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

PRESENT: HON. CAROL EDMEAD Justice PART 35

Kuwaiti Engineering Group

INDEX NO. 600033/05

MOTION DATE 1/10/07

- v -

MOTION SEQ. NO. 002

Consortium International

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for dismissal of amended complaint

	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 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Safege Consulting Engineers to dismiss the amended complaint is granted on the ground of *forum non conveniens* and the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 3/15/07

HON. CAROL EDMEAD J.S.C.

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

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 35

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KUWAITI ENGINEERING GROUP,

Index No. 600033/05

Plaintiff,

-against-

DECISION/ORDER

CONSORTIUM OF INTERNATIONAL CONSULTANTS, LLC and SAFEGE CONSULTING ENGINEERS,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Factual and Procedural Background

Following Iraq's invasion and occupation of Kuwait, in 1991 the United Nations established the United Nations Commission and Compensation Fund ("UNCC") to receive and review claims submitted by victims of the invasion and disburse compensation to successful claimants.

The plaintiff, Kuwaiti Engineering Group ("plaintiff" or "KEG"), is a Kuwaiti engineering company that provides, *inter alia*, design, architecture, damage assessment, and claims preparation services. Defendant Safege, a French corporation ("defendant" or "Safege"), nonparty Ecology and Environment, Inc. ("E&E"), a New York corporation, and nonparty RSK Environment Ltd. ("RSK"), a United Kingdom corporation, all provide environmental monitoring services. Defendant Consortium of International Consultants, LLC ("CIC") is a Delaware LLC.[1] CIC was created in 2001 pursuant to a Consortium Agreement between

[1] CIC is a Delaware Limited Liability Company, with its principal place of business located in Virginia (Aff. of David H. Alexander, dated January 18, 2007). Although CIC is a named defendant, the amended complaint contains no claims against CIC and no damages are sought against CIC.

defendant Safege, E&E and RSK, in order to bid on contracts to administer Kuwait's monitoring and assessment programs, which were necessary to support Kuwait's damage claims to the UNCC.

CIC successfully bid on a project to provide monitoring and assessment studies to the Kuwaiti Public Authority for Assessment of Compensation for Damages Resulting from Iraqi Aggression ("Kuwaiti PAAC"). On January 14, 2002, Kuwaiti PAAC and CIC entered into three Environmental Service Agreements ("ESAs"), whereby CIC was assigned responsibility for three "Clusters" of studies. CIC subsequently assigned "Cluster 2" to defendant Safege, which was to be performed in Kuwait.

On January 24, 2002, representatives and counsel for Safege and E&E (CIC's managing partner) met in E&E's Buffalo, New York offices to discuss Safege's performance of Cluster #2, and began to negotiate on a Master Technical Services Agreement (the "MTSA"). After a series of meetings (discussed below), the MTSA was executed on January 17, 2003 in Kuwait. Plaintiff was not a signatory to this agreement.

The stated purpose of the MTSA was:

> to define the terms of the collaboration and the relationships among each of the Consultants [defendant Safege, E&E, and RSK, collectively] and [defendant] CIC, and how each of the Consultants and CIC interact with PAAC . . . and other third parties, as well as the relationships between the Consultants themselves in connection with the performance of (i) each [ESA] . . . concerning Cluster #2. . . .

According to Paragraph 2(A)(4) of the MTSA, entitled "Kuwait Engineering Group,"

> RSK, E&E and [defendant] Safege agree that in the course of implementing the various portions of the Services hereto assigned by CIC to E&E, Safege and RSK . . ., that they will agree to utilize the services of [plaintiff] Kuwait Engineering Group ("KEG") to obtain the services of non-North Americans and/or non-European Union workers.

Thereafter, on March 11, 2003, defendant CIC and the plaintiff KEG entered into two letter agreements concerning the local labor to be provided for the work related to the ESAs. In the "First KEG Agreement," the parties confirmed the previous understanding between CIC and KEG

> for KEG to provide local labor to CIC's member companies for the work they are undertaking in connection with the [ESAs] Cluster #2 . . . E&E agreed at the time of the proposal preparation that they would employ non-western labor via KEG.

The "Second KEG Agreement" "confirmed the previous understanding between defendant CIC and KEG for sponsorship and with [plaintiff's principal] Othman Al-Rashed individually as CIC's agent. The Second KEG Agreement discussed Al-Rashed's agent's fee, and KEG's role to provide sponsorship for all Kuwaiti labor, equipment, and facilities, and fees for such services. The First and Second KEG Agreements were "subject to the laws of Kuwait."

On March 14, 2003, Safege advised E&E that it had appointed its own sponsor in Kuwait and that it would not use KEG with respect to carrying out the projects in Kuwait. The letter stated that Safege "clearly expressed Safege's intention to appoint its own sponsor at the meeting held in London on December 19, 2002" because its interests "have not been defended properly by CIC's current sponsor" (*see* letter dated March 14, 2003).

As a result, plaintiff commenced the instant action.

