Neutral Citation Number: [2011] EWHC 1842 (Comm)

Case No: 2011 FOLIO 68

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2011

Before :

MR JUSTICE BLAIR

- -

Between :

PT THIESS CONTRACTORS INDONESIA	**Claimant**
- and -	
(1) PT KALTIM PRIMA COAL	**Defendants**
(2) STANDARD CHARTERED BANK, SINGAPORE BRANCH	

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- -

Mr David Mildon QC and Mr Jern-Fei Ng (instructed by **Stewarts Law LLP**) for the **Claimant**
Mr Andrew Baker QC and Mr Sadhanshu Swaroop (instructed by **Holman Fenwick Willan LLP**) for the **First Defendant**

Hearing dates: 10th June 2011, and 30 June 2011

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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.

.....

MR JUSTICE BLAIR

Mr Justice Blair :

1. This action has been brought by the claimant, PT Thiess Contractors Indonesia ("Thiess") against the first defendant, PT Kaltim Prima Coal ("KPC"), and the second defendant Standard Chartered Bank ("the bank") for various declarations/orders to which it claims to be entitled under the terms of a Cash Distribution Agreement dated 27 June 2007. The action commenced on 20 January 2011. In short, KPC applies for a stay of the action on the grounds that an arbitration is presently under way between the parties. Thiess opposes the application, giving rise to the issue that I have to decide. (In form, the application is for a declaration that the court should not exercise any jurisdiction which it may have and/or for an order that the proceedings be stayed, and KPC makes it clear that it does not by the application submit to the jurisdiction of the court or take any step in the proceedings to answer the substantive claim.) The bank has no substantive position in the proceedings, and arrangements have been entered into by which it agrees to abide by the outcome, and otherwise drop out.

2. The facts are as follows. KPC operates a coal mine at Sangatta in East Kalimantan, Indonesia under a "Coal Contract of Works" granted by the Government of Indonesia. Thiess was engaged by KPC as its main sub-contractor to perform mining services at the mine pursuant to an "Operating Agreement – Mining Services" dated 10 October 2003 (the "OAMS"). The OAMS, which is governed by the laws of the state of Queensland, Australia, is a "life of mine" contract under which Thiess is remunerated primarily at a rate per tonne of coal produced. The background for present purposes is that the OAMS provides a mechanism for the review of pricing arrangements every five years. The parties have been unable to agree new pricing arrangements, and the present application is part of their overall dispute. In the absence of agreement, in broad terms the contract provides (to quote KPC's written submissions) for there to be a mediation, followed by an "expert determination", followed by arbitration.

3. The other agreement which is relevant so far as this application is concerned is the Cash Distribution Agreement (the "CDA") dated 27 June 2007. (I was told by Mr David Mildon QC, counsel for Thiess, that this replaced earlier arrangements, but these are not in evidence, though there is some reference to them in the Particulars of Claim.) Unlike the OAMS, the CDA is governed by English law. It creates legal relationships between KPC and another Indonesian coal company, and "principal contractors" including Thiess, as well as marketing agents (such as Glencore) and two account banks, of which one is Standard Chartered's Singapore branch. It is concerned, amongst other things, with the distribution of the cash proceeds of sale of coal produced not just under the OAMS but also under other contracts. Thiess is not actually a party to the CDA, but says that the parties operated on the basis that it is entitled to enforce the terms which are for its benefit (see the Claim Form in these proceedings). Mr Andrew Baker QC, counsel for KPC, drew attention to the fact that Thiess was not a party, but I did not understand him to say that this was in itself determinative of the application.

4. An important issue in argument was the role (or otherwise) of the CDA as providing security in the case of dispute between the parties. As Mr Baker QC put it, the stated purpose of the CDA was to "implement certain account administration and cash management arrangements" in relation to the revenue of, inter alia, KPC. The CDA

does not in terms state that it is an agreement giving security to anyone, and it is, he says, primarily directed at the banks.

