SCANNED ON 4/11/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED J.S.C.

PART 60

Index Number : 601916/2006

FOSTER WHEELER IBERIA S.A.

vs

MAPFRE EMPRESAS S.A.S

Sequence Number : 001

DISMISS ACTION

FBEM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 30 2007
COUNTY CLERK'S OFFICE
NEW YORK

This motion is decided in accordance with the accompanying memorandum.

SO ORDERED

FILED
APR 10 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Dated: 3/29/07

BERNARD J. FRIED J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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FOSTER WHEELER IBERIA S.A. as successor to
FOSTER WHEELER ENERGIA S.A.,

Plaintiff,

-against-

Index No. 601916/06

MAPFRE EMPRESAS S.A.S. AND MAPFRE
INDUSTRIAL S.A.S.,

Defendants.

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FILED
APR 10 2007
COUNTY CLERK'S OFFICE
NEW YORK

APPEARANCES:

For Plaintiff:

McCarter & English, LLP
245 Park Avenue, 27th Floor
New York, NY 10167-0001
(Stephen H. Weisman)

For Defendants:

Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
(John L. Gardiner, Jeffrey Glekel)

FRIED, J.:

Plaintiff Foster Wheeler Iberia S.A. (FWISA), a Spanish company based in Madrid, claims that defendant Mapfre Empresas Compania de Seguros y Reasuguros, S.A., also known as Mapfre Empresas S.A.S. (Mapfre Empresas), a Spanish insurer, is obligated to provide coverage under a 2003 insurance policy issued to Foster Wheeler Energia S.A., FWISA's predecessor, also a Spanish company. FWISA's claims all stem from losses arising from an arbitration in Chile, which, in turn, relate to the construction of a power plant in Iquique, in northern Chile. None of these events and transactions involve or relate to New York

Mapfre Empresas, for itself and as legal successor to defendant Mapfre Industrial S.A.S. (Mapfre Industrial), now moves for an order dismissing the complaint

pursuant to CPLR 327, CPLR 3211 (a) (1), (2), (4) and (8), the parties' exclusive forum selection clause, and/or the doctrine of forum non conveniens. For the reasons set forth below, defendants' motion for dismissal on the ground of forum non conveniens is granted.

Plaintiff FWISA, a Spanish company based in Madrid, is the alleged successor to Foster Wheeler Energia S.A., another Madrid-based Spanish company (Complaint, ¶ 2). FWISA is a subsidiary of Foster Wheeler, Ltd., a Bermuda corporation headquartered in New Jersey (id., ¶ 3). However, none of the transactions referenced in the complaint pertain to that parent entity.

Mapfre Empresas is a Spanish company, headquartered in Madrid (id., ¶ 4). At all times prior to December 31, 2005, when it merged with Mapfre Empresas, Mapfre Industrial was likewise a Spanish company, headquartered in Madrid (id.). Mapfre Empresas is now the legal successor to Mapfre Industrial (Aff. of Juan Carlos Gonzales Canales, Mapfre Empresas' Director of Legal Procedure and Services, ¶ 2 [Glekel Aff., Exh C]). Mapfre Empresas and Mapfre Industrial have never been licensed to do business in New York, maintained any offices in New York, had any employees in New York, or owned real property in New York (id,. ¶¶ 3, 6).

On January 9, 2003, Mapfre Industrial issued a "General Liability Insurance Policy" No. 0969319701861 (the Policy) to FWISA (Complaint, ¶ 18; Glekel Aff., Exhs D-F). The Policy, which was written entirely in Spanish[1], states that is subject to Spanish insurance law:

The insurance contract is governed by the provisions of the

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[1] See Aff. Certifying Translations of Gaylene Ashby, Exh B.

> General Conditions, Declarations and Special Conditions and, unless otherwise agreed as being more advantageous for the Insured, by the Insurance Contract Act (Law no. 50/1980 of October 9) and the Law of Ranking and Supervision of Private Insurance Policies (Law 30/1995, of November 8) and the regulations implementing it (Royal Decree 2,486/98 of November 20).

Policy, Article 1.

The Policy also specifically excludes any coverage for North American risks:

> These guarantees will apply to projects and works the Insured undertakes throughout the world, except in the United States and Canada. Losses occurring in the United States and Canada and claims filed in those countries are excluded.

Id., Article 9.