Amended Complaint

Plaintiff claims that Safege breached the MTSA when it refused to use the plaintiff as CIC's local agent in Kuwait and appointed Fouad Alghanim as its local agent in Kuwait. Second, the plaintiff claims that Safege tortiously interfered with the MTSA, the First KEG Agreement, and the Second KEG Agreement when it refused to use the plaintiff as its

agent/sponsor with respect to carrying out any of the projects in Kuwait, and when it induced the other CIC members not to use the plaintiff as their agent/sponsor for the projects in Kuwait. Also, the plaintiff claims that Safege tortiously interfered with the MTSA and the Second KEG Agreement when it appointed an agent/sponsor other than the plaintiff for the projects in Kuwait.

Motion

Defendant, Safege, moved to dismiss plaintiff's amended complaint based on lack of personal jurisdiction, *forum non conveniens*, or alternatively based on the plaintiff's failure to plead a cause of action, pursuant to CPLR 3211(a)(8), CPLR 327, or CPLR 3211(a)(7), respectively. The plaintiff opposed the motion, and cross-moved for discovery and a preliminary hearing. Both defendants Safege and CIC opposed the plaintiff's cross-motion.

By interim order, dated March 30, 2006, the Court granted the cross-motion, and held the motion to dismiss in abeyance pending further discovery (related to the issue of personal jurisdiction).[2]

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[2] The Court's prior decision stated:

Plaintiff . . . seeks to establish long arm jurisdiction over Safege under CPLR 302 (a)(1). . . .CPLR 302 (a)(1) provides that a court may exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, "transacts any business" within the State, provided that the cause of action arises out of the transaction of business. . . .To determine whether a party has "transacted business" in New York a court must consider "the totality of circumstances when determining the existence of purposeful activity. Thus, it has been held that the statutory test may be satisfied by a showing of other purposeful acts performed by the defendant in New York in relation to the contract, albeit preliminary or subsequent to its execution, even when the last act marking the formal execution of a contract may not have occurred within New York. . . .

The Court must consider various factors in determining whether a nondomicilliary has transacted business, including: (1) whether the defendant has an on-going contractual relationship with a New York corporation; (2) whether the defendant negotiated or executed a contract in New York, and whether the defendant visited New York after executing the contract for the purpose of meeting with the parties to the contract regarding the relationship; and (3) what the choice of law is in any such contract . . . .

[T]he MTSA demonstrates that Safege has an on-going contractual relationship with a New York corporation, namely E&E. Further, whether Safege negotiated a contract in New York, and whether Safege visited New York after executing the contract for the purpose of meeting with the parties to the contract regarding its relationship with E&E and the MTSA is evident from the record. . . . However, such contract negotiations in New York will satisfy §302(a)(1) if the discussions "substantially advanced" or were "essential to" the formation of the contract or advanced the business relationship to a more solid level. . . . Discovery, as well as a hearing, are

Upon the completion of such discovery, plaintiff and defendant submitted supplemental affirmations in support of dismissal.[3]

As to the claim of lack of personal "long arm" jurisdiction, Safege contends that the depositions and documentary discovery fail to establish jurisdiction. Neither the correspondence and telephone calls between Safege and persons in New York, nor Safege's physical presence at New York meetings, are sufficient to establish jurisdiction. Safege argues that the MTSA includes but a single reference to plaintiff, *to wit*: Section 2(A)(4), that forms the basis of plaintiff's claim. And, Section 2(A)(4) was not a result of meetings in New York, but included in draft agreements for the first time as a result of e-mail correspondence and telephone conversations at a time when the Safege representatives were in France. Nor does the deposition testimony of plaintiff, E&E representatives, or Safege support a finding of jurisdiction.

Furthermore, plaintiff cannot base its jurisdiction claim on the reference to plaintiff in Paragraph C of Exhibit G to the MTSA. Exhibit G simply reflects the manner in which expenses would be allocated among the members of CIC in the event plaintiff was used to provide certain office staff and services to CIC. Further, there is no evidence that Exhibit G was discussed at the New York meetings. Moreover, the allocation of expenses CIC paid plaintiff for office expenses

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footnote 2, cont'd.

necessary to determine whether the meetings in New York concerned issues critical to the advancement of the MTSA, whether or not the terms of the MTSA discussed in New York were already fixed or established before in New York, and whether the terms of the MTSA discussed at the New York meetings relate to plaintiff's claim against Safege. . . . The Court notes that although there is a Delaware choice of law provision in the MTSA, such factor is not dispositive. Nor is the fact that the New York arbitration clause included in the MTSA, which militates against jurisdiction, or that the MTSA was signed in Kuwait, dispositive (internal citations omitted).

[3] The parties agreed to permit the Court to resolve the motions in the absence of a hearing.

and staff support for the CIC office in Kuwait has nothing to do with the issue of non-Western labor mentioned in Paragraph 2(A)(4) that is the subject of this action.

Nor may plaintiff rely on documents concerning compensation to be paid to an "agent" to support jurisdiction. The agency fee that was paid by CIC for winning the underlying bid in Kuwait had nothing to do with the non-Western labor issue at issue in the complaint. And, the documents regarding the "agent" referred to Othman Al-Rashed, not to plaintiff, and thus, any claim that the agency fee was unpaid belongs to Mr. Al-Rashed, and not the plaintiff. Thus, any references in the documents or in meetings to an "agent" are irrelevant to the issue of establishing jurisdiction over Safege with respect to plaintiff's claim in this action.

Furthermore, as to the First and Second KEG Agreements, Safege asserts that it was not a party to these contracts, and that these contracts were not negotiated during any meetings in Buffalo at which Safege was present.

Moreover, plaintiff cannot prove that Safege's contacts with New York satisfy the constitutional standards of due process necessary to subject Safege to personal jurisdiction in New York.

As to dismissal on the ground of *forum non conveniens,*[4] Safege contends that dismissal is warranted pursuant to CPLR 327(a) "in the interest of substantial justice" because the action has no substantive nexus with New York. Safege contends that (1) Safege and plaintiff are not New York residents; (2) there is potential hardship to Safege in defending the action in New York since none of the evidence is located in New York, and all non-party witnesses are in Kuwait, beyond the subpoena power of this court; (3) there exists an alternative, adequate forum

[4] Defendant relies on its earlier briefs on the *forum non conveniens* issue, which bears repeating herein.

to hear plaintiff's claims, namely France or Kuwait, in which Safege is amenable to service; (4) the cause of action, *i.e.*, Safege's failure to use KEG as its local agent, and injuries to plaintiff arose in Kuwait; (5) the Court will need to apply foreign law to both the MTSA and the First and Second KEG Agreements, in light of their respective choice of law provisions; and (6) maintaining this action will burden a New York court since none of the parties are New York residents, the causes of action arose outside of New York, and Safege has no substantial contact with New York.

As to Safege's argument that plaintiff failed to state a cause of action against Safege for breach of the MTSA, plaintiff is not a party to the MTSA and cannot demonstrate that it is an intended beneficiary of this agreement. Safege argues that under the MTSA, plaintiff was to merely assist Safege in performing this agreement, and as such, cannot claim that it was an intended beneficiary thereunder. Also, CIC never waived its right to recover from Safege for any breach of the MTSA, and neither CIC nor Safege intended for the plaintiff to enforce the MTSA.

As to the plaintiff's tortious interference claim, Safege contends that the plaintiff failed to allege that Safege acted with an intention to harm the plaintiff without economic or another lawful excuse as required to maintain such claim. Also, plaintiff cannot maintain a claim for tortious interference with the MTSA, since plaintiff is not a party to the MTSA and Safege, a party to the MTSA, cannot be sued for tortiously interfering with its own contract.

Plaintiff's Opposition

Plaintiff argues that dismissal of the complaint against Safege based on *forum non conveniens* is unwarranted. Although Safege is not a New York resident, Safege "clearly saw a benefit" to selecting New York as the forum for disputes under the MTSA arbitration clause, and

that Safege has various contacts to New York. Also, KEG's principal, Mr. Al-Rashed, has a home in New York and has traveled to New York on a regular basis, especially during the MTSA negotiations. In any event, Safege's and KEG's numerous contacts with New York make up for the fact that neither entity is a New York resident.

Also, Safege's alleged hardship in defending this case in New York is without merit since, again, Safege selected New York as the forum to resolve disputes under the MTSA arbitration clause. Also, the majority of potential witnesses in this case are associated with E&E, a New York company, and are therefore subject to New York subpoena power. Moreover, since Safege was able to bring its employees to New York for the MTSA negotiations, and it is a large corporation with ample resources, bringing these same employees as potential witnesses to New York would not create a hardship. In addition, the plaintiff remarks that since Safege failed to identify the potential non-party witnesses in this case located in Kuwait, Safege cannot claim hardship if these witnesses were required to come to New York.

The plaintiff further contends that Kuwait and France are not adequate alternative forums, and pursuing this case in Kuwait or France would "severely prejudice" the plaintiff. Since plaintiff's counsel has taken the case on a contingency fee basis, and neither France nor Kuwait allow contingency fees, the plaintiff argues that it would be severely prejudiced if it were forced to litigate this case in these forums. Additionally, these forums do not allow for jury trials in commercial and civil matters, mandatory discovery, or punitive damages. Also, the filing fees to litigate this case in Kuwait are significantly larger than those in New York.

Plaintiff next contends that based on the contacts between Safege and New York, the plaintiff's causes of action arose in New York. Further, although the First and Second KEG

Agreements and the MTSA are governed by Kuwait and Delaware law, respectively, this court may maintain this action and apply these foreign laws. The plaintiff also avers that this action involves an "ordinary breach of contract dispute" by a party which has sufficient contacts to New York, and therefore, this action will not unduly burden this court. Plaintiff also urges the Court to consider the parties' use of a forum selection clause, which establishes that Safege intended to resolve any disputes under the MTSA in New York and not in France or Kuwait. Further, given that the facts related to Safege's breach of the First and Second KEG Agreements are directly related to its breach of the MTSA, the MTSA's forum selection clause also applies to the First and Second KEG Agreements.

In plaintiff's supplemental opposition to the motion to dismiss, plaintiff adds that the contacts by defendant Safege with New York, including various meetings attended by Safege in New York in January 2002, March 2002, and June 2002, numerous emails in 2002 and 2003, the MTSA, and the deposition testimony of representatives from Safege, E&E, CIC, and plaintiff demonstrates that the contacts by Safege with New York "substantially advanced" or were "essential to" the formation of the MTSA or advanced the business relationship to a more solid level. Thus, the Court has personal jurisdiction over defendant Safege pursuant to CPLR 302(a)(1) as a result of transacting business in New York. Further, the discovery demonstrates that the meetings in New York concerned issues critical to the advancement of the MTSA and demonstrates that the terms of the MTSA discussed at the New York meetings relate to plaintiff's claim against Safege.

Finally, plaintiff contends that the complaint sufficiently states a cause of action. As to its first cause of action for Safege's alleged breach of the MTSA, the MTSA shows that KEG is

specifically mentioned in Paragraph 2(A)(4) of the MTSA and the parties intended to benefit the plaintiff by appointing the plaintiff as the local agent in Kuwait. The plaintiff asserts that the parties had this intent because the plaintiff introduced Safege to E&E, and aided CIC in procuring the ESAs with the Kuwaiti government. Also, the plaintiff argues that the parties' intent to benefit KEG is further evidenced by two letters from CIC, dated August 21, 2001 and February 28, 2002, which confirmed KEG's status as CIC's local agent in Kuwait.

Plaintiff also contends that its second cause of action alleging Safege's tortious interference with the MTSA, the First KEG Agreement, and the Second KEG Agreement, sufficiently alleges: (1) the existence of a contract, *i.e.*, the MTSA and both KEG Agreements; (2) Safege had knowledge of all three contracts; (3) Safege breached all three contracts by appointing another entity as its local agent in Kuwait, and then inducing the remaining parties to the contracts not to use KEG as their agent in Kuwait; and (4) it has been damaged by Safege's interference in the amount of $5 million.[5]

Analysis

Personal "Long Arm" Jurisdiction

Pursuant to CPLR 302(a)(1), a court may exercise personal jurisdiction over an out-of-state defendant if that defendant "transacts any business within the state" and if the cause of action "arises from" those contacts (*Kahn Lucas Lancaster, Inc. v Lark Intern. Ltd.*, 956 F Supp 1131 [SDNY 1997] [*citing CutCo Indus., Inc. v Naughton,* 806 F 2d 361, 365 [2d Cir 1986]).

As to the first prong of section 302(a)(1), New York courts have held that conducting

[5] The plaintiff does not provide any arguments relating to its cause of action to receive an accounting of Safege's finances.

contractual negotiations by phone, fax or mail, in and of itself, with a party in New York, does not constitute the transaction of business within the state (*see Glassman v Hyder*, 23 NY2d 354, 361-63, 296 NYS2d 783, 788-89 [1968] [negotiations by telephone only]; *Success Marketing Electronics, Inc. v Titan Security, Inc.*, 204 AD2d 711, 612 NYS2d 451 [2d Dept 1994] [contract negotiated entirely by mail or facsimile]; *Spectra Prods., Inc. v Indian River Citrus Specialties, Inc.*, 144 AD2d 832, 833-34, 534 NYS2d 570, 572 [3d Dept 1988] [negotiations were by phone or mail and no meetings were held in New York]; *Paradise Prods. Corp. v Allmark Equipment Co., Inc.*, 138 AD2d 470, 471-72, 526 NYS2d 119, 121 [2d Dept 1988] [interstate negotiations by telephone alone insufficient to subject defendant to jurisdiction]; *Cooperstein v Pan-Oceanic Marine, Inc.*, 124 AD2d 632, 633, 507 NYS2d 893, 894 [2d Dept 1986], *leave to appeal denied*, 69 NY2d 611, 517 NYS2d 1025 [1987] [all negotiations were by telephone, and the contract was mailed to defendant in Florida]; Vincent C. Alexander, 1996 Supplemental Practice Commentary to § 302, at C302:10 ["courts seem generally loath to uphold jurisdiction under the 'transaction in New York' prong of CPLR 302(a)(1) if the contract at issue was negotiated *solely* by mail, telephone and fax without any New York presence by the defendant"]).

However, contrary to defendant's contentions, telephone contact can, in rare cases, constitute "transacting business" in the state if the defendant actively "projects" itself into New York events, such as by actively participating in a New York art auction by telephone (*Parke-Bernet Galleries, Inc. v Franklyn*, 26 NY2d 13, 308 NYS2d 337 [1970] [where defendant projected himself into the auction room in New York, by telephone, in order to compete with the other prospective purchasers who were there, such "activity far exceeded the simple placing of an order by telephone]).

