an administrative claim with FDIC. The "no prejudice" language of paragraph (d)(5)(F)(ii) draws the distinction that permits all the provisions of subsection (d) to function together harmoniously. A lawsuit filed before the appointment of FDIC as receiver is therefore subject to different rules than a lawsuit filed after appointment. A lawsuit filed before the receivership follows an essentially normal course while the FDIC's claims processing mechanism proceeds simultaneously.

771 F.Supp. at 1168.

The plain meaning of legislation is conclusive, except in those rare cases in which "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989). The purpose of FIRREA to expeditiously and fairly dispose of the bulk of claims against failed financial institutions, however, is best served by the continued adjudication of suits instituted prior to receivership. As already discussed, administrative disallowance of a claim does not bind the claimant, and the district court makes a *de novo* review of the claim. Therefore, imposing a potentially lengthy stay for exhaustion of administrative procedures in a case commenced in August of 1988 carries a risk of substantial prejudice to parties other than the RTC. *See also Marc*, 771 F.Supp. at 1169 ("To read the jurisdiction limit as not drawing a distinction between suits filed before and after the receivership would lead to the waste of considerable legal efforts."); *Callahan*, 758 F.Supp. at 64.

In sum, since there exists no inconsistency in the relevant statutory provisions of FIRREA, the Court is expressly prohibited from departing from the clear meaning of the terms. Pursuant to Sections 1821(d)(5)(F)(ii) and (6)(A), RTC is not entitled to a stay pending exhaustion of administrative proceedings.

Circuit has not yet issued a position on administrative requirements for [illegible]

III. *Conclusion*

For the foregoing reasons, RTC's Motion for Stay pending exhaustion of administrative proceedings is DENIED.

SO ORDERED.

TESORO PETROLEUM CORPORATION, Plaintiff,

v.

ASAMERA (SOUTH SUMATRA) LTD., Defendant.

Civ. A. No. SA-91-CA-0937.

United States District Court,
W.D. Texas,
San Antonio Division.

June 17, 1992.

Petroleum corporation filed complaint to vacate arbitration award and motion to determine jurisdiction and venue. The District Court, Prado, J., held that: (1) under Federal Arbitration Act, only proper federal court in which action to vacate arbitration award may be filed is court in and for district wherein award was made; (2) Southern District of New York was proper jurisdiction and venue for complaint; and (3) action to vacate arbitral award is not action or proceeding falling under Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, thus, Convention does not provide basis for suit to vacate arbitration award.

Case dismissed.

1. Arbitration ⇐77(1)

Under Federal Arbitration Act, only proper federal court in which action to vacate arbitration award may be filed is court

WWW.NEWYORKCONVENTION.ORG

in and for district wherein award was made. 9 U.S.C.A. §§ 1 et seq., 10(a).

2. Arbitration ⇐77(1)

The Southern District of New York, rather than the Western District of Texas, was proper jurisdiction and venue for complaint to vacate arbitration award where arbitration proceeding took place in Southern District of New York and arbitration award was entered in Southern District of New York. 9 U.S.C.A. § 10(a).

3. Statutes ⇐188

In construing statute, most persuasive evidence of congressional intent is wording of statute.

4. Arbitration ⇐76(1)

Action to vacate arbitral award is not action or proceeding falling under Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, thus, Convention does not provide basis for suit to vacate arbitration award. 9 U.S.C.A. §§ 201 et seq., 203, 204, 207; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Arts. I et seq., V, subd. 1, 9 U.S.C.A. § 201 note.

Gerald Thomas Drought, Martin, Drought & Torres, San Antonio, Tex., Lawrence A. Waks, Varet, Marcus & Fink, Austin, Tex., for Tesoro Petroleum Corp.

Paul Andrew Drummond, John G. Lewis, Groce, Locke & Hebdon, San Antonio, Tex., C. MacNeil Mitchell, Breed, Abbott & Morgan, New York City, for Asamera (South Sumatra) Ltd.

PRADO, District Judge.

ORDER

On this date the Court considered the Motion to Determine Jurisdiction and Venue, filed by Tesoro Petroleum Corporation on November 1, 1991.

Introduction

This suit stems from an arbitration proceeding that took place in the Southern District of New York. The arbitration award was entered on September 6, 1991, also in the Southern District of New York. On September 9, 1991, Tesoro Petroleum Corporation (Tesoro) filed its Complaint to Vacate an Arbitration Award in this Court, seeking to have the arbitration award (award) set aside. On September 18, 1991, Asamera (South Sumatra) Ltd. (Asamera) filed suit in the Southern District of New York, seeking to confirm the award.