5. In answer, the submission made by Thiess is that for present purposes the provision of security is indeed the function of the CDA. To quote its written submissions, the material provisions of the CDA are those concerned with securing the position of the service providers (including, amongst others, Thiess) and the coal companies (including KPC) where a dispute is pending as to how much should be paid under the relevant operating agreement (including the OAMS). In oral submissions to the arbitrators on 8 June 2011, Mr Mildon QC put it as follows. There is a distinction between on the one hand the OAMS, which is the agreement by which the final resolution of whether money is due from KPC to Thiess will be determined, and the CDA, which goes to security, and where cash flows from the sale of coal through the banks back to the parties pending the determination of the underlying dispute. He made, essentially, the same submission on the hearing of this application.

The dispute resolution provisions

6. I shall now describe the dispute resolution provisions of the two contracts so far as necessary. Clause 18 of the OAMS provides for various steps, of which the last is arbitration (the stage that has now been reached). The place of the arbitration is Singapore. Clause 18.3 provides as follows:

> "18.3 Formal Settlement of Issues
>
> Either Party may at any time that there exists an Issue under this Agreement give an issue notice to the other initiating the formal Issue resolution process set out as follows:
>
> . . .
>
> (d) (Arbitration) Arbitration of the Issue not resolved by Mediation in accordance with Clause 18.2(c) shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:
>
> (i) the dispute shall be referred to arbitration and finally settled in accordance with, and subject to, the UNCITRAL Arbitration Rules;"

The key definition in this regard is as to what is included within the term "Issue". Clause 1.1 of the OAMS provides that, "'Issue' means any difference or dispute between the parties arising under or in connection with this Agreement".

7. As regards the CDA, clause 31 provides for the non-exclusive jurisdiction of the English courts as follows:

> "GOVERNING LAW AND JURISDICTION
>
> 31.1 This Agreement is governed by and shall be construed in accordance with English law.

> 31.2 For the benefit of each of the other parties [*this includes Thiess*], each of the Transaction Parties which are parties to this Agreement [*this includes KPC*], the Principal Contractors, the Principal Marketing Agents and the Account Banks agrees that the English courts have non-exclusive jurisdiction to settle any disputes in connection with this Agreement and accordingly submits to the jurisdiction of the English courts".

8. There is then provision made for service on agents in England. The clause continues:

> "31.4 Each party hereto:
>
> (i) waives objection to the English courts on grounds of inconvenient forum or otherwise as regards proceedings in connection herewith; and
>
> (ii) agrees that a judgment or order of a court in connection herewith is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction."

The disputes

9. KPC has analysed the overall dispute between the parties into a number of distinct compartments. This analysis is not common ground, because Thiess approaches the issues differently, and characterises the disputes differently. The distinction which it draws is a more straightforward one between the underlying dispute as to the amounts payable under the OAMS, which is within the exclusive jurisdiction of the arbitral tribunal, and the provision of security pending arbitration, which it says is the subject of a separate code (i.e. the CDA) with its own jurisdiction provisions in case of dispute. Having identified that disagreement, I set out KPC's analysis in this regard, which I have found helpful in explaining the current position in the arbitration.

10. KPC describes the review of the pricing arrangements as "Dispute 1". The factual background is that on 1 October 2010, Mr Michael Lawrence (who had been appointed by the Institute of Arbitrators & Mediators Australia) made an "expert determination" of the pricing arrangements for the five year period from 1 July 2009. KPC was not satisfied with this "determination" (I should say I have put this phrase in inverted commas in accordance with KPC's submissions). Accordingly, on 28 October 2010 KPC referred to arbitration "the dispute over the pricing arrangements for the five year period commencing 1 July 2009" (see OAMS clause 3A.2(b)(viii)). The Tribunal consists of Mr David R Haigh QC, Professor Michael Pryles and Mr David Williams QC.

11. KPC says that there are two related disputes as to the effect of the "expert determination". The first (which it describes as "Dispute 2(a)") is whether the "expert determination" is "final and binding". Secondly, if, the "expert determination" is not "final and binding" then there is a dispute (which it describes as "Dispute 2(b)") as to its effect pending the outcome of the arbitration. As I understand it from KPC's submissions, the issue is whether current rates continue to be applied, or the disputed rates in the "expert determination" are applied, until the issue can be decided by the Tribunal. It is apparent that there is a considerable monetary difference between the two. On 21 March 2011 KPC applied to the Tribunal for determination of a

preliminary issue by way of an interim final award seeking declarations from the Tribunal as follows:

> "I) that the decision of the expert, Mr Lawrence, dated 1 October 2010, is not final and binding between the parties; and
>
> II) that pending a final award determining pricing arrangements under clause 3A of the OAMS in this arbitration Thiess must present payment claims under cl7.3 of the OAMS on the basis of the rates in Schedule 2, in accordance with cl.3A.2(c)."