In a recent First Department case, entitled *Fischbarg v Doucet* (2007 WL 738410, *7, 2007 NY Slip Op 01964 [1st Dept 2007]), defendant, Suzanne Doucet, a California resident, was the president of Only New Age Music, Inc. (ONAM), a California corporation. In 2001, plaintiff Gabriel Fischbarg, an attorney who lived and worked in New York, received a call from Ms. Doucet. Mr. Fischbarg agreed to pursue potential claims for copyright infringement that ONAM may have had against Allegro Corporation ("Allegro"). Thereafter, Ms. Doucet sent, *inter alia*, contracts and copyrighted material regarding the fraudulent and infringement allegations against Allegro. Ms. Doucet also informed Mr. Fischbarg that she thought ONAM might have to cancel their agreements with Allegro and confiscate certain unauthorized reproductions of ONAM's property. In May 2001, Allegro sued Ms. Doucet and ONAM in federal district court in Oregon, and Mr. Fischbarg represented them. However, Mr. Fischbarg physically never appeared in Oregon and performed all of his work in New York, by telephone. After a fee dispute, Ms. Doucet and ONAM discharged Mr. Fischbarg, who then sought an order from the Oregon court in the pending litigation for the payment his fees. When the Oregon court held that it did not have personal or subject matter jurisdiction over the fee dispute, Mr. Fischbarg brought an action in New York to recover the fees.

Ms. Doucet and ONAM argued that they were not subject to jurisdiction in New York under the long arm statute because they never physically came to New York or physically met with plaintiff, plaintiff was retained by a California corporation with respect to a claim against it by an Oregon corporation, and plaintiff conducted a portion of ONAM's defense in an Oregon federal court. In affirming the IAS Court's determination that it had personal jurisdiction over Ms. Doucet and ONAM under the long arm statute CPLR 302(a)(1), the First Department stated:

> Defendants [Ms. Doucet and ONAM] sought out plaintiff . . .in New York to perform legal services. At the time plaintiff was retained, it was not known . . . that the litigation would take place in an Oregon court. . . .Throughout plaintiff's representation, defendants made frequent phone calls to plaintiff in New York, and sent their e-mails and fax communications to him in New York. They made their payments to plaintiff's office in New York, where they consulted plaintiff about their lawsuit . . . . [T]he contacts by Ms. Doucet and ONAM with plaintiff, their New York counsel, were neither insubstantial nor sporadic. By working with plaintiff on a consistent basis during the period in question, defendants "transacted business" in New York sufficient to subject themselves to this State's jurisdiction over them in this fee dispute.

In the instant matter, the Court concludes that plaintiff sufficiently demonstrated that the contract negotiations, including physical meetings in New York coupled with Safege's email correspondence sent to New York, "substantially advanced" or were "essential to" the formation of the MTSA, or advanced the business relationship of the parties to a more solid level (*see Kahn Lucas Lancaster, Inc. v Lark Intern. Ltd.*, 956 F Supp 1131 [SDNY 1997]; *ICC Primex Plastics Corp. v LA/ES Laminati Estrusi Termoplastici S.P.A.*, 775 F Supp 650, 655 [SDNY 1991]; *see also NW Direct Design & Mfg., Inc. v Global Brand Marketing, Inc.*, 1999 WL 493348, at *3 [SDNY July 12, 1999]; *Mayer v Josiah Wedgwood & Sons, Ltd.*, 601 F Supp 1523, 1531 [SDNY1985]; *Goldstein v CTT Mobile Management Servs., Inc.*, No. 84 Civ. 824, 1985 WL 321, at *4 [SDNY Feb. 26, 1985]; *Klagsbrun v Ross*, 1995 WL 43664 [SDNY]).

From January 11, 2002 through February 14, 2003, representatives from Safege emailed E&E representatives in New York on numerous occasions to discuss various issues regarding the MTSA. Further, Safege representatives met with E&E representatives in New York in January 2002, March 2002, and June 2002, to negotiate the terms of the MTSA.

The visits to New York were for the purpose of negotiating the terms of the MTSA. Specifically, at the four-day meeting in January 2002, the members of CIC discussed the scope of

work for Safege and E&E within Cluster #2, the contract amount for each member, the manner in which major decisions by CIC related to Cluster #2 would be made, and for "the preparation of our internal agreement" (Dubreuil email to E&E representatives; Minutes of Meeting, March 22, 23, 24 and 25, 2002). According to the deposition testimony of David Alexander, counsel for E&E, the members of CIC discussed the need to have an internal document, which materialized into the MTSA (EBT page 52).