In order to conserve their own and the Court's resources and to avoid inconsistent procedural rulings, the parties entered into a stipulation [1] pursuant to which they agreed that this Court would initially determine whether jurisdiction and venue are proper in the Western District of Texas as opposed to the Southern District of New York.

Background

The dispute at the heart of this action concerns certain overriding royalty interests that Asamera claims Tesoro owes to it pursuant to a contract between Tesoro and Redco (Indonesia) Limited [2], referred to as the "1971 Farmout Agreement" (Agreement). The Agreement provided in part:

> 12. *Arbitration.* Any dispute between Redco ... and Tesoro arising out of this Agreement shall be settled by arbitration in New York, New York, according to the Commercial Arbitration Rules of the American Arbitration Association, then in effect.

It is not disputed that Asamera properly invoked the arbitration clause in April of 1990, when it commenced an arbitration to compel Tesoro to pay the disputed overriding royalty interest. The arbitration award was made on September 6, 1991, awarding Asamera a 2% overriding royalty interest for the 20 year life of a 1989 Technical Assistance Contract.

1. The stipulation was approved by the Court on October 27, 1991.

2. Redco (Indonesia) Limited is Asamera's predecessor in interest. For ease of reference the Court will henceforth refer to both Redco and Asamera as "Asamera".

WWW.NEWYORKCONVENTION.ORG

Tesoro is seeking to vacate the arbitration award in this case. The only issue before the Court at this juncture is whether the Western District of Texas or the Southern District of New York is the proper forum for doing so.

Tesoro contends that the issue is primarily one of venue, and argues that venue is proper in Texas in this case pursuant to two statutes, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 9 U.S.C. § 201 *et seq.* Tesoro argues that this court has subject matter jurisdiction over this case both pursuant to diversity jurisdiction and federal question jurisdiction, and that since this is the first filed case it takes precedence over the later filed action by Asamera. Tesoro also argues that this Court has personal jurisdiction over Asamera under the Texas Long Arm Statute and the Minimum Contacts Test.

Asamera argues that section 10 of the FAA vests exclusive jurisdiction to vacate an arbitration award in the United States District Court for the district in which the award was made; in this case, the Southern District of New York. Asamera also contends that the Convention does not provide a legal basis for an action to vacate an arbitration award, and that insufficient contacts exist between Asamera and this forum to establish personal jurisdiction over Asamera. These issues, involving construction of the FAA and the Convention, have not been squarely decided by the Fifth Circuit.

1. *Federal Arbitration Act.*

[1] With respect to vacating arbitration awards, the FAA provides as follows:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10(a).

Similarly, section 9 of the FAA, dealing with actions to confirm and enforce arbitration awards provides:

> If no court is specified in the agreement of the parties [to arbitrate], then such application [to enter a judgment on the arbitration award] may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9. These two sections are often referred to interchangeably as containing similar jurisdiction and venue provisions. *See Enserch Int'l Exploration, Inc., v. Attock Oil Co.*, 656 F.Supp. 1162, 1164, n. 5 (N.D.Tex.1987).

Two circuits have ruled on the effect of sections 9 and 10 of the FAA. The Ninth Circuit, interpreting these sections as jurisdictional limitations, has held that jurisdiction to confirm or vacate an arbitration award lies exclusively with the district court for the district wherein the award was made. *See Central Valley Typographical Union, No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985); *United States ex rel. Chicago Bridge & Iron Co. v. ETS–Hokin Corp.*, 397 F.2d 935, 939 (9th Cir.1968). *See also Enserch Int'l Exploration, Inc., v. Attock Oil Co.*, 656 F.Supp. 1162 (N.D.Tex.1987).

The Second Circuit, on the other hand, has interpreted these sections as venue pro-

WWW.NEWYORKCONVENTION.ORG

visions and has held that they are permissive and not mandatory with respect to where a suit to confirm or vacate an award can be brought. *Motion Picture Laboratory Technicians Local 780, I.A.T.S.E. v. McGregor & Werner, Inc.*, 804 F.2d 16, 18–19 (2d Cir.1986); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir.1985), *cert. denied*, 475 U.S. 1067, 106 S.Ct. 1381, 89 L.Ed.2d 607 *reh. denied*, 475 U.S. 1151, 106 S.Ct. 1808, 90 L.Ed.2d 352 (1986).