In other words, it is asking the arbitrators to determine the position pending the final outcome, its case being that the existing arrangements continue to apply.

12. Where matters have got to at the time of the hearing on this application is as follows. The arbitrators convened a hearing on 8 June 2011 by telephone conference. Thiess took the position, I think, that a formal hearing was required before preliminary issues were ordered, and that contention remains to be determined. The hearing ran short of time, and KPC filed reply submissions in writing on 10 June 2011. The hearing of the stay application before me began on 10 June 2011, and following an inadequate time estimate from the parties (two hours including giving judgment) it was completed on 30 June 2011 at the end of the court day. The Tribunal's ruling on the preliminary issue application is awaited. Though it was not the focus of the telephone conference, it appears from the transcript that I have seen that the arbitrators were concerned (as I am concerned) about the practical relationship between the arbitration and the English action.

13. KPC characterises the claim in the English action as "Dispute 3". It concerns documents which are called in the CDA a "Principal Contractor Claim" and a "Principal Contractor Claim Confirmation", and which are part of the machinery by which KPC pays Thiess. I need to set out the contractual provisions in a little detail. Clause 7 of the OAMS provides for KPC to pay to Thiess on a monthly basis a "Services Fee", adjusted in accordance with the terms of the Agreement. Under clause 7.3, within seven days after the end of each month Thiess is to deliver to KPC a "Payment Claim". KPC has the right to review any Payment Claim if it "considers (acting reasonably) any Payment Claim to be erroneous by reason of … any inclusion of an amount which [KPC] was not obligated to pay to [Thiess] under this Agreement". I note at this point that clause 7.3 is the provision mentioned in the formulation of the preliminary issue in the interim final award that KPC is inviting the arbitrators to make.

14. By clause 7.4, within seven days after receipt of a Payment Claim, KPC is to deliver to Thiess a "Payment Confirmation" which "states the amount of the Services Fee for the month" and which is to "include details of any amendments to the amounts claimed by [Thiess] in the Payment Claim".

15. By clause 7.5, within thirty days of the month in which the work the subject of the Payment Claim is performed, KPC is to pay to Thiess the amount payable in a Payment Claim, less any amounts "erroneously included" and any "disputed amounts" and any amounts which KPC is entitled to set-off under clause 7.7.

16. In essence, therefore, what is provided for in these provisions of the OAMS is the presentation by Thiess of a monthly Payment Claim, which KPC is entitled to review as to the erroneous inclusion of any amounts it is not obligated to pay, followed by a Payment Confirmation by KPC, followed by payment of the amount in the Payment Claim less any amount erroneously included. What happened, Mr Baker QC said, is that when the parties fell out, Thiess put in Payment Claims based on the disputed "expert determination". KPC treated that as erroneous, restating the payments due in terms of the existing arrangements.

17. I need now to consider the relevant provisions of the CDA. As I have indicated, the relevant provisions for present purposes provide for the service of a monthly "Principal Contractor Claim" by the service provider and a responsive "Principal Contractor Claim Confirmation" by the coal company both in a prescribed form. These documents are to be served on the banks. They are the key documents as regards this aspect of the dispute between the parties, and I have annexed to this judgment those concerned with claim number 80 issued in October 2010, which help make sense of what the contractual provisions mean.

18. Clause 1.1 of the CDA defines the term "Principal Contractor Claim" as "a claim by a Principal Contractor [such as Thiess] … for an amount payable by the relevant Coal Company [such as KPC] … in accordance with the relevant Assigned Documents [which includes the OAMS] as contemplated in clause 10, substantially in the form set forth in Schedule Six Part One". This schedule sets out a pro forma document to be issued by the contractor concerned, in this case Thiess, to the coal company concerned, in this case KPC. Clause 10.1(ii) contains the requirements as to the form of a "Principal Contractor Claim" by reference to Schedule Six Part One. The "Principal Contractor Claim" must include in line 3 the "Total Principal Contractor Claim Amount", in other words the total amount "claimed" by the contractor. As can be seen from the first document annexed to this judgment, as regards claim 80 the number stated on Thiess' "Principal Contractor Claim" dated 12 October 2010 is US$85,356,213.13, which is the number based on the "expert determination". With various adjustments which are not presently relevant, that number formed the basis for the monthly claim for September 2010.