The complaint alleges that, in 1995, FWISA became involved in a "turn key construction contract with Compania Electrica Tarapaca S.A. ('CELTA') for the construction of the Patache Thermal Power Plant in Ichique [sic], Chile" (the Chile Project) (Complaint, ¶ 14). Construction work on the Chile Project was assigned to a "joint venture" between FWISA and another foreign entity, Mecanica de la Pena S.A. (id.). That joint venture then allegedly subcontracted construction to yet another foreign entity, Constructora Odebrecht Chile S.A. (id.). Construction was finished in 1998 (id., ¶ 15).

FWISA claims that, in 2001, CELTA discovered construction defects in the power plant, and "commissioned a study to determine the cause(s) of the property damage" (id., ¶ 16). This study was undertaken by the Insitutio de Investigacion y Ensayes de Materiales (IDIEM), part of the University of Chile, and is in Spanish (Gonzalez Aff., ¶ 15).

The complaint refers to an arbitration proceeding brought against FWISA relating to the Chile Project (the Chile Arbitration) (Complaint, ¶ 17). CELTA's original arbitration notice, dated November 24, 2003, was written in Spanish and addressed to the Santiago, Chile offices of FWISA (see Glekel Aff., Exh G; see also Aff. Certifying Translations of Kirk Jackson, Exh H). The arbitration notice indicates on its face that CELTA's claim is being handled by Chilean counsel (id. at 2).

The complaint alleges that "FWISA requested coverage for its defense costs, and any indemnity costs, arising from the [Chile] Arbitration," and that "Mapfre wrongfully declined" such coverage (Complaint, ¶¶ 25-26; see also ¶¶ 19-24). With respect to this request for coverage, there have been a number of meetings and telephone conversations between the respective representatives of FWISA and Mapfre Empresas/Mapfre Industrial (Gonzalez Aff., ¶ 17). These discussions have occurred in Spain, with none directed to, or emanating from, New York (id.). The parties' two most recent letters, written in 2005, were exchanged between Madrid executives of FWISA and Mapfre Industrial, and were written in Spanish (id., ¶ 18).

On May 31, 2006, FWISA commenced these New York proceedings. Mapfre Empresas now moves to dismiss this action. As set forth below, I find that dismissal of this action is warranted pursuant to the doctrine of forum of non conveniens.

It is well settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York" (Martin v Mieth, 35 NY2d 414, 418 [1974]). The doctrine of forum non conveniens, codified in CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally

sound[2], would be better adjudicated elsewhere" (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 478-479 [1984], cert denied 469 US 1108 [1985]). The central focus of the forum non conveniens inquiry is to ensure that trial will be convenient, and will best serve the ends of justice (see Piper Aircraft Co. v Reyno, 454 US 235 [1981]; Capitol Currency Exch., N.V. v National Westminster Bank PLC, 155 F3d 603 [2d Cir 1998], cert denied 526 US 1067 [1999]). If the balance of conveniences indicates that trial in the plaintiff's chosen forum would be unnecessarily burdensome for the defendant or the court, then dismissal is proper (see id.).

New York courts consider the availability of an adequate alternative forum and certain other private and public interest factors when evaluating New York's nexus to a particular action, and deciding whether to dismiss an action on the grounds of forum non conveniens (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra). The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation (id; Highgate Pictures, Inc. v De Paul, 153 AD2d 126 [1st Dept 1990]). Although not every factor is necessarily articulated in every case, collectively, the courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: existence of an adequate

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For the purposes of CPLR 327 (a), I must assume that the court has personal jurisdiction over defendants (see Glaser v Kratz, 13 Misc 3d 1222(A) [Sup Ct, Nassau County 2006]; see also Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG, 23 AD3d 269 [1st Dept 2005]). In any event, although defendants also move to dismiss this action on the ground that they are not subject to the personal jurisdiction of the New York courts, because I am dismissing this action pursuant to CPLR 327, I need not decide the issue of whether jurisdiction exists over defendants (see Glaser v Kratz, 13 Misc 3d 1222(A), supra).

alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority of the witnesses; and the burden on New York courts (see Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra; World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153 [1st Dept 1996]; Evdokias v Oppenheimer, 123 AD2d 598 [2d Dept 1986]). A motion to dismiss on the ground of forum non conveniens is subject to the discretion of the trial court, and no one factor is controlling (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra; see also In re New York City Asbestos Litigation, 239 AD2d 303 [1st Dept 1997]).

The present action must be dismissed on the ground of forum non conveniens, because the number and weight of the relevant factors in this action center in Spain, and not in New York. This dispute is exclusively between Spanish corporations based in Madrid. All relevant facts and transactions occurred in Spain and/or Chile, and none in New York, and all witnesses and documents are located in Spain or Chile. Indeed, the insurance policy on which FWISA bases its claims was issued in Madrid, is governed by Spanish law, and, on its face, eschews any connection to New York by specifically excluding any U.S. risks (see Policy, Article 9). Where, as here, the action is almost entirely concerned with the events, institution and law of a foreign nation, "the action cannot be said to have a 'substantial nexus' with New York," and must be dismissed (Tetra Finance (HK) Ltd. v Patry, 115 AD2d 408, 410 [1st Dept 1985], appeal withdrawn 67 NY2d 758 [1986] [quotation marks and citation omitted]; see also Chawafaty v Chase Manhattan Bank, N.A., 288 AD2d 58, 58 [1st Dept 2001], lv denied 98 NY2d 607 [2002] ["(t)his action lacks a substantial connection to New York and would be burdensome to its courts"[).

Situs of the Transaction

The fact that the "transaction[s] out of which the cause of action arose occurred primarily in a foreign jurisdiction" weighs strongly in favor of dismissal on the ground of forum non conveniens (Islamic Republic of Iran v Pahlavi, 62 NY2d at 479; see also World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153, supra).

For example, in National Bank & Trust Co. of North America, Ltd. v Banco De Vizcaya, S.A. (72 NY2d 1005 [1988], cert denied 489 US 1067 [1989]), the Court of Appeals affirmed a forum non conveniens dismissal of an action concerning acts and representations which took place in Spain, and involved transactions between the Spanish offices of two banks, and where the principal non-Spanish element was a series of transactions involving sales of cement to Nigeria. Likewise, here, the fact that this dispute is between two Madrid companies[3], and concerns events in Spain or Chile, thus strongly favors a forum non conveniens dismissal (see Gonzalez v Victoria Lebensversicherung AG, 304 AD2d 427, 427 [1st Dept 2003], lv denied 1 NY3d 506 [2004] [motion court "properly concluded that New York was not a convenient forum for this litigation involving a contract entered into in Spain and entities, persons and events predominantly situated there"]; Hormel Intl. Corp. v Arthur Andersen & Co., 55 AD2d 905, 906 [2d Dept 1977] [dismissing under CPLR 327 where dispute concerned "the breach and negligent performance of a contract

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The fact that both parties are foreign also favors dismissal (see e.g. Wyser-Pratte Mgt. Co. v Babcock Borsig AG, 23 AD3d at 270 ["the fact that five of the nine defendants (were) German residents (was) entitled to, and was properly accorded, substantial weight" in dismissing under CPLR 327]).

initiated, negotiated and executed in Spain, and to be performed in Spain by defendant's Spanish personnel in (connection) with an investment in a firm organized under Spanish law and doing business in Spain"]; see also Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292, 294-295 [1st Dept 2005], lv denied 6 NY3d 703 [2006] [CPLR 327 favored dismissal where plaintiffs "claim(ed) entitlement to benefits from French banks while employed in Vietnam" and "New York's nexus to this matter not only fail(ed) to rise to the level of 'substantial,' but (was), in fact, barely discernable"]; Serano Ltd. v Canadian Imperial Bank of Commerce, 287 AD2d 309, 309 [1st Dept 2001] [forum non conveniens dismissal appropriate where "the action (was) virtually devoid of New York connections"]).

Moreover, this dispute implicates Spain's national interest in enforcing its own insurance laws (Aff. of Alberto Javier Tapia Hermida, Esq., ¶ 12 [Glekel Aff., Exh J] ["Under Spanish Law, the insurance industry is subject to numerous specific regulations that reflect the great importance that the Spanish legislative policy confers on the proper operation of the insurance market ...; in order to be effective these policies should be applied in a uniform and consistent fashion"]). This factor also strongly supports dismissal (see Finance & Trading Ltd. v Rhodia S.A., 28 AD3d 346, 347 [1st Dept], lv denied 7 NY3d 706 [2006] [CPLR 327 dismissal favored because France "clearly (had) an interest in regulating stock offerings of French companies on the Paris stock market"]; see also Union Homes Sav. & Loans Ltd. v Afri-Finance LLC, 16 AD3d 291, 291 [1st Dept 2005] [CPLR 327 dismissal favored where "the Nigerian government has a compelling interest in resolving the matter pursuant to its laws (concerning financial institutions)"]; Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d 171, 178 [1st Dept 2004] [reversing and dismissing where motion

court "failed to defer to India's interest in resolving its own affairs," including "the affairs of its financial institutions to insure uniformity and consistency in the processing of financial transactions and in the interpretation of Indian banking statutes and laws"]).