The Fifth Circuit has not directly addressed this issue. In *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir.), *cert. denied*, 419 U.S. 843, 95 S.Ct. 76, 42 L.Ed.2d 71 (1974), the court held that under 9 U.S.C. § 9, the proper place for a suit to confirm an arbitration award was in the district where the award had been made. *Id.*, at 184. However, this decision appears to have been influenced not only by "section 9's command," but also by principles of comity, judicial restraint, and waiver. *Id.* Therefore, this Court does not interpret *Prepakt* as deciding the issue in this case.

In another, more recent Fifth Circuit case the court stated:

> [W]e are not reluctant to hold that [section 9] does not establish an exclusive forum for suits upon arbitral awards. Rather, the section says only that a party *may* apply to the federal court in the district where the award was entered to seek its enforcement. This language does not prevent the court in the Southern District of Texas, which stayed the appellants' action pending California arbitration, from reopening that action after arbitration is concluded. As one court aptly pointed out, to conclude otherwise would seriously conflict with § 3 of the Arbitration Act which authorizes stays of litigation, because a "stay" order entered in a forum other than that where arbitration would occur could only lead to ultimate dismissal. (Citation omitted.)

Purdy v. Monex Int'l. Ltd, 867 F.2d 1521, 1523 (5th Cir.), *cert. denied*, 493 U.S. 863, 110 S.Ct. 180, 107 L.Ed.2d 136 (1989).

While this language appears to support an interpretation that the forum provisions of the FAA are permissive, the fact is that this part of the opinion is dicta. In *Purdy* the suit was originally filed in state district court and was subsequently removed to federal court where a motion to compel arbitration was filed.[3] No arbitration had taken place and no award had been made. Thus, the court in *Purdy* seems to be following the rule set forth in several cases that if a court is originally seized with jurisdiction of a case and issues an order compelling arbitration, that court's jurisdiction continues with respect to subsequent motions to confirm or vacate the award. *See Smiga*, 766 F.2d at 706; *NII Metals Services, Inc. v. ICM Steel Corp.*, 514 F.Supp. 164 (N.D.Ill.1981). Therefore, this Court also finds that *Purdy* does not provide controlling precedent on the issue of whether this suit to vacate an arbitration award made in the Southern District of New York can be properly maintained in this district.

[1] The Court finds that the most thorough analysis of this issue is set forth in *Enserch Int'l Exploration, Inc., v. Attock Oil Co.*, 656 F.Supp. 1162 (N.D.Tex.1987). While *Enserch* is not controlling authority, this Court agrees with both the analysis and the conclusion of the court in that case.

[2, 3] As the court in *Enserch* observed, in construing a statute, the most persuasive evidence of congressional intent is the wording of the statute. *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir.1977). The language at issue in this case is as follows:

> In any of the following cases the United States court in and for the district wherein the award was made *may* make an order vacating the award ... (Emphasis added.)

9 U.S.C. § 10(a). A straight-forward reading of this provision reveals that the per-

3. The arbitration agreement at issue in *Purdy* specified California as the place where the arbitration was to take place.

WWW.NEWYORKCONVENTION.ORG
United States
Page 4 of 14

This language does not appear to this Court to authorize a suit to be initiated for the purpose of vacating an arbitral award, but instead sets forth the specific, limited circumstances in which, in a suit to enforce an award, a court may decline to do so. Because the Court does not find that a suit to vacate an arbitral award is expressly allowed under the Convention, it must now determine whether such a suit has been authorized by common law.

In support of its argument that the Convention provides a basis for a suit to vacate an arbitration award, Tesoro cites the case of *Northrop Corporation v. Triad Financial Establishment*, 593 F.Supp. 928 (C.D.Ca.1984), *rev'd on other grounds*, 811 F.2d 1265 (9th Cir.), *cert. denied*, 484 U.S. 914, 108 S.Ct. 261, 98 L.Ed.2d 219 (1987). However, while a motion to vacate was filed in the *Northrop* case, it is not clear whether this motion initiated the action, or whether the motion was filed under the Convention or the FAA.[6] Therefore, *Northrop* does not provide authority for Tesoro's contention.