19. Clause 1.1 of the CDA defines the term "Principal Contractor Claim Confirmation" as meaning " … with respect to a Principal Contractor Claim, a confirmation to be submitted by the relevant Coal Company … substantially in the form set forth in Schedule Six Part Two". Clause 10.1(iv) contains the requirements as to the form of a "Principal Contractor Claim Confirmation" by reference to Schedule Six Part Two, which is again a pro forma document to be issued by the coal company concerned, in this case KPC, to the contractor concerned, in this case Thiess. The "Principal Contractor Claim Confirmation" must include on line 2 the total amount claimed by the contractor (the "Total Principal Contractor Claim Amount"), and include in line 3 the amount that the coal company considers to be payable (the "Gross Confirmed Principal Contractor Amount"). Clause 10.1(iv)(i) requires inclusion on line 9 of the disputed amount of the "Principal Contractor Claim", being the difference between the amount claimed and the amount confirmed as being payable (the "Principal Contractor Dispute Amount").

20. As regards claim 80, KPC's "Principal Contractor Claim Confirmation" dated 22 October 2010 is also annexed to this judgment. The number stated on line 9 for the "Principal Contractor Dispute Amount" is "NIL". That has been arrived at because on line 2, where the "Total Principal Contractor Claim Amount" is entered, the number is not US$85,356,213.13 (which is the number on Thiess' 12 October 2010 "Principal Contractor Claim" based on the "expert determination"), but US$14,411,908.78, which is based on KPC's case that the original pricing arrangements continue to be applicable pending resolution of the dispute. That number is the same as that entered on the next line as the "Gross Confirmed Principal Contractor Amount", in other words the amount confirmed by KPC as being payable. The consequence is that there is no difference between the amount claimed and the amount confirmed as being payable under clause 10.1(iv)(i).

21. Clause 10 goes on to deal with payment as follows. By clause 10.1(vi), if following service of these documents the contractor and coal company are able to agree on the cash distribution consequences they give to the bank a joint payment notice called a "Joint Principal Contractor Payment Notice". (No such agreement was reached in the present case.) Otherwise, clause 10.3(ii)(c) provides for Standard Chartered Bank, in certain circumstances (and I take this from the summary in KPC's written submissions which is not in this respect disputed), to transfer "the Principal Contractor Dispute Amount … as specified in the Principal Contractor Claim Confirmation" from "the Principal Contractor's relevant Primary Account" (defined as account no 0174122969 in the name of the KPC maintained with the bank) to the "Principal Contractor's relevant Dispute Account" (defined as account no 0174122993 in the name of KPC maintained with the bank).

22. In default of agreement (and I take this summary from Thiess' written submissions which is not in this respect disputed), the bank is required to transfer the "Dispute Amount" into the relevant coal company's "Dispute Account" (clause 10.3(ii)(c)). The "Dispute Account" is an account in the name of the relevant coal company which will only respond either to a joint instruction from the service provider and coal company or a unilateral instruction accompanied by a final court judgment or final arbitral award (which the bank is entitled to assume is authentic): see clause 10.6(i)(b).

23. Finally, Thiess places reliance on clauses 10.1(ii)(h) and 10.1(ii)(i) which require the total amount claimed to be split between the "Priority Contractor Payment" and the "Non Priority Contractor Payment". Clause 10.7 provides that the amount claimed by a contractor in a Principal Contractor Claim as a Priority Contractor Payment is "deemed to be the Priority Contractor Payment". Thiess says that this shows that the court is not entitled to go behind the amount claimed and investigate whether that amount is actually due.

