at paragraph 41 indicates that one of the issues that the learned master had to determine was whether or not the court should stay the proceedings in light of the arbitration clause in the Loan Agreement. In my view, South East Asia's argument that was deployed in this appeal in relation to the arbitration clause does not have much force, if any. I fail to see how South East Asia could, in the face of the pleadings and the above quotation in its skeleton submissions that were placed before the master, even have suggested that a stay on the basis of the arbitration clause was not before the learned master.

[56] For emphasis, I state that at paragraph 13 of the judgment, the learned master clearly indicates that a stay based on the arbitration clause arises for the court's consideration. It is important to appreciate at the outset that South East Asia in its amended statement of claim introduced the alternative claim based on the Settlement Agreement. Indeed, the original claim was based exclusively on the Loan Agreement.

[57] What is surprising is that at paragraph 41 of its written submissions, filed in this Court, South East Asia indicated that one of the issues that fell to be determined

by the master was whether or not the court should stay the proceedings in light of the arbitration clause in the Loan Agreement. Yet, at paragraph 42 of its written submissions it complained that 'at no point did the written submissions or other evidence before the court reflect the issues that were considered by the learned master. Accordingly, it is clear that the learned master did not adjudicate on the issues which were before her for determination'.

[58] A close reading of the master's judgment indicated that she gave careful consideration to the Settlement Agreement and analysed all of the relevant circumstances in relation to the Settlement Agreement in many paragraphs of the judgment which need not be repeated. I have no doubt that the arbitration clause issue arose and was addressed in South East Asia's skeleton argument in the court below and the learned master treated with it. In order to demonstrate the utter hopelessness of this point it is worth reproducing some of the material paragraphs of the master's judgment:[7]

> "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.'
>
> "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 has held that the applicable legislation in Anguilla is the 1996 UK Arbitration Act on the basis of the reception of law provision.'
>
> "It is not correct that the **Anguillan Arbitration Act i**s identical to the

[7] At paras. 54-58

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 provision of the Act, so far as the same are applicable, shall mutatis mutandis apply to all proceedings relating to arbitration within Anguilla." (My emphasis)

"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.

"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 any order staying the proceedings**.

"Notwithstanding anything in this Part of this Act, it 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] The learned master further examined clause 14.1 of the Loan Agreement which is referred to in paragraph 5 above. At paragraph 60, the learned master considered the case of **Anzen Limited and Others v Hermes One Limited**[8] where 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 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…"

[60] 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's 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.

[61] Finally, the learned master stated as follows:

> "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.
>
> 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

[8] [2016] UKPC 1 at para. 3.

> to arbitrate in the 2012 agreement. This application is extant. In my view the extant Pakistan Suit provides further support for staying these proceeding to enable the parties to settle their dispute by arbitration as agreed.
>
> 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."[9]

[62] In my judgment, South East Asia's argument proceeds before this Court on the basis of a mischaracterisation of the learned master's approach to the stay application. I have no doubt that a proper reading of paragraph 66 of the judgment clearly indicated that the learned master appreciated the nuances of South East Asia's argument. Further, on reading the relevant parts of the judgment, I regard this criticism of the learned master to be entirely misplaced. The master understood that South East Asia was contending that the Settlement Agreement was a compromise position and in the absence of an arbitration clause in the Settlement Agreement, there was no basis for staying the claim. However, the master made it clear that since the amended claim was primarily based on the Loan Agreement, it was therefore open to her to stay the claim on that basis.

[63] It was clearly within the master's discretion to say to the parties that you have agreed to arbitration and you should go to arbitration.

[64] Having said that, I turn now to address the issue of whether or not the learned master erred in the exercise of her discretion, in granting the stay on the basis of the arbitration clause.

[65] It would require extremely strong grounds for this Court to interfere with the learned master's exercise of discretion in circumstances where contrary to what South East Asia would now have this Court believe, it launched its amended claim on the basis of breach of the loan agreement, which it is common ground,

[9] At paras. 64-66.

contained the arbitration clause and, in the alternative, on the basis of the Settlement Agreement. It is therefore entirely misleading for South East Asia to now contend that its amended claim was premised exclusively on the Settlement Agreement and therefore the master erred in placing reliance on the Loan Agreement. The judgment indicates that the learned master took into account all of the relevant factors and omitted irrelevant factors and attached the appropriate weight to those factors.

[66] The question which follows is whether this a case in which the appellate court could interfere with the learned master's exercise of discretion? The law is well settled as to the circumstances in which it is permissible for an appellate court to interfere with the exercise of discretion by a trial judge. Indeed, in **Michael Dufour v Helenair Corporation Ltd and others**,[10] Sir Vincent Floissac, CJ stated that:

> "We are thus here concerned with an appeal against the judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account factors or beinf influenced by irrelevant factors and considerations, and (2) that as a result of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[67] The above pronouncements were applied in several cases of this Court including **Enzo Addari v Eddy Gay Addari**.[11]

[68] In my view, the learned master rendered a closely reasoned judgment on the issue of the arbitration clause in so far as it is related to the stay and examined the relevant legal principles at paragraphs 61-67 of the judgment and concluded that, "this is a matter in which the court should exercise its discretion in favour of granting a stay of proceedings pursuant to section 4 of the **UK Arbitration Act 1950** to enable the parties to submit to their arbitration". In so concluding, the learned master paid due regard at paragraph 66 of her judgment to the fact that

[10] (1996) 52 WIR 188.
[11] BVIHCVAP2005/0021 (delivered 23rd September 2005, unreported).

the claim is also based in the alternative on the Settlement Agreement which does not contain an arbitration clause. This is not, in my view, an obstacle to staying the proceedings on the basis of the arbitration clause. It was plainly within the exercise of the learned master's discretion to approach the stay application in the manner that she did and to arrive at the conclusions to which she did.

[69] Applying the principles enunciated in **Dufour v Helenair** as propounded by Sir Vincent Floissac above to the case at bar, I am far from persuaded that the learned master exercised her discretion improperly in granting the stay based on the arbitration clause in the Loan Agreement. It was clearly open to the learned master to exercise her discretion to stay the claim based on the existence of the arbitration clause in the loan agreement. South East Asia's challenge to the learned master's exercise of discretion on this basis is entirely misplaced.

[70] Accordingly, South East Asia's appeal against the learned master's decision on this ground is dismissed.

Conclusion

[71] For the foregoing reasons, South East Asia Energy Holding AG's appeal against the learned master's grant of the stay on the basis of forum non conveniens is allowed. South East Asia Energy Holding AG's appeal against the learned master's stay of the underlying claim on the basis of the arbitration clause in the Loan agreement and CPR 9.7 is dismissed.

Costs

[72] In so far as Hycarbex – American Energy Inc. has prevailed in defending this appeal in relation to two issues, including the main issue, it is entitled to receive two thirds of two thirds of the costs assessed in the court below.

[73] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar