CV-13-10107-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GHANA GOLD CORPORATION, GHANA GOLD INC., COASTAL EXPLORATIONS LIMITED AND ABURI GOLDFIELDS GHANA LTD.

(collectively, the "Applicants")

FACTUM
ON BEHALF OF MINATURA (BVI) LTD.

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PART I - OVERVIEW

1. Minatura (BVI) Ltd. ("Minatura"), which holds a 50% interest and control in the applicant Aburi Goldfield Ghana Ltd. ("Aburi"), makes this motion for an ultimate order withdrawing Aburi's application in these proceedings as it did not consent to same. The applicants herein, including Coastal Explorations Limited ("Coastal"), dispute that Minatura holds a 50% interest and control in Aburi and oppose Minatura's motion on that basis. Coastal takes the position that it holds 100% of the shares and control of Aburi.

2. In light of the position taken by Coastal that it holds 100% of the shares of Aburi, Minatura seeks direction from this Honourable Court as to the appropriate process for adjudicating the dispute between Minatura and Coastal in respect of the shareholdings and control of Aburi (the "Aburi Control Dispute").

3. It is Minatura's position that the Aburi Control Dispute must be determined by way of a full trial (the admission of *viva voce* evidence is necessary to determine this dispute). Minatura's primary submission is that the courts of Ontario do not have jurisdiction to determine the Aburi Control Dispute. There are simply no factors connecting that dispute to Ontario.

4. In the alternative, if Ontario does have jurisdiction, Minatura invokes the doctrine of *forum non conveniens* and argues that this Honourable Court ought not assume jurisdiction on the basis that Ghana is clearly the more appropriate forum to determine the dispute. The factors that support Minatura's *forum non conveniens* argument include the following facts:

(1) at its core the dispute involves the interpretation of a shareholders agreement between Minatura and Coastal which is explicitly to be governed by the laws of Ghana;

(2) the subject matter involves shares, mining interest and properties located in Ghana;

(3) Minatura has a presence is a British Virgin Islands company with a presence in Ghana (it does not have a presence in Ontario);

(4) Coastal is a Ghanaian company;

(5) Aburi is a Ghanaian company – its only assets are located in Ghana;

(6) Aburi's employees are in Ghana and its books and records are in Ghana;

(7) Aburi's banking is done in Ghana;

(8) the evidence of witnesses residing in Ghana including Ghanaian officials will be required to determine the dispute;

(9) the evidence of at least two other Ghanaian companies will be required;

(10) an order from a Canadian court in relation to the shareholders dispute will not be enforceable in Ghana and will therefore have to be relitigated there in any event; and

(11) Ghana is clearly the natural forum for the determination of the Aburi Control Dispute.

5. Significantly, there is a pending action in Ghana between Minatura and Coastal which will deal, *inter alia*, with the issue of the ownership and control of Aburi as between them. That dispute was already pending when the within proceedings were commenced. Minatura submits that the Aburi Control Dispute should be determined within that Ghanaian action.

PART II – STATEMENT OF FACTS

Background

6. Minatura, Coastal and Aburi entered into a shareholders agreement dated April 27, 2012 (the "Aburi Shareholders Agreement") that set out the rights and obligations of each of Minatura and Coastal in respect of their collective ownership in, and management of, Aburi.[1] By its explicit terms, the Aburi Shareholders Agreement is to be governed and interpreted pursuant to the laws of Ghana.[2]

7. Aburi was created to hold the joint venture interests of two equal equity owners, Coastal and Minatura. Both parties were to be responsible for jointly providing capital and resources to an alluvial gold mining project in Ghana. Aburi was to then appoint a mining services contractor registered in Ghana, being Ghana Rae Gold Mines Limited ("Ghana Rae"), to

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[1] Affidavit of Tod Turley sworn May 17, 2013 (the "Turley Affidavit"), paragraph 9, Motion Record, page 13

[2] Affidavit of A. Thomas Griffis sworn May 8, 2013 (the "First Griffis Affidavit"), Exhibit M, Article 11.8

run the whole project including building the mine site, infrastructure, plant, equipment, etc., and then operate and mine the alluvial gold resources on the Mmpesem License (the "License"). The License was in the name of another Ghanaian company, being Romex Mining Ghana Limited ("Romex"), who was interested primarily in the hard rock deposits of the License. Romex was to grant the rights to mine such alluvial resources to Aburi in return for a 5% royalty paid from gold production.[3]

8. Minatura and Coastal were to be shareholders of Aburi, each holding a 50% participating interest in Aburi.[4]

9. Minatura's shares of Aburi were to be issued after an initial payment was made to Ghana Rae. While there is no dispute that this initial payment was made to Ghana Rae, it appears that the shares were never issued to Minatura.[5]

10. Minatura's share certificates, had they been issued as required, were to be placed in escrow with an escrow agent and released to Minatura once the conditions set out in section 7.3(a) of the Aburi Shareholders Agreement had been fulfilled, which condition included delivery of all of the Contributed Equipment (as defined in the Aburi Shareholders Agreement) to the Aburi property. As the share certificates were never issued, there were no share certificates to place in escrow with an escrow agent.[6]

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[3] Turley Affidavit, paragraph 10, Motion Record, page 13

[4] Turley Affidavit, paragraph 12, Motion Record, page 14

[5] Turley Affidavit, paragraph 13, Motion Record, page 14

[6] Affidavit of A. Thomas Griffis sworn May 22, 2013, (the "Second Griffis Affidavit"), paragraph 17, Responding Motion Record

11. Section 7.3(b) of the Aburi Shareholders Agreement provided that Coastal would obtain its initial 50% participating interest in Aburi upon providing Aburi with the following non-exhaustive list of assets:

(1) access to the Aburi property for alluvial mining;

(2) exclusive right of Aburi to alluvial mine the property; and

(3) all up-to-date and fully licensed environmental and alluvial mining permits to carry on the anticipated operation of the project.[7]

12. Section 7.4 of the Aburi Shareholders Agreement provides that the parties were to treat each participant as a 50% shareholder regardless of whether or not such corporate steps or other measures had been taken and the requisite shares issued.[8]

13. The Aburi Shareholders Agreement also provided that Coastal and Minatura were to appoint two directors each to Aburi's Board of Directors. Two appointees of each of Coastal and Minatura were initially appointed to the Board of Directors.[9]

The Aburi Control Dispute

14. The Aburi Shareholders Agreement provided that the Contributed Equipment was to be delivered by the "Equipment Delivery Date". "Equipment Delivery Date" is defined in the Aburi Shareholders Agreement as the date that is thirty (30) days after delivery of the Certificate

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[7] First Griffis Affidavit, Exhibit M, Article 7.3(b)

[8] Turley Affidavit, paragraph 14, Motion Record, page 15

[9] Turley Affidavit, paragraphs 15 and 16, Motion Record Page 15-16

specified in Schedule C of the Aburi Shareholders Agreement, confirming that the Ghana Environmental Protection Agency ("EPA") had issued the environmental license necessary to conduct production on the Aburi property and attaching a copy of such license.[10]

15. On or about October 29, 2012, Coastal delivered a certificate to Minatura which purported to attach the requisite environmental license. The 12-page environmental license attached to the certificate was dated October 24, 2012 and addressed to Romex and not Aburi (the latter fact being contrary to section 7.4 of the Aburi Shareholders Agreement).[11]

16. Moreover, on November 14, 2012, Minatura advised Coastal that the environmental license attached to the certificate was not compliant with the requirements of the Aburi Shareholders Agreement as paragraph 5.11.3 (on page 5) did not permit the haulage of gravel with heavy machinery (as would be required for a mine operation of the scope contemplated) by restricting such haulage to be done "manually with the aid of shovel and pick axes".[12] Accordingly, Minatura advised Coastal on November 14, 2012 that the certificate delivered by Couastal was non-compliant with the requirements of the Aburi Shareholders Agreement as it would not permit the mine to be operated in the intended and agreed upon manner.[13]

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[10] First Griffis Affidavit, Exhibit M, Article 7.3(a)

[11] Second Griffis Affidavit, Exhibit B

[12] Affidavit of Stanley Amarteifio sworn on May 17, 2013, (the "Amarteifio Affidavit") paragraph 13, page 4, Supplemental Motion Record.

[13] Second Griffis Affidavit, Exhibit B

17. On November 15, 2012, Coastal provided Minatura with a replacement of page 5 of the environmental licence with a revision to paragraph 5.11.3. It is unknown whether the EPA provided Coastal with a complete revised license.[14]

18. On November 26, 2012, Minatura advised Coastal that delivery of a single revised page of the environmental license was not sufficient to formally revise the environmental licence as it was not obtained in accordance with established procedures. Consequently, Minatura took the position that Coastal had not provided Minatura with a compliant environmental license.[15]

19. On November 29, 2012, Coastal provided Minatura with a notice of default wherein it stated that if the alleged failure to provide the Contributed Equipment by the Equipment Delivery Date was not cured within 20 days of the date of the delivery of the notice of default, the Aburi Shareholders Agreement would terminate and be of no further force and effect.[16]

20. On that same day, Minatura advised Coastal that Minatara's obligation to deliver the Contributed Equipment had not been triggered since Coastal had not delivered a compliant environmental licence.[17]

21. Notwithstanding Minatura's position, Coastal provided Minatura with a notice of termination on December 20, 2012 purporting to terminate the Aburi Shareholders Agreement.[18]

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[14] Response to Undertaking # 4 by Tod Turley

[15] Second Griffis Affidavit, Exhibit E

[16] Second Griffis Affidavit, Exhibit G

[17] Second Griffis Affidavit, Exhibit E

22. On December 21, 2012, Robert Griffis signed a resolution purporting to remove Minatura's appointees from Aburi's Board of Directors. Minatura's appointees were advised of their purported removal on January 10, 2013.[19] On the same date, Minatura reasserted its position that the Aburi Shareholders Agreement was improperly terminated and stated that Minatura's appointees were still directors.[20]

23. Minatura instructed its Ghanaian litigation counsel to commence a legal action in Ghana against Coastal as early as January 14, 2013.[21]

24. Prior to the commencement of Minatura's anticipated action by Minatura as against Coastal (and prior to the applicants obtaining the Initial Order), Coastal commenced an action in the Ontario Superior Court of Justice ("the Canadian Action") by statement of claim issued on February 12, 2013, against Minatura and related companies alleging, in part, that Minatura breached the terms of the Aburi Shareholders Agreement. Coastal alleged in the Canadian Action, *inter alia*, that the Aburi Shareholders Agreement was properly terminated on December 20, 2012 and of no force and effect. Minatura disagrees with that allegation.[22]

25. By Writ of Summons issued on April 10, 2013 in the Superior Court of Judicature in the High Court of Justice of Accra, Ghana (the "Ghanaian Action"), Minatura commenced an

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[18] Second Griffis Affidavit, Exhibit N

[19] Second Griffis Affidavit, Exhibit H

[20] Second Griffis Affidavit, Exhbit J

[21] Response to Undertaking # 3 by Tod Turley

[22] Turley Affidavit, paragraph 25, Motion Record, page 19; First Griffis Affidavit, Exhibit O

action against Coastal (naming Aburi as a nominal defendant). The Ghanaian Action is active and pending before the Ghanaian court.[23]

Issues in Dispute

26. Minatura is seeking the following relief in the Ghanaian Action: specific performance by Coastal of the provisions of the Aburi Shareholders Agreement; an order of injunction to restrain Coastal from carrying on the business of Aburi to the exclusion of Minatura; and an order that Coastal account to Minatura for income from and the exact nature of all transactions carried out by Coastal from the inception of Aburi.[24]

27. Minatura alleges in the Ghanaian Action that Coastal had breached the terms of the Aburi Shareholders Agreement. Moreover, Minatura alleges that Coastal improperly terminated the Aburi Shareholders Agreement and has wrongfully excluded Minatura's nominees from participating in the Board of Directors.[25]

28. By letter dated April 25, 2013 (being prior to the commencement of the CCAA proceedings), Minatura's lawyers wrote to Coastal's counsel in the Canadian Action to advise that Minatura would be seeking an order, *inter alia*, dismissing the Canadian Action for lack of jurisdiction.[26]

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[23] First Griffis Affidavit, Exhibit P

[24] Turley Affidavit, paragraph 27, Motion Record page 19

[25] Turley Affidavit, paragraph 28, Motion Record page 20

[26] Turley Affidavit, paragraph 30, Motion Record page 30

29. In light of the herein CCAA proceedings, the Canadian Action was stayed and as a result Minatura's jurisdictional motion in that action has neither been scheduled nor heard.[27]

Choice of Law and Forum Selection Provisions

30. Article 11.8 of the Aburi Shareholders Agreement provides that it shall be construed and governed by the laws of Ghana.[28]

31. Article 11.7 of the Aburi Shareholders Agreement contains forum selection provisions. In summary, that provision provides that:

(1) if any dispute or interpretative issue remains unresolved after the Participants attempt to resolve same amicably and the cumulative amount of the claim is less than $5,000,000, then any Participant may refer the dispute or issue only to arbitration pursuant to the rules of the International Commercial Arbitration Act of Ontario; or

(2) if any dispute or interpretative issue remains unresolved after the Participants attempt to resolve same amicably and the cumulative amount of the claim is more than $5,000,000, then the dispute or interpretative issue will be subject to adjudication in the Courts of Canada.[29]

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[27] Turley Affidavit, paragraph 34, Motion Record page 21

[28] Turley Affidavit, paragraph 23, Motion Record page 18

[29] Turley Affidavit, paragraph 24, Motion Record page 18

No Connection to Ontario

32. The issue of which of Minatura or Coastal are in breach, or breached, the Aburi Shareholder Agreement, needs to be determined in accordance with the laws of Ghana.[30]

33. There is a lack of a real and substantial connection between the Aburi Control Dispute and the Province of Ontario.[31]

34. The subject matter of the dispute involves shares, mining interests and properties located in Ghana.[32]

35. Coastal and Aburi are domiciled in Ghana and Minatura is domiciled in the British Virgin Islands. Minatura has a presence in Ghana – it does not have presence in Ontario.[33]

36. Aburi's books and records, which will be required in order to undertake an accounting should it be found that the Aburi Shareholders Agreement was terminated improperly, are all created in Ghana.[34]

37. Ghanaian law governs the interpretation of the Aburi Shareholders Agreement.

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[30] Turley Affidavit, paragraph 36, Motion Record page 21

