SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

JOHN DOE I, et al.,
Plaintiffs,
vs.
UNOCAL CORP. et al.,
Defendants

JOHN ROE III, et al.,
Plaintiffs,
vs.
UNOCAL CORPORATION, et al.,
Defendants

CASE NOS. BC 237 980 AND BC 237 679

RULING ON DEFENDANTS' CHOICE OF LAW MOTIONS

Hearing date: 6/28/03
Ruling date: 7/30/03

After considering the moving, opposing, and reply papers and the arguments of counsel at the hearing, the court now rules as follows:

Defendant's motion to apply Bermuda law is DENIED. Defendant's motion to apply Burma law is DENIED.

At the June 28, 2003 hearing, the parties presented evidence in the form of in court testimony, deposition transcripts, declarations and documentary evidence, such as certificates of incorporation. In support of Defendants' Bermuda choice of law motion, the court received the deposition testimony of Narinder Hargun and Jan Woloniecki and declarations with supporting documents of Gary Miller, Louis B. Kimmelman and Narinder Hargun. In opposition to the Bermuda motion, Plaintiffs provided the court with the deposition testimony of Narinder Hargun and Jan Woloniecki and declarations with supporting documents of Cornelia Dai and Jan Woloniecki.

In support of Defendants' Burma choice of law motion, the court received the declarations with supporting documents of Louis Kimmelman and Khin Maung Thein. In opposition to the Burma motion, Plaintiffs provided the court with the declarations with supporting documents of Myint Zan and Andrew Huxley. The court heard testimony of Defendants' witness Professor Khin Maung Thein and Plaintiffs' witnesses Myint Zan and Andrew Huxley.

MOTION TO APPLY BERMUDA LAW

I. Findings of Fact

The court finds as follows: Unocal Myanmar Operating Company (UMOC) and Moattama Gas Transportation Company (MGTC), the subsidiaries of Unocal at issue, are incorporated in Bermuda as "exempt" corporations. Such exempt corporations are not authorized to conduct business in Bermuda. UMOC and MGTC maintain offices in Bermuda and Burma. Additionally, UMOC maintains an office in California. Neither corporation is qualified to do business in California. Defendant Union Oil Company of California is a California corporation with its principal place of business in California. (Dai Decl., Exh. 5.) Defendant Unocal Corporation's principal place of business and headquarters are in California. (Dai Decl., Exh. 82.)

Apart from incorporating in Bermuda and payment of fees and taxes for the privilege of incorporation under Bermuda law, these companies appear to have no other contacts with Bermuda. On the other hand, the evidence presented by Plaintiffs concerning the nature of the relationship between Unocal and its subsidiaries involves actions taken in California. (See Opposition, pp. 2-5.) For example, payments for Yadana project activities were paid directly from a Unocal account from California (Exh. 465) and Unocal represented to its stockholders, the public and its own board that it was a co-venturer in the Yadana project (Exhs. 30, 33, 49).

II. The Law of the State of Incorporation

California courts have not adopted the rule that that the law of the place of incorporation governs an alter ego claim. Therefore, this court will apply California choice of law principles.

III. Defendant's Due Process Rights

Phillips Petroleum v. Shutts (1985) 472 U.S. 797 created a two-part test to determine whether the application of a particular substantive law is constitutional. First, a court must determine if the applicable law of the forum conflicts in any material way with any other law that could apply to the dispute. (*Id.* at p. 816.) Second, a court must determine whether the forum state has "significant contact" with the claims asserted in the litigation. (*Id.* at pp. 819-821.)

Under California law, the alter ego analysis turns on whether "(1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice." (*Webber v. Inland Empire Invs.* (1999) 74 Cal.App.4th 884, 900.) However, Bermuda courts will

pierce the corporate veil only where the purpose of the company was to act as a cloak or a sham for the purpose of avoiding pre-existing legal obligations. (*Gilford Motor Co. v. Horne* [1933] 1 Ch. 935; *Jones v. Lipman* [1962] 1 All E.R. 442.) This exception to the rule of corporate separateness only applies to pre-existing obligations and does not apply to third-party rights that may be acquired after incorporation. (*Adams v. Cape Indus.* [1991] 1 All E.R. 929.) Therefore, there is a material difference in the laws of California and Bermuda—a California court may pierce the corporate veil in the interests of justice where a Bermuda court cannot.