Burden on the New York Courts

"[O]ne factor which weighs in favor of dismissal on forum non conveniens grounds is the applicability of foreign law" (Phat Tan Nguyen v Banque Indosuez, 19 AD3d at 294; accord Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d at 178 ["(t)he applicability of foreign law is an important consideration in determining a forum non conveniens motion" and weighs against retention of the action]). For this reason, New York courts commonly dismiss actions that may require interpretation of foreign law (see e.g. Islamic Republic of Iran v Pahlavi, 62 NY2d at 480 ["likely applicability of Iranian law" supports dismissal on forum non conveniens grounds]; PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp., 25 AD3d 470, 471 [1st Dept 2006] [dismissal favored where "resolution of plaintiff's claims would involve consideration of Indonesian law"]; Tilleke & Gibbins Intl., Ltd. v Baker & McKenzie, 302 AD2d 328 [1st Dept 2003] [holding that action involving Thai evidence and applying Thai law would be inordinate burden upon a New York court]).

Here, the Policy is governed by Spanish insurance law, thus further favoring dismissal (see e.g. National Bank & Trust Co. of North America, Ltd. v Banco de Vizcaya, S.A., 72 NY2d at 1006 [affirming dismissal where "court would be obligated to apply Spanish law"]; Hormel Intl. Corp. v Arthur Andersen & Co., 55 AD2d at 906 [fact that Spanish law governed the action was "an important consideration" supporting CPLR 327

dismissal]).

Location of Witnesses and Relevant Documents

All likely witnesses in this action are Spanish speakers, residing outside New York. All of Mapfre Empresas/Mapfre Industrial's personnel involved in issuing or administering the Policy and/or handling the request for coverage reside and work in Spain, and speak in Spanish (Gonzalez Aff., ¶ 20), as do the FWISA executives who have been corresponding with Mapfre Empresas (id., ¶¶ 17-18). The preponderance of foreign witnesses strongly militates in favor of dismissal (see Finance & Trading Ltd. v Rhodia S.A., 28 AD3d at 347 [dismissal favored under CPLR 327 because "(t)he majority of ... witnesses would be French"]; Phat Tan Nguyen v Banque Indosuez, 19 AD3d at 295 [dismissal granted where "the majority of the witnesses (were) in France or Vietnam"]; Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d at 178 [upholding dismissal because "(a)ny witness with personal knowledge of the (transaction) is located overseas"]).

All of the relevant documents are also located outside New York. All of Mapfre Empresas's relevant files are in Spain (Gonzalez Aff., ¶ 19 ["(a)ll documents, files or electronic data in Mapfre Empresas's possession concerning the Policy and/or the Request (for coverage) ... are located in Spain ... (and) (n)o such documents, files or electronic data are located in New York"]), as likely are many FWISA documents. Other documents relating to the Chile Arbitration are likely located in Chile. Many, if not most, of the relevant documents will be in Spanish, including the Policy, the University of Chile report, and the pleadings in the Chile Arbitration. All of these facts support a forum non conveniens dismissal (see Finance & Trading Ltd. v Rhodia S.A., 8 AD3d at 347 [dismissal favored

where "the majority of the relevant documents ... would be French"]; Phat Tan Nguyen v Banque Indosuez, 19 AD3d at 295 [same holding where documents were "in French or Vietnamese"]; Braspetro Oil Serv. Co. v UK Guaranty & Bonding Corp., Ltd., 18 AD3d 291, 291 [1st Dept 2005] [favoring dismissal where most documents were "located in Brazil and Singapore"]; Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d at 178 [same holding where "(t)he complete written record of th(e) transaction (was) located in India, as (were) all documents and correspondence"]).

