SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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STRABAG SPA,

Plaintiff,

- v -

CREDIT AGRICOLE CIB,

Defendant.

INDEX NO. 650865/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 31, 39, 40, 41, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, it is

Plaintiff Strabag, SpA, (Strabag), the contractor, moves pursuant to CPLR article 63 for a preliminary injunction enjoining and restraining defendant Crédit Agricole CIB (Bank), located in New York, from honoring any effort by the project owner Alto Maipo (Owner)[1] to draw funds from the Bank's standby letter of credit because there is no legitimate reason for such a draw down, according to Strabag.

Background

The purpose of the project at issue "is to convey water through the tunnels and into the powerhouses where it is run through the turbines and power is generated" to supply power to Santiago Chile. (NYSCEF 56, Norberto Corredor[2] aff ¶¶8, 22.) The

[1] Owner's motion to intervene as a defendant in this action was granted. (NYSCEF Doc. No. [NYSCEF] 65, March 6, 2023 Order.)

[2] Corredor is the General Manager of the Owner. (NYSCEF 56, Corredor aff ¶ 4.) His affidavit is filed in support of the motion to intervene (motion sequence number 002).

Owner engaged Strabag "to design, engineer, and construct a portion of the [Owner's Hydroelectric Power Project in Chile]" (the Project). (*Id*. ¶ 9.) In August 2022, Strabag declared substantial completion. (NYSCEF 127, Strabag November 17, 2022 letter.) On December 2, 2022, the Owner informed Strabag it disputed that Strabag had achieved Substantial Completion and refused to grant Strabag any relief from liquidated damages. (NYSCEF 128, December 2, 2022, Owner's Letter to Strabag.) December 31, 2022 is the Guaranteed Critical Milestone Date (GCMD) for Strabag's Substantial Completion of Critical Milestones D and E, after which the Owner may drawdown on the $90 million letter of credit issued pursuant to the February 19, 2018 Amended and Restated Lump Sum Fixed Price Tunnel Complex Construction Contract (the Contract) if Strabag owes liquidated damages for the delay. (NYSCEF 120, Contract § 6.4.4, §7.1.3.2; NYSCEF 19, Table 1 to Appendix A of Contract at 5-6 [$6 to $7 million monthly for Critical Milestone D and $4 to $5 million monthly for Critical Milestone E].) Otherwise, the background of this case is set forth in the comprehensive March 3, 2023 Order of International Chamber of Commerce (ICC) Emergency Arbitrator van Hooft (NYSCEF 77, Arbitration Order), and will not be repeated here except as necessary to the decision.

Contentions

The Owner seeks to draw down $16 million on the letter of credit because Strabag allegedly owes liquidated damages for Strabag's alleged failure to complete milestones D and E on the Project prior to December 31, 2022, the GCMD. According to the Owner, the Project is completely shut down and no longer generating electricity or revenue which is entirely Strabag's fault. (NYSCEF 56, Corredor aff ¶ 79.) The Owner

insists that Strabag cannot achieve substantial completion until (1) tests are performed and (2) Strabag repairs two partial tunnel collapses. The Owner opines that the water tests cannot be performed because of the collapsed tunnels, not because of lack of water. (*Id.* ¶ 49.)

The Owner intends to continue to draw on the letter of credit of $90 million. (NYSCEF 56, Norberto Corredor aff ¶ 68.) The Owner contends that "[t]he actual losses incurred by Alto Maipo as a direct result of the Project shutdown exceed the applicable and incurred [Late Critical Milestone Payments] for Critical Milestone D ($6 million per month) and Critical Milestone E ($4 million per month)." (*Id*. ¶ 66.) As a result of the shutdown, the Owner "suffered losses in excess of $10 million in January and is projecting losses of more than $16 million for February 2023 alone." (*Id*. ¶ 67.)

Strabag counters that the Owner's proposed drawdown on the letter of credit is fraudulent because Strabag achieved substantial completion under the Contract. Strabag also objects to the Owner's assertion that the collapsed tunnels demonstrate Strabag's failure to achieve substantial completion. Rather, Strabag asserts that the collapses were not discovered until the end of the year, [3] long after the Owner had taken control of the Project in March 2022.[4] Moreover, Strabag insists that it achieved

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[3] The Owner identified a damaged tunnel or partial collapse on December 29, 2022. (NYSCEF 56, Corredor aff ¶¶ 27-34.) A second tunnel collapse was identified in January 2023. (*Id*.¶ 35-36)

[4] The Owner "agreed to issue Critical Milestone Work Transfer Notices for Critical Milestones D, E, and F on 2 May 2022. The issuance of these notices transferred care, custody, control, operation and maintenance of Critical Milestones D, E, and F and the risk of all loss to Alto Maipo." (NYSCEF 1, Complaint 39; NYSCEF 102, March 25, 2022 Email from J. Dib (President of the Owner), re Alto Maipo – 3 Units Reached Commercial Operation Date (COD per NYSCEF 120, Contract at 9/146) ["Alto Maipo is now providing carbon free energy to the country and will play a critical role in

substantial completion before the tunnel collapses which occurred during the subsequent warranty period, not prior to substantial completion. Alternatively, Strabag asserts that delays caused by lack of water excuse both substantial completion and liquidated damages under the Contract.

The requirements for Strabag's substantial completion are delineated in § 7.1.1.1 of the Contract which provides:

> "'Substantial Completion' of any Critical Milestone shall be achieved when each of the following conditions (the 'Critical Milestone Substantial Completion Conditions') have been met:
>
> (a) Contractor has completed performance of all of the Work related to such Critical Milestone Work, except for any remaining items set forth in the Punch List and the Warranty work, and such Critical Milestone Work is capable of safe and reliable operation in accordance with all Applicable Laws and Good Industry Practices;
>
> (b) Contractor has completed and Owner has accepted as completed, each of the Acceptance Tests required to be performed by Contractor prior to the applicable Guaranteed Critical Milestone Date in accordance with Section 8.2; provided, that Contractor shall not be required to perform any wet tests and Acceptance Tests at the time of Substantial Completion of Critical Milestones A 1, A2, B1 , B2, and C (as defined in Appendix A), it being understood that wet tests and Acceptance Tests shall be performed in connection with Critical Milestones D, E, and F prior to Substantial Completion thereof;
>
> (c) with the exception of the remaining items set forth in the Punch List agreed or determined pursuant to Section 7.2.2, all portions of such Critical Milestone Work have been substantially completed and can be safely and reliably used for their intended purposes in accordance with all Applicable Laws, and all portions of such Critical Milestone Work can

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accelerating the decarbonization of Chile"]; NYSCEF 103, April 14, 2022 Email from Alcala, re Alto Maipo – Alfalfal II Unit 1 Reached COD.

legally and safely be operated or utilized for their intended purposes, including emergency operations;

(d) Contractor has performed all of its obligations pursuant to Section 2.16.2 with respect to such Critical Milestone Work, except to the extent set forth in the Punch List;

(e) The Punch List Amount has been defined pursuant to Section 7.2.4 and Contractor has delivered the Punch List / Warranty Security in accordance with Article 15; and

(f) Owner has delivered a Critical Milestone Substantial Completion Certificate to Contractor pursuant to Section 7.1.1.3 with respect to such Critical Milestone Work."

(NYSCEF 120, Contract at 86.[5])

Analysis

For injunctive relief under CPLR 6301, the movant must establish likelihood of success on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party. (*Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012] [citations omitted].) "A preliminary injunction should not be granted unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification." (*O'Hara v Corporate Audit Co.*, 161 AD2d 309, 310 [1st Dept 1990] [citations omitted].)

On February 15, 2023, the Owner initiated an arbitration proceeding before the ICC pursuant to the Contract. (NYSCEF 72, Email confirming filing; NYSCEF 120, Contract § 18.) While Strabag moves under CPLR 6301, Strabag's request for a TRO and preliminary injunction is effectively in support of that arbitration pursuant to CPLR

[5] NYSCEF pagination.

7502.[6] Accordingly, there will be no inconsistent adjudications because this court is not deciding the ultimate issues before the ICC.

To secure its performance of this now eleven-year project, Strabag agreed to a $200 million letter of credit as performance security in 2018.[7] (NYSCEF 117, Mario Theurl[8] aff ¶ 24; NYSCEF 120, Contract §§ 6.4.4, 6.4.5, 15.7.1; NYSCEF 1, compl. ¶ 14.) On May 17, 2018, the Bank issued the Letter of Credit currently at issue in this dispute which provides:

> "13. THIS LETTER OF CREDIT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE TERMS OF THE INTERNATIONAL STANDBY PRACTICES ('ISP98') . . . . AS TO MATTERS NOT GOVERNED BY THE ISP98, THIS LETTER OF CREDIT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, INCLUDING, WITHOUT LIMITATION, THE UNIFORM COMMERCIAL CODE AS IN EFFECT IN THE STATE OF NEW YORK."

(NYSCEF 116, Letter of Credit at 8-10.)

The draw may be made for one of six permitted reasons. (*Id*. at 11.) The relevant reason for the drawdown here is "THE BENEFICIARY IS PERMITTED TO DO SO IN ACCORDANCE WITH SECTION 15.3.4 OF THE CONTRACT." (*Id*. at 11.) Section 15.3.4 provides that the Owner

> "may draw on the [Letter of Credit] (a) to pay any Late Critical Milestone Payments owed and unpaid by Contractor or (b) in case of any Contractor Event of Default in an aggregate amount not to exceed the amount that Owner

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[6] In addition to the three prongs standard under article 63, the standard under CPLR 7502(c) is whether "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." (*Project Orange Assoc., LLC v General Elec. Intl.*, 23 Misc 3d 764 [Sup Ct, NY County 2009].)

[7] The letter of credit has since been reduced to $90 million. (NYSCEF 117, Theurl aff ¶ 25.)

[8] Theurl is Strabag's General Manager. (NYSCEF 117, Theurl aff ¶ 1.)

> reasonably believes would be payable to it in respect of all of its remedies hereunder."

(NYSCEF 120, Contract at 126.)

Strabag challenges the Owner's right to a late Critical Milestone Payment, or any payment for that matter, because Strabag insists it either achieved substantial completion or substantial completion is excused due to lack of water to conduct testing or because the Owner took control of the Project.[9] Strabag's responsibilities to achieve substantial completion are set forth in § 7.1.1.1 of the Contract, which is set forth in full above. However, under the independence principle the Bank is not involved in assessing Strabag's compliance with the Contract or the Owner's compliance with Amendment 2.

"[A] bank that issues a letter of credit is not required to look beyond the payment documents presented by the beneficiary in order to ascertain whether the parties to the underlying transaction have complied with their respective duties and obligations." (*Archer Daniels Midland Co. v JP Morgan Chase Bank, N.A.*, 2011 WL 855936 *4 [SD NY 2011].)

> "Letters of credit are commercial instruments that provide a seller or lender (the beneficiary) with a guaranteed means of payment from a creditworthy third party (the issuer) in lieu of

[9] The court rejects Strabag's argument that pursuant to § 7.3.3 of the Contract, substantial completion is presumed since the Owner took control of the Project. The May 2, 2022 Amendment 2 modified the provision on which Strabag relies for this argument: "On the date of delivery of the Critical Milestone Work Transfer Notice for Critical Milestone D (assuming that Substantial Completion of Critical Milestone D has not yet occurred), the Performance Security will be reduced by the amount of forty five million Dollars (US$45,000,000). At Substantial Completion of Critical Milestone D (assuming that the Critical Milestone Work Transfer Notice for Critical Milestone D has been delivered), the Performance Security will be further reduced by the amount of twenty-five million Dollars (US$25,000,000)." (NYSCEF 100, Amendment 2 [emphasis added].)