<u>The claim in the English action</u>

24. In the English action, Thiess has filed a Claim Form and Particulars of Claim. In brief, it claims that:

    i) The relevant "Principal Contractor Claim Confirmations" issued by KPC are in breach of clause 10.1(iv) of the CDA;

ii) KPC has thereby prevented the transfer of sums to the Dispute Account in accordance with CDA clause 10.3(ii)(c) (see the Claim Form and paragraph 33 of the Particulars of Claim);

iii) Accordingly Thiess claims relief in the form of declarations, orders for specific performance and injunctions which have to do with the form of the disputed "Principal Contractor Claim Confirmations" and, as it sees it, the correction of "the state of the account under the CDA" to conform with the provisions of the CDA(see in particular the terms of the Prayer).

25. In summary, and so far as this application is concerned, Thiess submits that the CDA provides a procedure (a) for the identification of the "Dispute Amount", (b) the payment of that amount into the "Dispute Account" pending resolution of the underlying dispute, and (c) the assurance that the "Dispute Amount" can only thereafter be released either by mutual agreement or against a final award/judgment. That contractual scheme, it contends, has been "subverted" by the way KPC completed the relevant "Principal Contractor Claim Confirmations" so as to show the "Principal Contractor Dispute Amount" as nil. This is correctly, it says, the subject of the claim in the English action.

26. In its response submissions on the application, and without entering into the merits of the argument, KPC says that having first, and necessarily, considered and understood the OAMS, in particular Clauses 7.3 - 7.5 thereof, correct conclusions would include these: (a) a "Principal Contractor Claim" as defined in the CDA is a claim for, i.e. a formal request to be paid, an amount payable by KPC, whereas Thiess submitted erroneous demands for amounts not provided for by the OAMS; (b) Clauses 7.3 - 7.5 of the OAMS govern the substance of making and responding to Thiess' written claims for payment, and entitle KPC, in some circumstances including those of this case, to review and amend the amounts stated by Thiess in a "Principal Contractor Claim"; (c) the "security" provided by the CDA, to the extent it provides "security", is that there will be segregated bank accounts and trustworthy independent account administration by the bank in relation (so far as concerns Thiess) to amounts payable by KPC; it is not there to "secure" amounts demanded by Thiess in error due to any of the flaws identified in OAMS Clause 7.3(a)-(d). This dispute falls, it submits, to be determined in the arbitration.

27. As KPC says, the Court is not concerned in this application in any way with the merits of the dispute, merely to identify it for the purposes of the stay application.

The parties' submissions

28. KPC's primary case is based on the mandatory stay provision contained in s. 9 Arbitration Act 1996 as follows:

> "(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."

> …
>
> (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."

29. Alternatively, if the case does not come within s. 9, the English court still has an inherent jurisdiction to stay the court proceedings, which it should exercise where "good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first": *Al-Naimi v. Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 at 525 (CA).

30. The submissions of KPC may be summarised as follows. By these proceedings, Thiess has referred to this court a dispute between itself and KPC as to whether it has operated correctly the account administration, cash management and payment arrangements arising out of and concerning the OAMS. Under the provisions of the OAMS, this is plainly a "difference or dispute between the parties arising under or in connection with this Agreement" and is therefore referred to arbitration by the agreement. A stay is consequently mandatory under s.9 and the fact that the dispute may also have reference to the CDA machinery does not affect that conclusion. Reliance is placed on clause 10.1(vii) of the CDA which provides that the provisions of the CDA are "without prejudice to" (*inter alia*) the rights of KPC under the OAMS. The claim in the English proceedings is, it says, parasitic to the dispute which has been referred to arbitration, and it could have been raised in the arbitration as a counterclaim.

31. Alternatively, in what KPC accepted was a more complex argument, it says that a proper consideration of what would be involved to determine the dispute in the English proceedings itself shows that these proceedings are in respect of matters that ought to be referred to arbitration. The concepts of "Principal Contractor Claims" and "Principal Contractor Claim Confirmations" have their origin in the OAMS. Accordingly in order to determine the claim (whatever KPC's defences might be) the court would have to construe the OAMS. Determination of the proceedings would raise issues that have already been referred to arbitration as to the finality or otherwise of the "expert determination", and the nature of the parties' payment obligations pending resolution of the issue by the arbitrators. Other issues will arise, for example, as to what is meant by the term "erroneous" in clause 7 of the OAMS, which are clearly matters for the arbitrators. Taken in the round, the controversy between the parties in this case is one of substance, governed by the OAMS and subject to arbitration thereunder; it is not one of mere form, or accounting, that might arguably be governed independently by the CDA outside the scope of the OAMS arbitration agreement.