Consequently, this court must determine whether the forum state has "significant contact" with the claims asserted in the litigation. (*Phillips Petroleum v. Shutts, supra*, 472 U.S. at pp. 819-821.) The issue raised by Plaintiffs' alter ego claims is the nature of the relationship between Unocal and its Bermuda subsidiaries MGTC and UMOC. Unocal seeks to apply Bermuda law to the alter ego analysis only, not to the underlying tort claims in this action. If California has "a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair," then application of California law will not violate Unocal's due process rights. (*Allstate Ins. Co. v. Hague* (1981) 449 U.S. 302, 320.)

UMOC and MGTC are both incorporated in Bermuda and maintain offices in Bermuda and Burma. UMOC also has an office in California. Neither corporation may to do business in Bermuda or in California. Much of the evidence presented by Plaintiffs concerning the nature of the relationship between Unocal and its subsidiaries UMOC and MGTC involves actions taken in California. (See Opposition, pp. 2-5.) For example, payments for Yadana project activities were paid directly from a Unocal account from California (Exh. 465) and Unocal represented to its stockholders, the public and its own board that it was a co-venturer in the Yadana project (Exhs. 30, 33, 49). The facts of this case show little contact with Bermuda regarding Plaintiff's alter ego claims, aside from its role as the place of incorporation. Moreover, as UMOC and MGTC are not

defendants in this case, neither can complain that their due process rights have been violated.

Because the facts giving rise to a potential finding that Unocal was the alter ego of UMOC and MGTC show a significant aggregation of contacts with California, application of California law will not violate Defendants' due process rights.

IV. California Choice of Law Principles

California courts apply the "governmental interest/comparative impairment" analysis, which consists of three steps, when determining which law to apply. First, the court examines whether the applicable substantive laws of the apparently interested jurisdictions differ as applied to the relevant transaction. If there is no difference, then the court applies forum law. Second, if the laws differ, then the court considers whether the conflict is "true" or "false." It is a "true" conflict if each of the seemingly interested jurisdictions has a legitimate interest in the application of its rule of decision. It is a "false" conflict if only one jurisdiction has a legitimate interest in the application of its rule with respect to the particular issue. Finally, if more than one jurisdiction has a legitimate interest in having its laws applied, the court must analyze the "comparative impairment" of the interested jurisdictions by applying the law of the state whose interest would be the more impaired if its laws were not applied. (*Caufal v. AT & T. Inc.* (9th Cir. 2000) 223 F.3d 932, 934; *Hurtado v. Superior Court Abogados* (1974) 11 Cal.3d 574, 580.)

As stated above, this court has identified a difference in the alter ego doctrines of California and Bermuda, and must determine what interest, if any, each state has in having its own law applied to the case. Defendants have identified Bermuda's interest in having its laws applied to companies that chose to incorporate within its borders. Plaintiffs identify California's interests in applying its law as: (1) California's interest as the forum for the action; (2) California's interest in regulating corporations incorporated

in California and actually doing business in California; (3) California's interest in regulating "tortious activity" on the part of business operating within its borders; (4) the interest in preventing unfair business practices under Business and Professions Code section 17200; and (5) the application of foreign law would offend public policy. As regards the piercing analysis, both California and Bermuda have legitimate interests in regulating corporations that incorporate and do business within their borders. Because each state has an interest in having its own law applied, this court must select the law of the state whose interests would be more impaired if its law were not applied. (*Washington Mutual*, *supra*, 24 Cal.4th at p. 920.)