The purposes of the March 2002 meetings were to discuss, *inter alia*, "common management of the CIC Cluster 2 bank account," "insurances," "CIC Koweiti tax exemption and extension to each partner," and the "CIC consortium agreement and Master Technical Service agreement." (Dubreuil email to E&E representatives). The Minutes of the March 21 and 22, 2002 meetings indicate that the members of CIC discussed banking arrangements, CIC's payment to its agent in Kuwait, insurance certificates, the MTSA and amendment No. 1 to the Consortium Agreement, contract amount for Cluster #2, a CIC member communication schedule, and the preparation of documents. According to the deposition testimony of David Alexander, one of the main purposes of the March 2002 meetings was to discuss the MTSA (EBT page 22). The minutes of the meeting also indicate that "E&E requested that Safege and RSK utilize the services of INRM or KEG for providing supplemental technical services on a priority basis . . . ." (Revised Minutes of Meeting March 21 and 22, 2002 ¶ 10).[6] However, according to Mr. Dubreuil, there was no discussion of the provision of non-western labor in Kuwait (EBT page

[6] E&E's principal, Gerald Strobel, testified that neither the MTSA nor the issue of providing non-Western labor was discussed at the January or March 2002 meetings. Mr. Strobel further testified that the MTSA was discussed at the June 2002 meetings, and that he "believe[d]" that the June 2002 meetings advanced the formation of the MTSA.

42).

Thereafter, numerous emails were exchanged to and from Mr. Dubreuil of Safege and E&E representatives regarding the minutes of the meeting and the MTSA.[7] With respect to plaintiff, Dubreuil included the following comment, among many others, on his email to E&E representatives on May 29, 2002: "We agree to hire KEG personnel when necessary and at a reasonable cost." And, according to his email on June 19, 2002 to E&E representatives, as to "KEG," Mr. Dubreuil "understood the problem during our recent phone conversation. We will investigate together a solution in Buffalo." Mr. Dubreuil testified at his deposition that "we were still not in agreement on the financials, so KEG may have been discussed but it certainly was not . . . not resolved." (EBT page 99).[8]

Subsequently, representatives from Safege and E&E, and plaintiff's principal, attended the meetings in June 2002 to further negotiate the MTSA. Mr. Alexander stated that he believed one of the purposes of the June 2002 meeting(s) was to discuss unresolved issues about the MTSA, as well as the project itself. (EBT pages 74, 86, 222). According to the deposition testimony of Mr. Dubreuil, "the subject of the Kuwaiti Engineering Group was raised [at these meetings] but that subject was secondary to our financial concerns . . . it was raised but it was not dealt within [sic] full." (EBT page 168). E&E's principal, Gerald Strobel, also testified that the issue of plaintiff providing non-North American services was discussed. Mr. Strobel also

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[7] The deposition testimony of Jean-Marie Dubreuil for Safege indicates that the "bulk of the discussions that took place surrounding the MTSA were by e-mail."

[8] Mr. Dubeuil testified that "there was no discussion" as to whether plaintiff should be mentioned in the MTSA, and that "KEG was included in the MTSA agreement by E&E sometime in May or June of 2002." (EBT page 151). Mr. Dubreuil further stated that the "subject of the Kuwaiti Engineering Group was raised but that subject was secondary to our financial concerns." (EBT page 168).

testified that the MTSA was discussed at the June 2002 meetings, and that the June 2002 meetings advanced the final formation of the MTSA and advanced the business relationship between the various parties to a more solid level (EBT page 8). Further, the discussions at the June 2002 meetings related to plaintiff and the issue of plaintiff providing non-Western and/or non-European labor. (EBT pages 13-15). Mr. Alexander stated that some "progress" was made with regard to the terms of the MTSA which addressed plaintiff's participation. Moreover, Mr. Strobel testified that the discussions in New York were essential to the ultimate completion of the MTSA, as they were "a part of the succession of steps . . ." (EBT page 16). Yet, Mr. Strobel stated that he did not "honestly" "think" that "it" was a necessary part of the MTSA. (EBT page 28).

Although Mr. Alexander testified that the key issues in the MTSA and Section 2(A)(4) were not resolved until the January 2003 meeting in Kuwait, and the record demonstrates that practically all of the discussions during the New York meeting involved financial and governance issues of the MTSA, it cannot be said that the MTSA itself was not advanced by the meetings in New York. And, that plaintiff or plaintiff's services were not mentioned during the January 2002 meetings is not dispositive.

Although defendant Safege maintains that communications through email are insufficient to confer jurisdiction over it, it has been observed that technological advances in communication, such as email, "enable a party to transact enormous volumes of business within a state without physically entering it" (*Deutsche Bank Securities, Inc. v. Montana Bd. of Investments* 7 NY3d 65, 850 NE2d 1140 [2006]). The Court of Appeals has in the past recognized CPLR 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and

telephonic means to project themselves into New York to conduct business transactions (*see e.g., Deutsche Bank Securities, Inc. v Montana Bd. of Investments*, *supra citing Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 308 NYS2d 337 [1970]; *Ehrlich-Bober & Co. v University of Houston,* 49 NY2d 574, 427 NYS2d 604 [1980]). Further, the Court's decision does not rest solely upon the email communications from Safege to E&E in New York, but on the fact that high level employees of Safege conducted negotiations of many terms of the MTSA in New York, in addition to negotiating such terms through email.

Based on the submissions, the Court concludes that the negotiations in New York, though emails sent to E&E representatives and meetings in New York "substantially advanced" or were "essential to" the formation of the MTSA, and advanced the business relationship of the parties to a more solid level.

As to the second prong of section 302(a)(1), the "arising under" requirement, "a claim arises out of a party's transaction of business in New York if there is a 'substantial nexus' between the transaction of business and the cause of action sued upon."