This Court, like Asamera, has been unable to locate any case in which a party initiated an action under the Convention to vacate or set aside an arbitral award. The closest case that this Court was able to locate is *Jamaica Commodity Trading Co. Ltd. v. Connell Rice & Sugar Co., Inc.*, 1991 WL 123962 (S.D.N.Y.1991). In that case, an arbitration award was entered on June 26, 1990. Approximately five months later, the Jamaica Commodity Trading Company filed an application to confirm the award under the FAA. In response, Connell Rice & Sugar Company filed a motion to vacate under the Convention. The issue before the court was whether the motion to vacate was untimely, since under the FAA such a motion must be filed within three months after the award is filed or delivered. *See* 9 U.S.C. § 12. The court in *Jamaica* held that the motion to vacate was not untimely because it was filed pursuant to the Convention and the Convention does not expressly limit the time in which a party may move to vacate or remand an arbitration award. The court observed that:

> [U]nder the Convention a party has three years to move to confirm the award ... [therefore] ... a party may raise one of the grounds [set forth in the Convention] for vacating an award at any time during the three-year period *in opposition* to a motion to confirm." (Emphasis added).

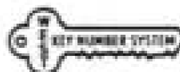
Id., at 3. Thus, the court held that a motion to vacate under the Convention was proper, when filed in response to a motion to confirm. *Id.*

The holding in this case, although closer to the argument Tesoro makes than *Northrop*, also does not go far enough to serve as authority for the proposition that the Convention authorizes a suits to vacate an arbitral awards. Absent stronger authority, and in light of the Convention's overriding purpose to encourage the recognition and enforcement of arbitration agreements in international commerce, this Court simply cannot hold that the Convention authorizes a suit to vacate, like the one at issue in this case.

Conclusion

Because this Court has found that this suit may not properly be entertained by this Court under either the FAA or the Convention, the suit shall be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) and 28 U.S.C. § 1406(a).

Accordingly, it is hereby ORDERED that this case is DISMISSED pursuant to Fed. R.Civ.P. 12(b)(1) and 28 U.S.C. § 1406(a).



6. Both statutes were discussed and applied in that case. *Northrop*, 593 F.Supp. at 934-36.

WWW.NEWYORKCONVENTION.ORG

© COPYRIGHT 1993 MEALEY PUBLICATIONS, INC., WAYNE, PA

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

ASAMERA (SOUTH SUMATRA) LTD.
VS
TESORO PETROLEUM CORPORATION

AWARD OF ARBITRATORS

CASE NUMBER: 13 T 199 00399 90

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into between the above-named Parties and dated March 17, 1971, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, AWARD as follows:

1. A Declaration that the right of ASAMERA (SOUTH SUMATRA) LTD., hereinafter referred to as CLAIMANT, to receive the overriding royalty provided for under paragraph 6 of the Farmout Agreement dated March 17, 1971 did not cease on October 15, 1988 but continues through the life of the Technical Assistance Contract dated March 13, 1989, without prejudice to the rights of the Parties on the expiry, amendment or termination of the Technical Assistance Contract dated March 13, 1989.

2. TESORO PETROLEUM CORPORATION, hereinafter referred to as RESPONDENT, shall account for and pay to the CLAIMANT all royalties due under paragraph 5 of the Farmout Agreement dated March 17, 1971 pursuant to the Declaration set out in paragraph (1) above, in accordance with the practices and procedures adopted by the Parties prior to October 15, 1988.

3. RESPONDENT shall pay to CLAIMANT simple interest at the rate of 5% per annum on all royalty payments falling due during the period October 15, 1988 to the date of this Award; such interest being payable, on each royalty payment, from the date on which it became due until the date of this Award.

4. The compensation and expenses of the Arbitrators totalling ONE HUNDRED FIFTEEN THOUSAND NINE HUNDRED FIFTEEN DOLLARS AND FIFTY SIX CENTS ($115,915.56), shall be borne by RESPONDENT. Therefore, RESPONDENT shall pay to CLAIMANT the sum of FORTY EIGHT THOUSAND FOUR HUNDRED FIFTY DOLLARS ($48,450.00), representing that portion of the compensation previously advanced by CLAIMANT to the Association and RESPONDENT shall pay to the American Arbitration Association the sum of EIGHTEEN THOUSAND SEVEN HUNDRED FIFTEEN DOLLARS AND EIGHTY SIX CENTS ($18,715.86), representing that portion of the compensation still due the Association.

5. The administrative fees and expenses of the American Arbitration Association totalling TWENTY FOUR THOUSAND DOLLARS ($24,000.00), shall be borne by RESPONDENT. Therefore, RESPONDENT shall pay to CLAIMANT the sum of TWENTY THREE THOUSAND DOLLARS ($23,000.00), representing that portion of the fees previously advanced by CLAIMANT to the Association.