UMOC and MGTC are exempt corporations; they may not do business in Bermuda. (Exhs. 3038, 3039; Hargun Depo., p. 119.) Courts have held that Bermuda's interest in regulating the affairs of such corporations is "greatly diminished." (*Curiale v. Tiber Holding Corp.* (E.D.Pa. Sept. 18, 1997) 1997 U.S.Dist. LEXIS 14563, *16.) Further, if the corporate veils of MGTC and UMOC are pierced, it is "relatively unimportant" to Bermuda, as a California corporation would be held liable since no Bermuda corporation is a party to this action. (See *id.* at *16, *37, fn. 8.) In contrast, Unocal and Union Oil are incorporated and/or do business in California. UMOC has its principal place of business in California. Unocal and Union Oil are the only entities that will be "regulated" in any way by this action. California's interest in applying its own alter ego analysis to the action of its own corporations regarding the nature of the control it exercised over its subsidiaries would be more impaired than Bermuda's more attenuated interests in applying its alter ego law. Because California's interest outweighs Bermuda's interest in having its alter ego law applied to this case, California law applies.

MOTION TO APPLY BURMA LAW

I. Findings of Fact

The evidence before the court shows that Burma law has been based upon ancient Buddhist law, Indian law, colonial era codifications of English common law, socialist edicts under the 1974 Constitution and currently, pronouncements from the military regime which took power in 1988. (Thein Decl., ¶¶ 8-18.) The evidence shows that as a result of imposition of military law in 1988 "there [i]s no effective rule of law" in Burma. (U.S. Department of State, Burma, Country Report on Human Rights Practices, 2002, released March 31, 2003; Zan Decl., ¶¶ 10-11, 14; Huxley Decl., ¶ 29.) The Burmese "court system and its operation remained seriously flawed." (U.S. Department of State, Burma, Country Report on Human Rights Practices, 2002.) The State Department noted that the "judiciary is not independent of the military junta.... Courts adjudicate cases under decrees promulgated by the junta that effectively have the force of law." (*Ibid.*) Moreover, it is questionable whether an intact body of law survived the socialist regime of the 1960s and 1970s, which ended the common law system in Burma. (Huxley Decl., ¶¶ 20-29.)

The military, or State Peace and Development Council (SPDC), chooses the judges. (RT 123-124.) The SPDC may also remove a judge at any time for any reason. (*Ibid.*) Professor Thein testified that he had never heard of a case where the SPDC disagreed with the court's decision. (RT 129.) When asked why five of the six justices of the Burmese Supreme Court retired en masse in 1998, Professor Thein conceded that the military did have the power to remove them. (RT 126.) Based on the evidence before it, it is questionable whether Burma has a functioning judiciary actively interpreting statues and establishing decisional law upon which this court may rely.

When questioned regarding the procedure this court should follow in determining which law applied and how to interpret that law, Professor Thein responded that this court should look to the applicable statutes and interpret these laws first according to the

decisional law of Burma through published cases, then to Indian and English law. This court finds this procedure too uncertain. This court cannot apply Burmese law without knowing the circumstances under which a Burmese court would look to English or Indian law, and the content of that law. (See Huxley Decl., 10-13, 33, 36-39.) Defendants did not present an expert on English or Indian law.

While Professor Thein claimed that a functioning judiciary, which publishes appellate decisions, exists in Burma, Plaintiffs presented an entirely different picture. (See U.S. Department of State, Burma, Country Report on Human Rights Practices, 2002; Zan Decl., ¶¶ 10-11, 14; Huxley Decl., ¶ 29.) Plaintiffs' expert in Burma law, Mr. Huxley, has been unable to acquire published appellate decisions from Burma since 1976. (Reporter's Transcript (RT) 199.) If Mr. Huxley has been unable to locate and acquire recent decisional law from Burma, this court is concerned that it also may not have access to any recent decisions from Burmese appellate courts.

Consequently, this court agrees with Mr. Huxley that the law of Burma is "radically indeterminate." (Huxley Decl., ¶ 33.)