[31] Turley Affidavit, paragraph 37, Motion Record page 21-22

[32] Turley Affidavit, paragraph 37, Motion Record page 21-22

[33] Turley Affidavit, paragraph 37, Motion Record page 21-22

[34] Turley Affidavit, paragraph 38, Motion Record page 22

38. The evidence of officials from both the Ghana EPA and Ghana's Minerals Commission will be required to confirm whether Coastal fulfilled its obligations under Article 7.3(b) of the Aburi Shareholders Agreement (i.e. whether Aburi has ever obtained the requisite alluvial mining rights and/or the requisite environmental license).[35] This is at issue especially considering that Ghanaian law, as summarized by Stanley Amerteifio in his affidavit sworn on May 24, 2013, states that an environmental license issued to Romex (assuming one was issued) was not legally transferrable to Aburi.[36] This summary of Ghanaian law is consistent with section 5.13.5 of the environmental permit which states that same is not transferrable. This summary of Ghanaian law is also consistent with section 5.2.2 of the environmental permit which requires notification be given to the EPA upon a change of ownership.[37]

39. As Coastal and Minatura also disagree on whether the purported correction made to the environmental permit on November 15, 2012 was made in accordance with established procedures, the evidence of officials from Ghana's EPA and the evidence of Ghanaian lawyers will be required.[38]

40. The evidence of officials from Ghana's Minerals Commission will also be required in order to determine whether Romex's alluvial mining permit was properly assigned to Aburi.[39] This is especially relevant considering the allegation now being made in paragraph 32

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[35] Turley Affidavit, paragraph 37, Motion Record page 21-22

[36] Amarteifio Affidavit, paragraph 15, Supplemental Motion Record page 4

[37] Second Griffis Affidavit, Exhibit B

[38] Turley Affidavit, paragraph 37, Motion Record page 21-22

[39] Turley Affidavit, paragraph 37, Motion Record page 21-22

of the First Report of the Monitor dated May 29, 2013 (the "First Report"), wherein it is stated that the alluvial mining rights are held by Ghana Gold Corporation for Coastal's benefit and that Aburi does not have any rights to mine at the property.[40] Assuming this allegation is accurate, Ghanaian law will be required to determine whether Minatura could have even been in breach of the Aburi Shareholders Agreement if Coastal had not fulfilled its pre-condition (being the requirement to provide an alluvial mining license to Aburi) to having a 50% participating interest in Aburi. This allegation conflicts with the terms of the Aburi Shareholders Agreement as well as the terms of the operating agreement between Romex and Aburi dated April 27, 2012 which is referenced in paragraph 33 of the First Report. Consequently, the evidence of Romex, a Ghanaian company, will also be required.

41. Issues relating to Coastal's unilateral exclusion of Minatura personnel from the Aburi Mining Property, and the appointed operators of the Aburi mining property, Ghana Rae Gold Mines Limited (also a Ghanaian company), need to be determined pursuant to the laws of Ghana.[41]

42. The evidence of Ghanaian regulatory officials will be required in order to determine if a new certificate was required to properly trigger the Equipment Delivery Date and whether the certificate provided by Coastal on October 29, 2012 was compliant. Since no new certificate from Coastal was delivered following the delivery of the original October 29, 2012

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[40] First Report of the Monitor, paragraph 32

[41] Turley Affidavit, paragraph 37, Motion Record page 21-22

certificate, it will need to be determined, pursuant to the laws of Ghana, whether Minatura's obligation to deliver the Contributed Equipment has therefore even been triggered.[42]

43. The laws of Ghana would also speak to various other issues, such as whether Coastal had the ability to unilaterally pledge or otherwise encumber Aburi's shares (if such a pledge or encumbrance was provided), whether Coastal's directors were able to unilaterally agree to Aburi's application under the CCAA, and other actions that were proscribed in the Aburi Shareholders Agreement.[43]

44. The relief sought by Minatura in the Ghanaian Action, as well as the anticipated orders likely to be sought within the CCAA application by the applicants (particularly through the SISP), even if granted by an Ontario court, will not be enforceable by the courts in Ghana.[44] Therefore, litigating the Aburi Control Dispute in Ontario is unnecessary and will have to be followed by identical proceedings in Ghana. Simply put, the assumption of jurisdiction by an Ontario court over the Aburi Control Dispute will serve only to increase the expense of the litigation by adding an unnecessary proceeding.

PART III – LAW AND ARGUMENT

45. The issue to be determined on this motion is whether an Ontario court has jurisdiction to hear and decide the Aburi Control Dispute, and even if Ontario may take

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[42] Turley Affidavit, paragraph 36, Motion Record page 21

[43] Turley Affidavit, paragraph 37, Motion Record page 21-22

[44] Amarteifio Affidavit, paragraph 18, Supplementary Motion Record page 5

jurisdiction, ought an Ontario court use its discretion to stay proceedings on the grounds of *forum non conveniens*.

46. There are also some preliminary issues that require resolution. These issues include:

(1) did the applicants fail to make full and fair disclosure of all material facts when seeking the Initial Order?

(2) does the CCAA even apply to Aburi?

(3) ought the Aburi Control Dispute be determined at this time based on the incomplete record currently before the court?

FAILURE TO MAKE FULL AND FAIR DISCLOSURE

47. On May 9, 2013, the applicants applied for, and obtained, protection from its creditors until June 8, 2013, or such later date as this Court may order (the "Stay Period") under the CCAA pursuant to the Initial Order.