6. Each Party shall bear its own costs of preparation and presentation of its case in the arbitration.

7. RESPONDENT shall pay to CLAIMANT simple interest at the rate of 9% per annum on all sums immediately due and payable under this Award, from the date of this Award until the date of payment.

8. The Declaration and Orders awarded above shall be in full satisfaction of the CLAIMANT'S First, Second and Third Claims for Relief as set out in its Demand for Arbitration and all other claims and counterclaims are hereby denied with prejudice, save as expressly provided in the Declaration set out in paragraph (1) above.

9. This Award is made by unanimous decision of the arbitrators and is deemed to be made in New York on the date on which the signature of all of the Arbitrators on a copy of the Award has been received by facsimile transmission at the offices in New York of the American Arbitration Association.

10. This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

CHRISTOPHER G. L. HALL / DATE

6 September 199?

J. MARTIN H. HUNTER / DATE

MELISSA R. H. WATSON / DATE

WWW.NEWYORKCONVENTION.ORG

COPYRIGHT 1993 MEALEY PUBLICATIONS, INC., WAYNE, PA

I, Christopher G. L. Hall, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

(DATED) (SIGNATURE)

I, J. Martin H. Hunter, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

5 September 1991 (DATED) [signature] (SIGNATURE)

I, [illegible] R. K. Watson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

(DATED) (SIGNATURE)

STRICTLY PRIVATE & CONFIDENTIAL

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION TRIBUNAL

\- x

In the Matter of an Arbitration between :

ASAMERA (SOUTH SUMATRA) LTD., : Case No. 13 T 199 0039990

Claimant, :

-against- :

TESORO PETROLEUM CORPORATION, :

Respondent, :

\- x

Summary of Arbitrators' Reasons

The "Guide for Commercial Arbitrators" published by the American Arbitration Association (the "AAA") (at page 21), strongly discourages arbitrators from explaining the reasons for their decisions, or from writing an "opinion" on the merits of the case. However, Article 7 of the AAA's "Supplementary Procedures for International Commercial Arbitration" states as follows:-

"Parties in international cases often expect

WWW.NEWYORKCONVENTION.ORG

> arbitrators to provide a written opinion explaining the reasons for their award. The AAA will make arrangements for such an opinion in consultation with the parties and the arbitrators."

In this case the Claimant, through its attorneys, requested that the Tribunal should give brief reasons for its decision. The Respondent, through its attorneys, stated that it had no objection. Accordingly, after consultation with the AAA's case administrator, we agreed to provide a summary of our reasons. We emphasise that this document is by no means to be taken as a full written opinion on the case; nor does it set out our views on all of the issues, or on all of the points raised at the hearing and in the written briefs. It simply states, in summary form, the essential elements that led to our decision on the merits of the dispute.

Furthermore, in this document we make no attempt to set out all the relevant facts. A permanent record of the evidence on which our decision is based has been created in the various volumes of exhibits and in the full transcript of the testimony given at the hearings in New York which started on 24 April 1991.

Nor do we refer explicitly to the numerous authorities cited during the course of the proceedings (around 70 cases and textbook references were put before us) although we have in

fact reviewed many of them in order to ascertain the relevant principles of Texas and Indonesian law.

We also do not explain the series of assignments under which

(a) the relevant Redco company became Asamera, and

(b) Tesoro introduced various associated companies into the history of events.

No point of substance turns on this aspect. For this reason we refer simply to "Claimant" and "Respondent" throughout.

The case turns on the interpretation of the Farmout Agreement of 17 March 1971 (the "1971 FOA"). The critical issue is whether or not the 1971 FOA is to be interpreted (according to Texas law, by which it is expressly construed and governed; see paragraph 13) as conferring on the Claimant the right to receive the 2% overriding royalty (the "royalty") provided for in paragraph 6 beyond 15 October 1988, being the date on which the 20 year term referred to in Section 11 of the Technical Assistance Agreement of 15 October 1968 (the "1968 TAC") ended.

The provision for the payment of the royalty appears in paragraph 6 of the 1971 FOA:-

> "... [the Respondent] shall pay ... an overriding royalty of two per cent (2%) of the value of all (i) "crude oil" ... produced, saved and marketed from the Farmout Areas ... and (ii) "Natural Gas" ... produced, saved and marketed from the farmout areas ..."