32. Alternatively, these proceedings should be stayed under the court's inherent jurisdiction. That course of action would eliminate any risk of conflicting decisions, whilst saving substantial time and costs as compared to the significant expense entailed in English court proceedings running in parallel with the arbitration. This, it is submitted, is the convenient course, since the Tribunal is likely to have decided the preliminary issue prior to the conclusion of the English proceedings, which would then be resolved or rendered otiose.

33. The submissions of Thiess may be summarised as follows. Section 9 Arbitration Act 1996 only applies to a matter which the parties have agreed to refer to arbitration. The parties have not agreed to refer issues under the CDA to arbitration. On the contrary they have agreed a different dispute resolution code for such disputes. The "Dispute Account" is a creature of the CDA and there is no reference to the Dispute Account anywhere in the OAMS. It is true that the purpose of the CDA Dispute Account procedure is to provide security pending the outcome of substantive disputes arising under operating agreements (including the OAMS) which are subject to arbitration clauses and to that extent the claim in this action and the claim in the Singapore arbitration are connected. It does not follow that the parties have agreed to refer to the Tribunal issues about the provision of security pending a final arbitral award. There is no overriding rule of policy which prevents parties to arbitration agreements from agreeing to refer to the court questions concerned with security pending arbitration. It is sometimes necessary and desirable to involve the courts in the enforcement of contractual security arrangements particularly where these involve multi-party transactions including banks which might not wish to become privy to lots of different arbitration clauses and arbitration references. Thiess has, it says, been careful to put its case in these proceedings in a way which does not involve any overlap with the issues arising in the Singapore arbitration under the OAMS.

34. As regards inherent jurisdiction, KPC's alternative case proceeds from the premise (Thiess says) that it is impossible for the court to rule on the present claim without trespassing on the role of the Singapore Tribunal. It is not accepted that any overlap of issues will arise. But if there is an overlap, it is simply a consequence of the contractual scheme, and not a ground for refusing to give effect to the contractual scheme. Fundamentally, the court is concerned with what is being "claimed" and the Tribunal is concerned with whether what is being claimed is actually due. If it were right that it was always necessary to investigate under the CDA whether a sum claimed in a "Principal Contractor Claim" is actually payable then nothing could ever end up in the Dispute Account pending a final arbitral award. There is no suggestion from KPC that Thiess has acted otherwise than in good faith. Thiess is not asking to have the sums claimed paid to itself here and now. It is asking to have the amounts claimed paid into the Dispute Account.

Discussion and conclusion

35. In both written and oral argument, there was little controversy as regards the legal principles, the issue between the parties being as to how they are to be applied to the present facts. A stay must be granted under s. 9 Arbitration Act 1996 if these proceedings are "in respect of a matter which under the [arbitration] agreement is to be referred to arbitration". A discussion of how that question is to be determined appears from *Tanning Research Laboratories Inc v. O'Brien* (1990) 169 CLR 332 (HCA), where the court was concerned to construe the term "matter" in the equivalent Australian legislation. At pp 352-3, Deane and Gaudron JJ refer to the importance of identifying the "substance of the controversy", rather than the formal nature of the proceedings. Accordingly, as KPC puts it in its submissions, the court must consider the substance of the controversy as it appears from the circumstances in evidence on the application (and not just the particular terms in which the claimant has sought to formulate its claim in court). A similar approach is suggested in Joseph, *Jurisdiction*

and Arbitration Agreements and their Enforcement, 2nd edn 2010, paras 11.13-11.16, and I would adopt it.

36. It is also clear law that the construction of an arbitration agreement should start from the assumption that the parties, as rational business people, were likely to have intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal (*Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40). In *Fiona Trust*, however, the question was as to the scope of the disputes within an arbitration clause. In the present case, the application for a stay is made in the context of two agreements, one containing an arbitration clause, and the other a submission to the jurisdiction of the English courts. A recent discussion of the authorities in an analogous situation is found in *Sebastian Holdings Inc v. Deutsche Bank AG* [2011] 1 Lloyd's Rep. 106, which concerned clauses in different agreements giving jurisdiction to courts in different countries. Referring to the principles established in the case-law, Thomas LJ said at [41], "It is generally to be assumed … that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals". He continued at [42]: "However, 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 upon the intention of the parties as revealed by the agreements against these general principles".