48. Prior to obtaining the Initial Order, and prior to the commencement of both the Ghanaian Action and the Canadian Action, Coastal and Aburi were aware that Minatura was asserting that the Aburi Shareholders Agreement was improperly terminated, that it was a 50% shareholder of Aburi and that two of the directors of Aburi were designees of Minatura. The Court and the Monitor were not made aware of these material facts. No reference was made to these allegations in the affidavit evidence tendered in support of the application.

49. Moreover, and notwithstanding that the identity of Minatura's Canadian counsel was also known to Coastal at the time, the Initial Order was obtained without any notice to Minatura.

50. Rule 39.01(6) of the *Rules of Civil Procedure* provide that "where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application".

51. Minatura submits that this Honourable Court should set aside the Initial Order as it applies to Aburi and its property on the basis of the failure of the applicants to make full and fair disclosure of all material facts.

APPLICATION OF CCAA TO ABURI

52. Subsection 3(1) of the CCAA provides that it applies in respect of a debtor company "*or affiliated debtor companies*" if the total claims against the debtor company or the affiliated debtor companies is more than $5,000,000.00.

53. The CCAA does not define "affiliated debtor companies".

54. Section 3(2) of the CCAA defines "affiliated companies" as follows:

> (a) companies are affiliated if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
>
> (b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

55. Subsection 3(3) of the CCAA provides as follows:

> (3) **Company controlled** – For the purposes of this Act, a company is controlled by a person or by two or more companies if
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> (a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
>
> (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

56. Subsection 3(4) of the CCAA defines subsidiary as follows:

> (4) Subsidiary – For the purposes of this Act, a company is a subsidiary of another company if
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> (a) it is controlled by
>
> (i) that other company;
>
> (ii) that other company and one or more companies each of which is controlled by that other company, or
>
> (iii) two or more companies each of which is controlled by that other company; or
>
> (b) it is a subsidiary of a company that is a subsidiary of that other company.

57. The applicants herein have made the application herein on the basis that they are purported to be "affiliated debtor companies". That purported affiliation is based on the (disputed) contention by Coastal that it owns 100% of the shares of Aburi.[45] Aburi, however, is not a "debtor company". No evidence has been tendered with respect to Aburi's inability to satisfy its obligations as they generally become due. Nor is there any evidence of Aburi's assets

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[45] First Griffis Affidavit, paragraph 9

and property being under threat. Only the shares of Coastal, being both a "debtor company" and an "affiliated company", *may* have been pledged to FCMI.

58. The fundamental purpose of the CCAA is to facilitate compromises and arrangements between companies and their creditors and enable the continuance of the companies seeking CCAA protection. The legislation is remedial in nature and, as such, is entitled to a liberal interpretation. Justice Farley in *Re Lehndorff General Partners Ltd.* stated as follows:

> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors.[46]

59. As no evidence has been tendered by the applicants of Aburi's inability to satisfy its obligations as they generally become due, and no evidence has been tendered which purports to state that Aburi's assets and property are in jeopardy, Aburi ought not be an applicant in the herein CCAA proceedings.[47] A stay of proceedings as against Aburi is not essential. Aburi's

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[46] *Lehndorff General Partners Ltd (Re),* (1993) 17 C.B.R. (3d) 24 at paras. 6, 7 and 10

[47] Second Griffis Affidavit, paragraph 56

assets are not subject to any security interest in favour of the only identified secured creditor, FCMI Parent Co. ("FCMI").[48]

60. As it is the shares of Coastal, which *may* have been pledged to FCMI, that are at risk to FCMI, a stay of proceedings as against Coastal and its assets (including its shareholdings in Aburi) would adequately ensure the continued operation of the applicants' business. Coastal's shareholdings in Aburi, whatever percentage they may be, could still be sold in accordance with the SISP.[49]

PROCEDURE FOR DETERMINING THE ABURI CONTROL DISPUTE

61. Minatura disputes Coastal's contention that it owns 100% of the shares of Aburi; Minatura contends that it is the owner of 50% of the shares of Aburi.[50] Minatura also contends that it has the right to elect 50% of the board of directors of Aburi.[51] That entitlement is based on the terms of the Aburi Shareholders Agreement.

62. There is a real and subsisting dispute between Minatura and Coastal about whether the Aburi Shareholders Agreement has been breached by either party: both parties alleging that the other is in default. There is also a dispute as to the available remedies as a result of those alleged breaches. That dispute ought to be determined in the Ghanaian Action (which is

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[48] Turley Affidavit, paragraph 45, Motion Record, page 23

[49] Turley Affidavit, paragraph 63, Motion Record, page 27; Second Griffis Affidavit, paragraph 56, Responding Motion Record

[50] Turley Affidavit, paragraphs 7 and 8, Motion Record, page 12, Tab B

[51] *Ibid*, paragraphs 15 to 18, Motion Record, pages 15 and 16, Tab B

subsisting) and the determination of that dispute will establish, *inter alia*, whether Minatura has a 50% interest in the shares of Aburi and whether it has the right to elect 50% of the members of Aburi's board of directors (and therefore have a controlling vote in Aburi's management).