WWW.NEWYORKCONVENTION.ORG

COPYRIGHT 1993 MEALEY PUBLICATIONS, INC., WAYNE, PA

[emphasis added]

This wording is extremely wide. It does not expressly limit the royalty to oil and gas produced (etc) by the Respondent but in our view this must be implied, in order to make commercial sense of the provision; and we so find. Nor, more importantly, does paragraph 6 contain any limitation as to time, or reference to any event or circumstances which would trigger the cessation of the Claimant's right to receive the royalty.

Further, it is common ground that the 1971 FOA contains no other provisions which deal expressly with its duration. Nor does it contain a "renewal or extension" clause; if it had, it is likely that there would have been no need for an arbitration.

It is necessary, therefore, for us to interpret the 1971 FOA in the context of its silence on the question of duration, both in paragraph 6 and elsewhere.

In Texas law, as in many other common law jurisdictions, the principal rule of construction of contracts is that the court will give effect to the intention of the parties at the time of entering into the contract. That intention is in principle to be ascertained by construing the language of the contract itself. Words and phrases will be accorded

their ordinary English language meaning unless evidence is provided of any special technical meaning, or custom and usage, in the relevant context. The contract will be examined in its entirety, within its "four corners". Only in the event of ambiguity will extraneous evidence, such as the oral testimony of witnesses, be admitted.

The provision of the 1971 FOA which engaged the attention of the parties and the Tribunal most prominently in the context of duration is contained in paragraph 1:-

> "Transfer of Contract Rights
>
> Reserving to [the Claimant] the overriding royalty described in paragraph 6 below, [the Claimant] hereby transfers, conveys and assigns to [the Respondent] its entire interests in the Contract insofar as the Contract relates to and affects .... [the Farmout Areas]"
>
> [emphasis added]

The Respondents argued that the effect of this provision was to assign to it the rights in the 1968 TAC; that the relevant right (as it relates to duration) is a fixed period of 20 years ending on 15 October 1988; and, on the "no greater estate" principle seen in Texas law primarily in the context of mineral leases, the Claimant's entitlement to receive the reserved royalty could not survive beyond the term of the assigned rights.

INTERNATIONAL ARBITRATION REPORT

WWW.NEWYORKCONVENTION.ORG

We studied with interest the written and oral testimony of the Texas law experts presented by the Respondent. We do not doubt that the force of their evidence so far as it relates to Texas mineral leases. But in our view the Respondent's argument is fatally flawed in two respects.

First, we do not consider (and this was effectively conceded by Professor Lowe in his testimony) that the authorities on Texas mineral leases, which deal with property rights, are precisely analogous to the situation we have to consider. We do not see any reason in principle why a royalty obligation should not survive beyond a fixed term of assigned contractual rights, and we are not persuaded that any of the many cases cited provide authority for the Respondent's contention in the present case. In our view, in the context of an assignment of contractual rights, the parties are free to agree on whatever they like. There are no relevant implied terms. No relevant presumptions. It is purely a question of interpreting the contract according to the rules of construction of Texas contract law.

Secondly, and perhaps more significant, we do not consider that the phrase emphasised in the extract from paragraph 1 of the 1971 FOA quoted above "... its entire interests in the Contract ..." should be construed so restrictively as to mean "rights". In his testimony (Transcript, p.1059) Professor Lowe hesitated and said that this was a "very hard

question". We conclude that, in its ordinary English language meaning, the phrase "entire interests in the Contract" includes the opportunity (noting that it was conceded by the Claimant's Indonesian law experts that it was not an enforceable right under Indonesian law) for the Claimant to obtain a renewal or extension under Section XII.5 of the 1968 TAC. In other words, we conclude that paragraph 1 of the 1971 FOA assigned to the Respondent something more (however intangible) than merely a fixed 30 year term to operate in the Farmout Areas as Pertamina's contractor. It follows that the royalty need not be limited to the 30 year term even if (contrary to our view) the "no greater estate" principle applies.

Still looking "within the four corners" of the 1971 FOA, we were referred to paragraphs 7 and 8. But we found them to be of no assistance in the context of determining the critical issue of whether or not the royalty survived beyond 15 October 1998. We mention only that we do not accept Mr Krint's view of the effect of paragraph 7 of the 1971 FOA.

We are thus able to determine the critical issue between the parties by construing the 1971 FOA according to its terms, within its four corners. We conclude that, examining the 1971 FCA as a whole, the wide provisions governing the

© COPYRIGHT 1993 MEALEY PUBLICATIONS, INC., WAYNE, PA

WWW.NEWYORKCONVENTION.ORG

payment of the royalty in paragraph 8 are not subject to any limitation as to time.