37. At [49], Thomas LJ cited the 2010 supplement to Dicey, Morris and Collins, *The Conflict of Laws*, 14th edn, at paragraph 12–094. This encompasses the position where one of the agreements is an arbitration agreement, and makes it clear that the allocation of jurisdiction is fundamentally one of construction. The overall task of the court is stated as follows:

> " … the decision in *Fiona Trust* has limited application to the questions which arise where 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." (Omitting the citation of the authorities)

In the event, the court in that case refused to stay proceedings in London in favour of proceedings in New York.

38. I have set out above the arbitration clause in the OAMS and the jurisdiction clause in the CDA. It is correct, as Thiess points out, that KPC as a party to the CDA "waives objection to the English courts on grounds of inconvenient forum or otherwise", but whilst this is a factor to take into account, I agree with KPC that this is not determinative of the construction question for the reasons given by Rimer J in *UBS A.G. v. Omni Holdings A.G.* [2000] 1 WLR 916 at 923-925. It cannot prevent the application of the mandatory stay.

39. Further, there is force in KPC's submission that the claim under the CDA in the English proceedings, despite its careful formulation, overlaps with the position under the OAMS. The way KPC put it in reply is as follows. As regards clause 7.5 of the OAMS (see above for the relevant provisions), there may be room for debate over the boundary between "amounts erroneously included" (which refers back to clause 7.3) and "disputed amounts" (treated by clause 7.5 as something separate). Whether, it says, our facts represent a case of the former, and if so whether that means KPC had a contractual right under the OAMS to state the amounts it did in its PCCCs, is (a) (part of) the debate on the merits on Dispute 3, (b) plainly a matter for resolution under clause 18 of the OAMS (i.e. arbitration).

40. KPC's central point is that, given the wide terms of the arbitration agreement in the OAMS extending to "any difference or dispute between the parties arising under or in connection with this Agreement", the claim under the CDA (however formulated) falls within the agreement, and therefore falls under the mandatory statutory stay as being "in respect of a matter which under the agreement is to be referred to arbitration". Its alternative submissions essentially have to do with practical aspects of the relationship between the arbitration and the English action if both proceed at the same time. The latter will raise issues, it says, that fall to be determined by the arbitrators, and the preferable course (KPC would argue the required course) is to allow the arbitration to take its course, with the consequence that the substance of the dispute in the English action will be determined, thereby avoiding parallel proceedings.

41. As against that, I would point out that there is nothing unusual about submitting a contractual dispute to arbitration whilst referring matters relating to security to the jurisdiction of one or more courts. This is frequently a feature of international transactions, and the choice of jurisdiction in the security agreement may have to do with factors independent of the principal agreement. An example is to be found in *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821, Andrew Ang J. In that case, the plaintiff sought to stay proceedings on an escrow agreement, on the basis that the parties had agreed to refer disputes under the principal agreement between them (an offshore drilling contract) to

arbitration. Refusing a stay, the High Court of Singapore held at [21] that the parties had carved out disputes under the escrow agreement. At [26], applying recent English authorities, the judge said that, "In addition, I was of the view that where different but related agreements contained overlapping and inconsistent dispute resolution clauses, the nature of the claim and the particular agreement out of which the claim arose ought to be considered. Where a claim arose out of or was more closely connected with one agreement than the other, the claim ought to be subject to the dispute resolution regime contained in the former agreement, even if the latter was, on a literal reading, wide enough to cover the claim". I agree with this approach.

42. It is correct, as KPC points out, that there are distinctions between the facts of that case and the present facts, in that Thiess is not a party to the CDA, and that the term "security" is not found in the relevant provisions of the CDA. As to the first point, I have explained above that Thiess' case is that it had the benefit of the provisions of the CDA, and I do not understand KPC to say that the fact that Thiess is not a party is in itself determinative. As to the second point, the effect of the CDA is that amounts claimed by the contractor (Thiess) which the coal company (KPC) disputes (described in the CDA as the "Dispute Amount") are to be transferred into a "Dispute Account" with Standard Chartered Bank, to be held pending agreement or a final arbitral award. Such an arrangement, however described, is similar to an escrow arrangement, and is in my view by way of security. It is not right (as KPC seemed to suggest) that the nature of such an arrangement as securing the amount in dispute pending resolution of the dispute is altered by the fact that the "Dispute Account" is also an account of KPC, and that Thiess will not in fact receive the benefit of the money unless and until there is an arbitration award in its favour.