Plaintiff's action rests primarily upon the terms of the MTSA, in which the RSK, E&E and defendant Safege agreed to utilize the services of plaintiff to obtain the services of non-North Americans and/or non-European Union workers. In its amended complaint, plaintiff claims that Safege breached the MTSA when it refused to use the plaintiff as CIC's local agent in Kuwait. Accordingly, there is a substantial nexus between plaintiff's claim for breach of contract and the MTSA, which was negotiated at meetings in New York and through emails sent to individuals in New York.

Furthermore, exercising jurisdiction over Safege would not offend the Fourteenth Amendment requirement of due process.

A State may exercise personal jurisdiction over a non-domiciliary defendant provided that it has certain "minimum contacts" with the forum "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice" (*International Shoe Co. v Washington,* 326 US 310, 66 SCt 154 [1945]). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" *(Hanson v Denckla*, 357 US 235, 253, 78 SCt 1228 [1958]). In *World-Wide Volkswagen Corp. v Woodson* (444 US 286, 100 SCt 559 [1980]), the Court stated that "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." Thus, it has been held that where the defendant has "deliberately" engaged in significant activities within a State or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well (*Burger King Corp. v Rudzewicz,* 471 US 462, 475, 105 SCt 2174 [1985]).

Here, the physical presence of high-level officers of Safege to negotiate the terms of the MTSA constitutes purposeful availment of the privileges and benefits of New York law (*see NW Direct Design & Mfg., Inc.*, 1999 WL 493348 [SDNY][physical presence of high-level officers of defendant to negotiate and execute a contract constitutes purposeful availment of the privileges and benefits of New York law]). Safege purposefully sought out the services of CIC's

managing partner, E&E, a New York corporation, *via* E&E's counsel, also located in New York, in order to solidify the consortium among CIC members and to establish a governing document under which members of the CIC would operate. Here, Safege purposefully directed its activities toward New York - the State in which the managing partner of CIC, of which Safege was a member, was headquartered. Safege entered into a meaningful contractual relationship with that New York entity, E&E, which culminated in an agreement which serves the basis of this action. Although E&E is not the party commencing this litigation, having allegedly breached the terms of such contract, Safege cannot claim surprise at having to litigate in New York for its conduct (*see, Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 806 NYS2d 84 [2d Dept 2005] [internal citations omitted]).

Where a defendant is found to have "purposefully. . .directed [its] activities at forum residents . . . [it] must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210 [2000] *citing Burger King Corp. v Rudzewicz,* 471 US at 477, *supra*]; *Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 806 NYS2d 84 [2d Dept 2005]; *see JDC Finance Company I, L.P. v Patton*, 284 AD2d 164, 727 NYS2d 71 [1st Dept 2001]). "Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the 'fundamental substantive social policies' of another forum may be accommodated through application of the forum's choice-of-law rules" (*Burger King Corp. v Rudzewicz*, 471 US 462, 105 SCt 2174 [1985]; *see also LaMarca v Pak-Mor Mfg.*

Co., 95 NY2d 210, *supra*).[9]

Here, defendant Safege failed to establish that the maintenance of this action against it in New York would be unreasonable. Any potential clash of New York's law with the "fundamental substantive social policies" of another forum, such as Kuwait or France, may be accommodated through the application of the forum's choice-of-law rules in the parties' agreements. Further, Safege failed to establish the potential hardship to litigating this action in New York (*infra*, page 22).

Accordingly, this Court finds that it has personal jurisdiction over defendant Safege, and that dismissal of this action for lack of jurisdiction lacks merit.

Forum Non Conveniens

Notwithstanding the above, this Court finds that "in the interest of substantial justice the action should be heard in another forum" (*see* CPLR 327[a]; *Islamic Republic v Pahlavi*, 62 NY2d 474, 478-79, 478 NYS2d 597, *cert denied* 469 US 1108, 105 SCt 783, 83 LEd2d 778).

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[9] Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts *may* be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice" (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 806 NYS2d 84 [2d Dept 2005] [citing *Burger King Corp. v Rudzewicz, supra* at 476, 105 SCt 2174; *see International Shoe Co. v Washington, supra* at 320, 66 SCt 154; *LaMarca v Pak-Mor Mfg. Co., supra* at 217, 713 NYS2d 304). Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies" (*World-Wide Volkswagen Corp. v Woodson*, 444 US at 292, supra). Although some courts have applied such factors in their due process analysis, "these considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required" (*see, e.g., Keeton v Hustler Magazine, Inc., supra*, 465 US at 780; *McGee v International Life Insurance Co.*, 355 US at 223-24, supra). Here, the required showing of minimum contacts has been satisfied.

CPLR 327(a) states:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Though no one factor is controlling, the factors to be considered on such a motion include: (1) the burden on the New York courts, (2) the potential hardship to the defendant, (3) the unavailability of an alternative forum in which plaintiff may bring suit, (4) that both parties to the action are nonresidents, and (5) that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*Shin-Etsu Chemical Co., Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d 171, 777 NYS2d 69 [1st Dept 2004] *citing Islamic Republic of Iran v Pahlavi,* 62 NY2d 474, 479, 478 NYS2d 597 *cert. denied* 469 US 1108, 105 SCt 783).