> relying solely on the financial status of a buyer or borrower (the applicant). Historically, letters of credit have been used to assure predictability and stability in mercantile transactions by diminishing a seller's risk of nonpayment and a buyer's risk of nondelivery due to insufficient funds."

(*Nissho Iwai Europe PLC v Korea First Bank*, 99 NY2d 115, 119 [2002] [citation omitted].)

New York applies the "independence principle" to letters of credit, which "requires strict compliance with facially valid requests for payment under a letter of credit." (*Archer Daniels,* 2011 WL 855936 *4 [citations omitted].) "[A]n issuing bank's obligations under a letter of credit are separate from, and independent of, the rights and obligations of the parties to the underlying commercial transaction." (*Id.*, citing *410 Sixth Ave. Foods, Inc. v 410 Sixth Ave., Inc.*, 197 AD2d 435, 436 [1st Dept 1993].)

However, fraud is an exception to the independence principle. (*3M Co. v HSBC Bank USA, N.A.*, 2018 WL 1989563, *9 [SD NY, Apr. 25, 2018, No. 16 CIV. 5984 (PGG)].) In New York, the fraud exception is codified in UCC § 5-109(a) which provides:

> "If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant[,] . . . [t]he issuer, acting in good faith, may honor or dishonor the presentation . . . .

(UCC § 5-109 [a] and [a] [2].)

The exception is narrow to ensure "the smooth operation of international commerce" by preventing pre-payment litigation. (*3M Co.,* 2018 WL 1989563 at *9.) The conditions necessary before the fraud exception apply are: (1) "fraud must be found

either in the documents or must have been committed by the beneficiary on the issuer or applicant"; and (2) the "fraud must be 'material.'" (UCC § 5-109, Official Comment 1 [citation omitted].) "Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor." (*Id.*) The circumstances must "plainly show that the underlying contract forbids the beneficiary to call a letter of credit." (*Id.*) The fraud exception will apply "where the beneficiary's conduct has 'so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served.'" (*Id.*, quoting *Ground Air Transfer, Inc. v Westate's Airlines, Inc.*, 899 F2d 1269, 1272-73 [1st Cir 1990].) Finally, "[t]he courts should be skeptical of claims of fraud by one who has signed a 'suicide' or clean credit and thus granted a beneficiary the right to draw by mere presentation of a draft." (UCC § 5-109, Official Comment 3.) Accordingly, to satisfy the likelihood of success prong for a preliminary injunction, Strabag must establish the likelihood of success on Strabag's fraud theory; a contract dispute is not sufficient. (*See 410 Sixth Ave. Foods, Inc. v 410 Sixth Ave., Inc.,* 197 AD2d 435, 437 [1st Dept 1993] ["At best, the evidence supports solely mutual allegations of breach of contract, not fraud."].)

Here, Strabag argues that the Owner improperly withheld substantial completion certification while gaining access to and commercially operating the project by promising to give Strabag an extension of time for delays caused by lack of water. However, on the eve of the deadline, December 31, 2022, the Owner allegedly discovered the collapsed tunnels and blamed the collapses on Strabag and Strabag for delays. Relying on *Rockwell Intern. Sys., Inc. v Citibank, N.A.*, Strabag argues that one

party cannot put another party into default and draw on the letter of credit as a result of the default; to do so constitutes fraud which bars a drawdown on a letter of credit. (719 F2d 583 [2d Cir 1983].) In *Rockwell*, following the fall of the Shah of Iran, the new government instructed Rockwell to stop working on a project then attempted to drawdown on a letter of credit asserting that Rockwell had defaulted. (*Id.*; *see also Archer Daniels,* 2011 WL 855936 *5 [a government buying rice could not draw on a letter of credit where there was no report certifying problems with the rice—the buyer's representation to the bank as to the reason for the drawdown was "almost certainly false" based on unrebutted documentary evidence and the fact that 2/3 of the shipment had yet to reach the port].) Here, Strabag describes a classic bait and switch.