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 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.

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.

45. This application is therefore refused. As I mentioned at the hearing, this ruling does not exclude any sensible case management that may be called for in these proceedings to take account of the progress of the arbitration. I see no reason why this court and the distinguished international arbitrators who constitute the Tribunal should not, with the cooperation of the parties, be able to arrange things so that the risks of overlap to which KPC draws attention in its submissions are minimised.

d. 6

THIESS
INDONESIA

PT Thiess Contractors Indonesia

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12 October 2010

Ref No. L-179/TCI-FIN/FS/X/2010

PT Kaltim Prima Coal
Gedung Wisma Bakrie 2 Lt. 10
Jl HR Rasuna Said Kav. B-2
Karet Kuningan, Setiabudi
Jakarta Selatan 12920

Attention: **President Director**

RE: PRINCIPAL CONTRACTOR CLAIM– PT Thiess Contractors Indonesia

In accordance with the Operating Agreement – Mining Services between PT Kaltim Prima Coal and PT Thiess Contractors Indonesia dated 10 October 2003 and clause 10.1(ii) of the Cash Distribution Agreement dated 27 June 2007, we hereby claim the following amount in respect of the month stated:

1	The Principal Contractor Claim number	: 80
2	The month covered by the Principal Contractor Claim	: **September 2010**
3	The Total Principal Contractor Claim Amount	: **USD 85,356,213.13**
4	The Principal Contractor Claim PPN	: **USD 4,064,581.58**
5	The Gross Principal Contractor Claim Amount	: **USD 81,291,631.55**
6	The Principal Contractor Claim Withholding Tax	: **USD 8,129,163.16**
7	The Net Principal Contractor Claim Amount	: **USD 77,227,049.97**
8	The portion of the Total Principal Contractor Claim -	
9	Amount constituting the Priority Contractor Payment	: **USD 85,353,231.73**
10	The portion of the Total Principal Contractor Claim -	
11	Amount constituting the Non Priority Contractor Payment	: **USD 2,981.40**

Back-up data relating to this claim has been sent separately to PT Kaltim Prima Coal Contract Administration.

Yours sincerely
PT Thiess Contractors Indonesia

GDavis

GREG DAVIS
Financial Controller

THE STRENGTH OF EXPERIENCE

KPC
COAL FROM INDONESIA

PT. KALTIM PRIMA COAL

Ref. No : L370/MR/550/2010

Date : 22nd October 2010

To : PT Thiess Contractors Indonesia
Ratu Prabu 2
Jl. TB. Simatupang Kav.1B
Jakarta 12560
Att. President Director

Principal Contractor Claim Confirmation.
September 2010

Dear Sir
In accordance with the Operating Agreement Mining Services between PT Kaltim Prima Coal and PT Thiess Contractors Indonesia dated 10 October 2003 and clause 10.1 of the Cash Distribution Agreement dated 27th June 2007 , we hereby confirm payments and transfer as follows:

1	The Principal Contractor Claim number	:	080	
2	The Total Principal Contractor Claim Amount	:	US$	14,411,908.78
3	The Gross Confirmed Principal Contractor Amount	:	US$	14,411,908.78
4	The Confirmed Principal Contractor PPN	:	US$	686,281.37
5	The Net Confirmed Principal Contractor Amount	:	US$	13,725,627.41
6	The Confirmed Principal Contractor Withholding Tax	:	US$	1,372,562.74
7	The Coal Company Claim Deduction	:	US$	2,570,331.32
8	The Confirmed Principal Contractor Payment	:	US$	10,469,014.72
9	The Principal Contractor Dispute Amount	:	US$	NIL
10	The Confirmed Priority Contractor Payment	:	US$	10,466,033.32
11	The Confirmed Non Priority Contractor Payment	:	US$	2,981.40

Yours sincerely

Muhammad Rudy
GM Contract Mining
PT KALTIM PRIMA COAL

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