"The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (62 NY2d, *supra,* at 479, 478 NYS2d 597; *Yoshida Print. Co., Ltd. v Aiba,* 213 AD2d 275, 624 NYS2d 128).

As to the burden on the New York courts, it has been held that "our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York" (*Silver v Great Amer. Ins. Co.*, 29 NY2d 356, 361, 328 NYS2d 398). New York's interest in the subject matter of this action is practically non-existent as plaintiff seeks damages solely from a French company for a project to be undertaken in Kuwait. The alleged breach of contract claim stems from plaintiff's obligation to procure the services of "non-North Americans." New York hardly has an interest in adjudicating a dispute,

the matter of which does not involve New York residents. Thus, the instant dispute between plaintiff and defendants has no substantial nexus to New York.

However, the potential hardship to the defendant Safege is not as apparent. Although the documentary evidence is located outside of New York, such discovery can be sent to New York with facility. Further, the potential hardship created by the fact that non-party witnesses in Kuwait are beyond the subpoena power of this Court would have also existed in the event of an arbitration in New York between the parties to the MTSA. In this regard, although "live" testimony is not ordinarily taken, and discovery is very limited during an arbitration proceeding, the potential for such evidence is not uncommon (*see e.g., Matter of Sedlis (Gertler)*, 161 AD2d 228, 554 NYS2d 614 [1st Dept 1990]; *Integrated Sales, Inc. v Maxell Corp. of America*, 94 AD2d 221, 463 NYS2d 809 [1st Dept 1983]).

Yet, it is undisputed that that there are alternative forums, namely Kuwait and France, in which plaintiff may bring suit. "Ordinarily, [the] requirement [of an adequate alternative forum] will be satisfied when the defendant is 'amenable to process' in the other jurisdiction.... [However,] dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute" (*Shin-Etsu Chemical Co., Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d 171, *citing Piper Aircraft Co. v Reyno*, 454 US 235, 254 n. 22, 102 SCt 25). Here, it is undisputed that Safege, with its principal place of business located in France, and with offices located in Kuwait, can be sued in either France or Kuwait. While it is unclear from the record as to whether Kuwaiti courts permit litigation in its courts of breach of contract and tort

actions,[10] French law recognizes general causes of action for breach of contract and tort-related claims such as those alleged herein (Aff. of David Freedman ¶3). The Court also notes that contrary to plaintiff's contentions, contingent fees are permitted under Kuwaiti law. And, plaintiff's claims that punitive damages cannot be pursued in France, that the filing fees in Kuwait are exorbitant, and that jury trials is unavailable in Kuwait, may make New York a seductive draw, but do not render France courts inadequate or unavailable to adjudicate the plaintiff's breach of contract and tortious interference claims.

Further, the most significant factor in the equation, *i.e.*, whether the plaintiff resides in New York (*Cadet v Short Line Terminal Agency, Inc.*, 173 AD2d 270 [1st Dept 1991]), does not tip strongly in plaintiff's favor. In fact, none of the parties in this action are residents of New York. It is undisputed that plaintiff is a Kuwaiti company, and that Safege, the real party in interest, is a French corporation. CIC, a nominal defendant, is a Delaware corporation, with its principal place of business located in Virginia. That one of the members of CIC, *i.e.*, E&E, is a New York corporation is of no moment with respect to this factor. E&E is not a named party, and plaintiff asserts no claim against E&E in its amended complaint. Further, E&E is not the entity who allegedly committed the offending conduct.

Finally, the transaction out of which plaintiff's causes of action arose occurred primarily in a foreign jurisdiction. At the core of plaintiff's action is defendant Safege's alleged failure to

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[10] The Court's research reveals that under the 1959 Law Regulating the Judiciary, "Kuwaiti courts are competent to hear all disputes concerning personal status, and civil, criminal and commercial matters" (www.law.emory.edu/IFL/legal/kuwait). There "is a one main General Court in Kuwait city and another three Courts in the providences of Kuwait. The "main" court reviews disputes of all types and claimed amounts and "consists of many chambers, *i.e.*, internal court panels, each of which preside for a specific legal field, e.g., civil, commercial, lease, criminal, administrative, labour, family matters etc." (www.libralawfirm.com/legalsystem.asp.)

use plaintiff as a local agent in Kuwait for services to be performed in Kuwait.

Therefore, although the Court may exercise "long arm" jurisdiction over defendant Safege, the Court finds that dismissal of the amended complaint is warranted on the ground of *forum non conveniens*.

Failure to Plead a Cause of Action

In light of the above, the Court does not reach the merits of defendant Safege's claim that the complaint fails to state a cause of action.

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Safegé to dismiss the amended complaint is granted on the ground of *forum non conveniens* and the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: March 15, 2007

Hon. Carol Robinson Edmead, J.S.C.