First, the Owner asserts that the court is barred from analyzing Strabag's likelihood of success to establish that the Owner's draw on the letter of credit is fraudulent because the Emergency Arbitrator has found otherwise.[10]

On February 16, 2023, Strabag initiated an emergency arbitration before the ICC pursuant to the Contract. (NYSCEF 120, Contract § 18.) Strabag was seeking to stop the Owner from drawing on the letter of credit at issue in this case. (NYSCEF 52, Application ¶ 127.) Strabag's position in the emergency arbitration was:

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[10] The Owner also suggests that this court should be guided by the Independent Adjudicator who on March 2, 2023 dismissed Strabag's Request for Determination on the same issue because he lacked jurisdiction letter of credit issues. (NYSCEF 76, Ruling on Jurisdiction of Independent Adjudicator to Hear Strabag's Request for Determination No. 2, Substantial Completion Dispute, ¶ 35.) Section 2.29.1.3 of Amendment 2 to the Contract specifically provides: "the Independent Adjudicator shall not consider, and shall not issue a Determination with respect to, any dispute between the Parties relating to any draw on a letter of credit posted by the Contractor in favor of Owner." (NYSCEF 100, Amendment 2 at 11.) The Owner's suggestion that the court should follow the Independent Adjudicator is misleading at best.

> "Respondent's draw on its Performance Security is in furtherance of a fraud and premised on a wrongful claim for liquidated damages based on project delays that [the Owner] expressly agreed are excusable. Applicant asserts that it urgently requires emergency relief to prevent [the Owner] from retaining the proceeds of its draw and from making further drawings under the Performance Security."

(NYSCEF 77, Arbitration Order ¶ 76.)

The Owner's position in the emergency arbitration was that:

> "113. … Strabag improperly seeks to prevent [the Owner] from exercising its bargained-for-rights to draw on the Performance Security, a clean irrevocable letter of credit which secures the Late Critical Milestones Payments owed and unpaid by Strabag as a result of its failure to achieve Critical Milestones by the Guaranteed Substantial Completion Date of 31 December 2022.
>
> 114. [The Owner] asserts that the specific relief that [Strabag] seeks, is not permitted under the Contract, the law applicable to the Parties' Contract and the Performance Security, and, in any event is inextricably bound with the highly complex and fact-intensive issue of whether Strabag achieved Substantial Completion which should not and cannot be determined in emergency proceedings as this would imply prejudging on those issues."

(NYSCEF 77, Arbitration Order ¶¶ 113-114.)

As to likelihood of success, the Emergency Arbitrator found that the framework of ICC emergency proceedings constrained her from making a finding of likelihood of success because it would impermissibly entail her prejudging the merits of the dispute. (NYSCEF 77, Arbitration Order ¶¶ 196-203, 205.) She explained:

> "205. It is not plain from the 'moving papers' that Substantial Completion has been reached or that Strabag is entitled to an extension, as asserted by Applicant. The Emergency Arbitrator is therefore not able to conclude that [the Owner] has committed a material fraud in stating that it complied with Section 15.3.4 of the Contract. The Emergency Arbitrator is not able to conclude either that Respondent 'has no colorable claim.'
>
> 206. As far as [Strabag]'s assertion is concerned that [the Owner]'s draw would also be in furtherance of a fraud

> because it has manufactured a scheme that allowed it to obtain the benefit of its bargain (commercial operation of the Critical Milestone Work) while simultaneously delaying and rejecting Substantial Completion to collect Late Critical Milestone Payments from Strabag, the Emergency Arbitrator considers that it has been insufficiently substantiated. It has therefore not been established that [the Owner] has committed a material fraud in this manner."

(*Id.* ¶¶ 205-206.)

The court rejects the Owner's collateral estoppel argument because the Emergency Arbitrator effectively abstained from deciding likelihood of success to avoid prejudging, which could be viewed as a different standard on likelihood of success. While an arbitration award could certainly have preclusive effect, it will not collaterally estop a court when the arbitrator applies a different standard. (*Matter of Sherwyn Toppin Mktg. Consultants, Inc. v New York State Liquor Auth.*, 103 AD3d 648, 651 [2d Dept 2013] [collateral estoppel did not apply where the prior action utilized a "higher and different burden of proof" than that required in the current action].)