63. Minatura submits that, as the applicants' position with respect to its shareholdings and control of Aburi is unchanged, the matters at issue in this motion ought to be determined in two steps. The first step involves seeking a determination that the Aburi Control Dispute as between Coastal and Minatura be determined in Ghana within the already pending Ghanaian Action. Pending that determination, there ought to be an interim suspension of the herein CCAA proceedings as it applies to Aburi and its property. Such interim relief will be necessary whether the Aburi Control Dispute is determined in Ghana or Ontario or elsewhere.

64. The determination of the Aburi Control Dispute between Minatura and Coastal will resolve:

(1) whether Aburi is "affiliated" with the other applicant companies (by itself there is no evidence that it has claims against it totaling more than $5,000,000); and

(2) whether Aburi had consented to being an applicant in these CCAA proceedings.

65. If it is determined in the Aburi Control Dispute that Coastal's actions vis-à-vis Minatura's interests were improper, then it flows that Coastal did not have authority to make unilateral decisions for Aburi including the impugned decision to commence the CCAA proceedings and this Honourable Court must order the withdrawal of Aburi's application herein.

66. Given the basis of Coastal's opposition to the within motion, Minatura is seeking this Honourable Court's direction about how and in which forum the Aburi Control Dispute is to be determined.

67. Minatura respectfully submits that to deny it the opportunity to have a full trial (there are significant facts in dispute) would be to deny it procedural fairness/natural justice.

68. Due process entails a right to present one's case and to examine critically and comment on the case presented by the opposite party. It also requires adjudication (or at least the fair opportunity for adjudication) before an impartial adjudicator whose decision:

(a) must be based on properly presented evidence; and

(b) may be rendered only in accordance with the law.[52]

69. Numerous procedural safeguards are built into the civil procedure process to ensure fairness to the parties, including the right to counsel, the right to a full hearing, and the right to examinations for discovery and to full production of relevant documents. These are all manifestations of the rule of law and due process of law in their civil context.[53]

70. For the reasons that follow, Minatura submits that the Aburi Control Dispute should be determined before the Ghanaian Court, preferably in the Ghanaian Action.

CONFLICTS OF LAW - JURISDICTION AND *FORUM NON CONVENIENS*

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[52] Abrams and McGuiness, *Canadian Civil Procedure Law* (2008: Lexis Nexis Inc.) at para 1.17 [*Abrams*]

[53] *Ibid.* at para. 1.77

A. GENERALLY

71. The within motion raises issues about the fundamental principles of conflicts of laws, also known as "private international law". The Supreme Court of Canada has defined private international law thusly in its leading decision in *Club Resorts Ltd. v. Van Breda*: [54]

> Private international law is in essence domestic law, and it is designed to resolve conflicts between different jurisdictions, the legal systems or rules of different jurisdictions and decisions of courts of different jurisdictions. It consists of legal principles that apply in situations in which more than one court might claim jurisdiction, to which the law of more than one jurisdiction might apply or in which a court must determine whether it will recognize and enforce a foreign judgment or, in Canada, a judgment from another province.[55]

72. The Supreme Court of Canada identified three intertwined categories of issues in private international law: jurisdiction, *forum non conveniens* and the recognition of foreign judgments. None of those divisions of this branch of law can be safely analyzed and applied in isolation to the others.[56]

73. In terms of analysis, when an Ontario court is faced with whether it should entertain matters concerning private international law, the first step is to determine whether the court has jurisdiction to deal with the matter.[57]

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[54] *Club Resorts Ltd. v. Van Breda* (2012) 343 D.L.R. (4th) 577 [*Van Breda*].

[55] *Van Breda* at 589.

[56] *Ibid.*

[57] *Van Breda* at 608.

74. The question of jurisdiction, according to this Honourable Court, is a legal issue: "A court either has jurisdiction to hear a matter or it does not."[58]

75. If jurisdiction is established (in step 1 of the analysis), the litigation will proceed before the court of the forum *unless* the defendant (in our case Minatura) invokes *forum non conveniens*. If the respondent invokes *forum non conveniens* (as has been invoked done by Minatura in the within motion), the court's analysis proceeds to the second step – the determination of whether there is a clearly more appropriate forum in which to litigate the dispute.[59]

76. The question of *forum non conveniens* is a matter of discretion.[60] The factors to be considered by the court in the exercise of that discretion are set out below.

B. STEP 1 – THE ASSUMPTION OF JURISDICTION

77. The test for whether an Ontario court has jurisdiction to hear a particular dispute is whether there is a real and substantial connection between the dispute and the Ontario court.[61]

78. The application of the real and substantial connection test is not an exercise of discretion. According to the Supreme Court of Canada in *Van Breda:*

> The real and substantial connection test does not mean that problems of assumption of jurisdiction or other matters, such as choice of the proper law applicable to a situation or the recognition of

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[58] *Royal Bank of Canada v. DCM Erectors Inc.*, 2013 ONSC 2864 at paragraph 8. [*DCM Erectors*]

[59] *Van Breda* at 619.

[60] *DCM Erectors* at paragraph 8.