However, we do not exclude the possibility that events might occur in the future, whether on expiration of the Technical Assistance Agreement dated 13 March 1989 (the "1989 TAC") or otherwise, under which the Respondent might continue as Pertamina's contractor in the Farmout Areas but in circumstances in which the royalty would cease to be payable. A total nationalisation or expropriation of the 1989 TAC rights and the substitution of some wholly new basis for the Respondent to remain in the Farmout Areas would provide a graphic example. This is why we have formulated the Declaratory Relief in the terms in which it appears in the Award. It will be for another tribunal to determine the position between the parties, if necessary, in the light of changed circumstances.

Since we do not consider the 1971 FOA to be ambiguous on the critical issue it is not necessary (and indeed it would be improper) for us to place any weight on the voluminous extraneous evidence that was placed before us, and which occupied a great deal of time at the hearing. However, for the sake of completeness we think it appropriate to review briefly three aspects of the evidentiary material which is extraneous to the 1971 FOA itself.

First, we looked at the "Stanvac" Farmout Agreement, entered into by the Claimant shortly before the 1971 FOA. This was relied upon by the Respondent to show that a renewal or extension clause was intentionally omitted from the 1971 FOA. However, the Stanvac Farmout Agreement has an entirely different structure and was manifestly written by a different hand. We find it to be of no assistance in construing the intentions of those who negotiated or entered into the 1971 FOA.

Secondly, we examined the later transactions concerning the Tarakan Island properties. Both parties placed reliance on the documents (brought into existence between 1980 and 1982) relating to the relinquishment of part of the 1968 TAC area and the associated conversion, with an extension, to a PSC in respect of the "carved out" Tarakan Island properties which were subsequently farmed out to Phillips. At first sight, the recital in the agreement of 3 February 1983 (Joint Exhibit 11) which states:

> "whereas ... [the Respondent] has been burdened ... with an overriding royalty payable by [the Respondent] for the life of the PSC or any amendment or extension thereof"
>
> [Emphasis added]

appears to be significant. But it is simply a recital, not an executive provision, so it is merely a statement of purported fact: it was prepared (on the Claimant's side) and reviewed (on the Respondent's side) by people who had not

COPYRIGHT 1993 MEALEY PUBLICATIONS, INC., WAYNE, PA

WWW.NEWYORKCONVENTION.ORG

© COPYRIGHT 1993 MEALEY PUBLICATIONS, INC., WAYNE, PA

been present more than 10 years earlier when the 1971 FOA was negotiated; and we do not consider that whatever these people thought (or, perhaps, failed even to consider) in 1983 is of any assistance to us in ascertaining the intentions of the parties in 1971. It is true, of course, that the "Tarakan Island" documents did amend the 1971 FOA, but not - as we find - in any respect that is material to the issues that arise in this arbitration.

Thirdly, we reviewed the application of the contra proferentem principle, referred to briefly by the Claimant in its Post-Hearing Reply Memorandum. It is not surprising that, almost exactly 20 years after the execution of the 1971 FOA, the main participants were not available to give testimony. It is not entirely clear who negotiated the transaction on each side, or who drafted of the 1971 FOA. However, the letter of intent dated 14 January 1971 (Joint Exhibit 34) was proferred by the Respondent. Paragraph 6 states:

> "[the Respondent] will agree to pay [the Claimant] an overriding royalty of US$1.035 per barrel ... of oil produced by [the Respondent] from the Farmout Areas ..."

This language foresees quite closely the language of paragraph 6 of the 1971 FOA itself, as does the language of paragraph 1 of both the letter of intent and the agreement itself. We also consider it significant that the 1971 FOA

is governed by Texas law. Bearing in mind that this law was familiar to the Respondent's lawyers, but that the Claimant had no connection with Texas, we consider that, on the balance of probabilities (being the relevant burden of proof), the preponderance of the evidence justifies the conclusion that 1971 FOA was prepared and proferred by the Respondent. Accordingly, if there were to be any ambiguity (we hold that there was not) we would construe that ambiguity against the Respondent.

During the arbitration a great deal of time was spent on the question of whether the 1989 TAC was a "renewal or extension" of the 1968 TAC or a "new" TAC. In the light of our interpretation of the 1971 FOA it is not necessary for us to determine this issue. Nevertheless, we consider it appropriate to review it briefly.