Despite FWISA's reference to possible unnamed "witnesses and documents ... in Chile and the United States" (FWISA Mem., at 23), such evidence is at best peripheral to the actual dispute, governed by Spanish insurance law, between two Spanish parties, and does not alter the conclusion that Spain is the most convenient forum (see e.g. SMT Shipmanagement & Transport Ltd. v Maritima Ordaz C.A., 2001 WL 930837, * 8 [SD NY 2001], affd sub nom. David J. Joseph Co. v M/V Baltic, 64 Fed Appx 259 [2d Cir 2003] [as the testimony of U.S. witnesses was "peripheral compared to the evidence located in Venezuela," dismissal was warranted]; Oil Basins Ltd. v Broken Hill Proprietary Co., Ltd., 613 F Supp 483, 489 [SD NY 1985] [possibility that one Virginia witness might testify on "at best, only tangentially" related matters did not outweigh convenience of Australia, where most witnesses resided]; Globalvest Mgt. Co. L.P. v Citibank, N.A., 7 Misc 3d 1023(A) [Sup Ct, NY County 2005] [presence of two U.S. witnesses did not outweigh convenience of Brazil]).

Adequate Alternative Forum

Although the availability of an alternative forum is not a "prerequisite" to a

forum non conveniens dismissal, New York courts consider it a "most important factor" (Islamic Republic of Iran v Pahlavi, 62 NY2d at 481). Numerous courts have consistently held that Spain is an adequate forum for the resolution of disputes (see e.g Kryvicky v Scandinavian Airlines Sys., 807 F2d 514, 516-517 [6th Cir 1986] [affirming lower court's finding that courts of Spain were an "adequate alternate forum"]; North America Promotions, Ltd. v Ficodesa (Magefesa Group), 2003 WL 22532810 [ND Ill 2003] [same]; see also Tapia Aff, ¶¶ 17-23 [demonstrating that Spanish courts have the ability to gather evidence, and hear and determine a dispute]). Thus, Spain is an available, more appropriate alternative forum, lending further support for dismissal of the action.

I reject FWISA's claim that Spain "is no more convenient a forum" than a New York court because "FWISA's alleged underlying liability arises from Chilean law, not Spanish law" (FWISA Mem., at 2), and "Spanish courts possess no more expertise than this Court in applying Chilean law" (id. at 24). This argument ignores the facts that: (1) the actual dispute between the parties – coverage under the Policy -- is governed by Spanish law; (2) any Chilean issues are subsidiary to the Spanish law dispute over the Policy; and (3) as FWISA concedes, Spain possesses "an interest in enforcing its insurance policies among Spanish entities" (id. at 19).

In addition, Chile is a Spanish-speaking country, and Chilean law is based on Spanish law (see Panama R. Co. v Rock, 266 US 209 [1924]). Thus, rather than supporting retention of this case, the potential presence of Chilean issues favors dismissal in favor of a Spanish-speaking forum (see e.g. Lorca, Castillo S.A.C. v Pettibone Corp., 1982 US Dist LEXIS 13480 [ND Ill 1982] [in choice between U.S. and Chilean forum, preponderance of

Spanish-peaking witnesses, Spanish language documents and Chilean law issues favored forum non conveniens dismissal]). It is thus clear that Spain is far better suited than New York, legally, linguistically, and culturally, to resolve any Chilean issues.

Upon balancing the appropriate factors, Mapfre Empresas has sustained its burden of showing that the end of justice and the convenience of the parties will be best served if this action is heard in Spain. Accordingly, Mapfre Empresas's motion for dismissal on the ground of forum non conveniens is granted, conditioned upon defendants' consent to jurisdiction in the courts of either Spain or Chile (see Trinity Investment Trust L.L.C. v Morgan Guaranty Trust Co. of New York, 275 AD2d 661 [1st Dept 2000] [affirming motion court's grant of motion to dismiss on forum non conveniens grounds, conditioned upon defendants' consent to jurisdiction in the courts of Japan]). In light of this determination, Mapfre Empresas's alternative motions for dismissal on the grounds of lack of personal jurisdiction and an exclusive forum selection clause are denied as moot.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court, conditioned upon defendants' consent to jurisdiction in the courts of either Spain or Chile; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 3/29/07

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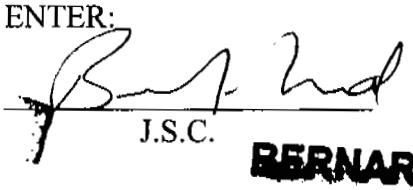

J.S.C.

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J.S.C.

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