[61] *Van Breda* at pages 608 to 612.

> extraprovincial judgments, must be dealt with on a case-by-case basis by discretionary decisions of courts, which would determine, on the facts of each case, whether a sufficient connection with the forum has been established. Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely. Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts rule would be incompatible with certain key objectives of private international law.[62]

79. The *Van Breda* court continues that "the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up 'on the fly' on a case-by-case basis…there must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts."[63]

80. The following passage from *Van Breda* is particularly instructive:

> [74] The goal of the modern conflicts system is to facilitate exchange and communications between people in different jurisdictions that have different legal systems. In this sense, it rests on the principle of comity. But comity itself is a very flexible concept. It cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states and, in the Canadian context, respect for and deference to other provinces and their courts. Comity cannot subsist in private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships. Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system….
>
> [75] The development and evolution of the approaches to the assumption of jurisdiction reviewed above suggest that stability and predictability in this branch of the law of conflicts should turn

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[62] *Van Breda* at 608.

[63] *Ibid.* at 610.

primarily on the identification to the court that is seized of it….[64]

81. The *Van Breda* court held that identifying a set of relevant presumptive connecting factors and determining their legal nature and effect is required to bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction."[65]

82. Some (but not all) of the factors listed in rule 17.02 of the *Rules of Civil Procedure* contain presumptive factors that if present are sufficient for the Ontario Court to assume jurisdiction.[66]

83. The existence of the following factors from rule 17.02 have been recognized by the courts as presumptive factors for the assumption of jurisdiction:

(1) carrying on business in Ontario (rule 17.02(p));[67]

(2) the defendant is a resident in Ontario (rule 17.02(p));[68]

(3) the contract connected with the dispute was made in Ontario (rule 17.02(f)(i));[69]

84. Other presumptive connecting factors from rule 17.02 that may be relevant to this dispute include:

(1) whether the dispute involves property in Ontario (rule 17.02(a));

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[64] *Ibid.*

[65] *Ibid.* at 611.

[66] *Ibid.* at 613.

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.*

(2) whether the dispute involves the interpretation of a contract in respect to property in Ontario (rule 17.02(b));

(3) whether damage was sustained in Ontario (rule 17.02(h));

85. It must be borne in mind that the presumptive connectors, to the extent they exist, are rebuttable – the party challenging the presumption of jurisdiction "must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them."[70]

86. Minatura respectfully submits that there are no presumptive connecting factors that connect the dispute between Minatura and Coastal to the Ontario court. The following facts are relevant in that regard:

(1) Minatura is a British Virgin Islands company that does not carry on business in Ontario;

(2) Coastal is a Ghanaian company;

(3) Aburi is a Ghanaian company that does not carry on business in Ontario;

(4) Aburi's assets are located in Ghana and it has no property in Ontario;

(5) the Aburi Shareholders Agreement was not made in Ontario;

(6) Minatura's injury (for Coastal's breach of the Aburi Shareholders Agreement) was not sustained in Ontario;

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[70] *Ibid.* at 617.

(7) Coastal's alleged injury (if it is held that Minatura breached the Aburi Shareholders Agreement) was not sustained in Ontario;

87. The law is clear that if there are no recognized presumptive connecting factors, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. Moreover, the court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors: that, according to the *Van Breda* court, "would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system."[71]

88. It is submitted that no presumptive connecting factors are present and that the Ontario court does not have jurisdiction to determine this dispute.

C. STEP 2 – *FORUM NON CONVENIENS*

89. In the event that this Honourable Court does not accept Mintara's submissions regarding jurisdiction simpliciter, Minatura invokes *forum non conviens* to argue that Ghana is a clearly more appropriate forum to determine this dispute.

90. In order to succeed, Minatura must demonstrate:[72]

(1) that another forum exists that has an appropriate connection under conflict rules and that should be allowed to dispose of the dispute;

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[71] *Ibid* at 616.

[72] *Ibid.* at 619.

(2) that using the real and substantial connection analysis that the other forum has connections to the dispute; and

(3) that the proposed alternate forum should be preferred and considered to be more appropriate.

91. According to the *Van Breda* court:

> When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute.[73]

92. Unlike the test for the assumption of jurisdiction, the test for establishing *forum non conveniens* is based on the specific factors in a particular case to ensure that the parties are treated fairly and that the process for resolving their dispute is efficient.

93. The party invoking *forum non conveniens* must show that the alternative forum is clearly more appropriate.[74]

94. In deciding whether to apply *forum non conveniens* courts may consider the following factors:

(1) the applicable law of the contract; [75]

(2) the avoidance of a multiplicity of proceedings; [76]

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[73] *Ibid.* at 620.

[74] *Ibid.* at 621.

[75] *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 at 593 (Ont. C.A.) [*Muscatt*]; *DCM Erectors* at paragraph 8.

(3) geographical factors that suggest the natural forum; [77]

(4) the location of witnesses, especially key witnesses; [78]

(5) the location where the bulk of the evidence will come from; [79]

(6) the jurisdiction where the factual matters arose; [80]

(7) the place of business of the parties; [81] and

(8) the loss of a legitimate juridical advantage.