There are numerous conflicting indications, both within and outside the 1989 TAC itself. It is clear that the word "extension" was used liberally and loosely in Indonesia by officials of Pertamina, the Government, the US Embassy in Jakarta and foreign contractors alike. Equally, the expressions "new agreement" or "new contract" appear from time to time, particularly in the later stages when the Respondent became aware of the position the Claimant was likely to take - following which a deliberate policy of

WWW.NEWYORKCONVENTION.ORG

COPYRIGHT 1993 MEALEY PUBLICATIONS, INC., WAYNE, PA

describing the arrangements for continuation as a "new" agreement was implemented by the Respondent.

In the ebb and flow of the negotiations between the Respondent and Pertamina between March 1986 and October 1988 (which in fact started by the Respondent thinking about an extension of the 1968 TAC as of 1986, some 3½ years before it was due to expire) the question of whether or not any continuation should take the form of a PSC or TAC changed at least twice. The commercial terms also changed during the course of the negotiations. The terms ultimately agreed to and contained in the 1989 TAC were materially different from those contained in the 1968 TAC. Some terms were more favourable to the Respondent, others less favourable. There was also a signature bonus. Nonetheless, the same contractor was to exploit the same areas under a broadly similar contractual structure and we conclude that in substance (both as a matter of law, whether Texas law or Indonesian law, and as a matter of pure common sense) - at least for the purposes of the 1971 FOA - the 1989 TAC must be considered as a "renewal" or "extension" of the 1968 TAC.

This leaves, finally, the arguments relating to fiduciary duties; "utmost good faith and fair dealing"; "good faith"; and constructive trusts. Having considered the testimony of the Texas law experts we doubt that we would have found that any relevant duties existed under these theories. But given

the conclusion we have reached on the 1971 FOA the entire area is moot, and we do not have to make any determination.

The Claimant advanced a claim for interest, but neither party addressed this topic comprehensively in its briefs. At no time during the arbitration did the Respondent submit that the Tribunal lacked power to make an award in respect of interest; nor did the Respondent put forward any substantive argument that the rates of interest claimed were inappropriate (or contrary to the laws of either Texas or New York). We considered it to be manifestly "just and equitable" (to use the precise words of Article 43 of the AAA's Commercial Arbitration Rules) that the Claimant should be compensated for not having had possession of the money to which it was justly entitled at the proper time. As to pre-award interest, we considered it appropriate to award simple interest on all outstanding royalties at the statutory pre-judgment rate of 6% applicable in Texas Law. However, we considered it appropriate that the post-award rate should be 9%. We determined that post-award interest should be payable on all sums awarded, which therefore includes the pre-award interest capitalised as at the date of the award and the amounts payable to the Claimant by the Respondent in respect of the costs of the arbitration.

In summary, the Claimant succeeds virtually in full. The Award directs the Respondent to pay to the Claimant the

WWW.NEWYORKCONVENTION.ORG

outstanding royalties due since 15 October 1988, together with pre-award interest at the statutory rate applicable in Texas. The Award also directs payment of future royalties whilst the 1989 TAC subsists. All royalties are to be accounted for and calculated in accordance with the practice and procedure previously adopted under paragraph 6 of the 1971 FOA. The Award further directs that the costs of the arbitration itself shall be borne by the Respondent (with each party to bear its own costs of preparing and presenting its case); and that simple interest at 9% shall be paid on all sums awarded from the date of the Award until the date of payment.

What we have not been willing to do, for the reasons set out above, is to extend the scope of the Declaratory Relief to cover renewal, extensions, amendments or replacements of the 1989 TAC. Logically it appears to follow from our construction of the 1971 FOA that the royalty continues to be payable so long as the Respondent (or its successors and assigns - see 1971 FOA paragraph 13) remain in the Farmout Area as contractor. But we are reluctant to award declaratory relief which would apply to factual situations that we cannot foresee at the time of making the Award. If and when the point arises the parties will know how we interpreted the 1971 FOA. Our interpretation may even be res judicata between them (see Hunter v. Prosser 298 NY 828, 84 NE 2d 143 (1949)). But if they cannot resolve by

agreement any issue that may arise on a new set of facts a fresh arbitration will be needed.

Our Award was made by unanimous decision.

Signed

....

Haeliesa R M Watson Christopher G L Hall

J Martin H Hunter

6 September 1991

COPYRIGHT 1993 MEALEY PUBLICATIONS, INC., WAYNE, PA

VOL. 8, #3, 3/93 - #06-930331-104

WWW.NEWYORKCONVENTION.ORG