II. Defendants' Due Process Rights

Defendants take the position that application of California law to Plaintiffs' claims would violate Defendants' due process rights and would thus be constitutionally impermissible under *Phillips Petroleum v. Shutts* (1985) 472 U.S. 797. Unocal requests that this court: (1) apply Burma commercial law for any joint venture analysis; (2) apply the Burma Village and Towns Act for any analysis of the legality of conscription; and (3) apply Burma tort law to Plaintiffs' tort claims.

This court finds that the joint venture that forms the basis of the claims alleged by Plaintiffs possesses a sufficient aggregation of contacts with California so as to make application of California law constitutionally permissible. (See Opposition, pp. 3-5; Opposition to Bermuda Motion, pp. 2-5.) Further, when considering fairness in the due process context, an important element is the expectation of the parties. (*Phillips*

Petroleum v. Shutts, *supra*, 472 U.S. at p. 821.) Each contract to which Unocal subsidiaries UMOC, UIPC or MGTC was a party called for application of English law. (Opposition, pp. 5-6.) The evidence shows that Unocal did not have an expectation that Burma law would solely govern its conduct in relation to the Yadana Project.

III. Burma Law Is Indeterminate

As the proponent of foreign law, Defendants must identify the applicable rule of foreign law. (*Washington Mutual*, *supra*, 24 Cal.4th at p. 919.) The expert testimony at the hearing established to the court's satisfaction that Burma law is indeterminate. For example, Professor Thein testified that he could identify only five reported tort cases; none of them were relevant to the issues in this case. (Reporter's Transcript (RT) pp. 130-131.) Likewise, there is no identifiable Burma law as to the legal nature and consequences of a joint venture. (See Moving Papers, p. 9 ["The term 'joint venture' in Myanmar has no intrinsic legal meaning"]; Thein Decl., ¶¶ 51-58.) Finally, Defendants seek to apply the Village and Towns Acts as statutory law regulating conscripted labor. Even in the unlikely case that these statutes authorized the violent and oppressive behavior at issue in this case (which Defendants' repeatedly and reproachably liken to "jury duty"), this court would refrain from applying the Village and Towns Acts for public policy reasons. (See Part IV, *post*.)

This court agrees with Plaintiffs arguments regarding Burma's legal system and the state of its rules of law and finds Plaintiffs' experts more credible than Professor Thein.

Where a court finds no authority from the foreign jurisdiction addressing a particular situation, California courts assume that the foreign law "is not our of harmony with ours and thus we look to our law for a solution to the problem." (*Gagnon Co., Inc. v. Nevada Desert Inn* (1955) 45 Cal.2d 448, 454; *In re Marriage of Moore & Ferrie* (1993) 14 Cal.App.4th 1472, 1481; Evid Code, § 311.) Therefore, as Burma law is

indeterminate and does not address the issues arising in this action, this court will look to California law for a solution to the problem.

IV. California Choice of Law Principles

Because this court finds that Burma law is indeterminate, Defendants have failed to establish that the laws of Burma and California are materially different for the purposes of a choice of law analysis. (*Washington Mutual, supra*, 24 Cal.4th at p. 919-920.)

V. Public Policy

Foreign laws will not be given effect when contrary to the public policy of California. (*Severn v. Adidas Sportschuhfabriken* (1973) 33 Cal.App.3d 754, 763.) This public policy exception applies where the "foreign law is so offensive to our public policy as to be 'prejudicial to recognized standards of morality and to the general interests of the citizens.'" (*Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, 135.)

To the extent that Burma law precludes Plaintiffs' tort claims in this case, specifically the forced labor claims, this court invokes the public policy exception to the traditional choice of law rules. Application of this rule is not unfair in this case. Prior to its involvement in the pipeline project, Unocal had specific knowledge that the use of forced labor was likely, and nevertheless chose to proceed. (Exh. 476.)

Defendant's motion to apply Bermuda law is DENIED. Defendant's motion to apply Burma law is DENIED.

IT IS SO ORDERED.

Dated: 7/30/03

Victoria Gerrard Chaney

Judge