95. Minutara submits that the following factors point to Ghana as the clearly more appropriate forum to resolve the shareholders dispute between Minatura and Coastal:

(1) the Aburi Shareholders Agreement provides that it is governed pursuant to the laws of Ghana;

(2) the books and records of Aburi are all created in Ghana;

(3) the subject matter involves shares, mining interests and properties located in Ghana;

(4) Coastal and Aburi are domicile in Ghana. Minatura has a presence in Ghana;

(5) a key issue in the shareholders dispute deals with the interpretation of regulatory rules and provisions from the Ghanaian EPA, the Minerals Commissions and

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[76] *Muscutt* at 593.

[77] *Muscutt* at 593.

[78] *DCM Erectors* at paragraph 8.

[79] *DCM Erectors* at paragraph 8.

[80] *DCM Erectors* at paragraph 8.

[81] *DCM Erectors* at paragraph 8.

other bodies, whose presence as witnesses in the proceedings will be required along with the production of their documents;

(6) the key witnesses regarding whether the Aburi Shareholders Agreement was breached by one party or the other are located in Ghana. Ghanaian lawyers will also play a key role when making legal submissions in accordance with Ghana law given the governing law provisions contained in the Aburi Shareholders Agreement;

(7) there is a pending action in Ghana which will deal with the determination of the shareholders dispute between Minatura and Coastal;

(8) to have the dispute resolved here risks not only a multiplicity of proceedings dealing with the same issues but also a potential for contrary decisions;

(9) the Ghanaian Action preceded the within CCAA proceedings;

(10) the remedies that flow from the breaches of the Aburi Shareholders Agreement will be determined pursuant to Ghanaian law;

(11) orders made in the within proceedings will not be enforceable in Ghana;

(12) Ghana is clearly the natural forum for the determination of the shareholders dispute between Minatura and Coastal.

96. For the foregoing reasons Minatura submits that this Honourable Court (should it determine that it has jurisdiction) should exercise its discretion not to assume jurisdiction on the basis of *forum non conveniens* and allow the Aburi Control Dispute to be determined in Ghana in the Ghanaian Action.

97. The question of whether Aburi consented to being an applicant to the within proceedings or whether it is an "affiliate" of the other applicant companies can only be determined after the determination of the shareholders dispute in Ghana.

PART IV – ORDER REQUESTED

98. Minatura seeks an order temporarily suspending Aburi's application as a debtor company in the within CCAA proceedings pending a determination of the Aburi Control Dispute in the Ghanaian Action or as this Honourable Court may direct.

99. Minatura also seeks its costs of this motion on a substantial indemnity basis to be paid by Coastal.

All of which is respectfully submitted this 31st day of May, 2013 by

G. F. Camelino
of counsel for Minatura (BVI) Ltd.

S. Michael Citak
of counsel for Minatura (BVI) Ltd.

SCHEDULE "A"

List of cases relied upon by Minatura.

1. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R 24 (Ont. S.C.)

2. Excerpt from Abrams and McGuinness, *Canadian Civil Procedure Law*

3. *Van Breda v. Village Resorts Ltd.* (2012), 343 D.L.R. (4th) 577 (S.C.C.)

4. *Royal Bank of Canada v. DCM Erectors Inc.*, 2013 CLB 12571 (Ont. S.C.)

5. *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.)

SCHEDULE "B"

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rules 17.02, 39.01(6)**

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

Property in Ontario

(a) in respect of real or personal property in Ontario;

Administration of Estates

(b) in respect of the administration of the estate of a deceased person,

(i) in respect of real property in Ontario, or

(ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;

Interpretation of an Instrument

(c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,

(i) real or personal property in Ontario, or

(ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;

Trustee Where Assets Include Property in Ontario

(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

Mortgage on Property in Ontario

(e) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;

Contracts

(f) in respect of a contract where,

(i) the contract was made in Ontario,

(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,

(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or

(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;

Tort Committed in Ontario

(g) in respect of a tort committed in Ontario;

Damage Sustained in Ontario

(h) in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed;

Injunctions

(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario;

(j) REVOKED: O. Reg. 131/04, s. 9.

(k) REVOKED: O. Reg. 131/04, s. 9.

(l) REVOKED: O. Reg. 131/04, s. 9.

Judgment of Court Outside Ontario

(m) on a judgment of a court outside Ontario;

Authorized by Statute

(n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;

Necessary or Proper Party

(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;

Person Resident or Carrying on Business in Ontario

(p) against a person ordinarily resident or carrying on business in Ontario;

Counterclaim, Crossclaim or Third Party Claim

(q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

Taxes

(r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality. R.R.O. 1990, Reg. 194, r. 17.02; O. Reg. 171/98, s. 2; O. Reg. 131/04, s. 9.

39.01

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36**

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

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(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, C.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GHANA GOLD CORPORATION, GHANA GOLD INC., COASTAL EXPLORATIONS LIMITED AND ABURI GOLDFIELDS GHANA LTD.

Court File No. CV-13-10107-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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