Here in New York, we assess the facts as of the date of the preliminary injunction request and predict likelihood of success based on what we know at the time. A decision to grant a preliminary injunction is not "law of the case." (*J.A. Preston Corp. v Fabrication Enterprises, Inc.,* 68 NY2d 397, 402 [1986] ["The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for."]; *Triple D & E, Inc. v Van Buren*, 72 Misc 2d 569, 574 [Sup Ct 1972], *affd*, 42 AD2d 841 [2d Dept 1973] ["The denial or award of a temporary injunction does not establish the law of the case. The conclusion arrived at from the preliminary motion may be altered when all of the facts have been explored at

a plenary trial."].) Moreover, the Emergency Arbitrator fails to acknowledge the shifting burden of proof between likelihood of success and irreparable harm. (*See Sau Thi Ma v Xaun T. Lien*, 198 AD2d 186, 186 [1st Dept 1993] [reversing the denial of a preliminary injunction where such relief would preserve the status quo and where there would be irreparable harm because "a substantial amount of money may be dissipated or otherwise unavailable for recovery …"].) Accordingly, the court will analyze whether Strabag has established a likelihood of success.

Whether Strabag achieved substantial completion is in dispute. Where facts are in sharp dispute, a preliminary injunction should not be granted. (*O'Neill v Poitras,* 158 AD2d 928, 928-929 [4th Dept 1990].) However, another contract provision excuses the delay if the delay is due to the unavailability of water sufficient to conduct "Acceptance Tests." The Owner fails to address the Contract provision in its brief, instead focusing on irrelevant arguments such as whether Strabag timely informed the court that it had initiated the Emergency Arbitration as required by the Contract's arbitration provision. However, at argument, the Owner referred the court to its brief filed in the Independent Adjudicator proceeding which addresses the Contract.[11] (NYSCEF __, tr 34:9-15;[12] NYSCEF 71, Owner's Response to Request for Determination No. 2, Feb. 15, 2023.)

Contrary to Strabag's objections, the Contract clearly provides that Strabag has testing obligations. Strabag's "Scope of Work" is defined in the Contract as:

> "(a) all work and services required in connection with the design, engineering, procurement, permitting, fabrication, manufacture, investigation, excavation, construction … dewatering, … testing and completion of the Tunnel

[11] The Owner's Response to Request for Determination No. 2, Feb. 15, 2023, is not mentioned in the Owner's Memo of Law.
[12] Parties are directed to file the March 20, 2023 transcript in NYSCEF.

> Complex (including completion of all Acceptance Tests and operation of the Tunnel Complex through Tunnel Complex Substantial Completion), …
>
> (c) attendance and support during the AM-CO510 Electromechanical Contractor's testing and commissioning,…
>
> (e) the correction of defects and any actions required to comply with the Warranty[.]"

(NYSCEF 120, Contract § 1.1; *see also id.* § 7.1.1.1(b) [requiring the completion of "Acceptance Tests" and, for Critical Milestones D, E, and F, "wet tests and Acceptance Tests"].)

Appendix D contains the Testing Guidelines which Strabag must follow when fulfilling its Contractual Testing obligations.

> "1. General[.] Upon completion of construction and throughout start-up and commissioning of each functional unit, Contractor shall perform various tests to demonstrate that such functional unit and any part thereof comply with the Contract, including the Acceptance Tests. The tests, and the sequence in which they shall be performed, are described in general terms in this Appendix D. The Contractor shall develop the detailed inspection and test schedule and the details of the tests. Water filling, Wet Test, and Acceptance Test procedures will be defined in cooperation with the Owner and the Electromechanical Contractor and shall be subject to Owner's Approval."

(NYSCEF 20, Appendix D at 4.)

However, it is clear from the record at this time, that the Owner's rejection of substantial completion came well before the collapses of the tunnels were discovered. (NYSCEF 105, December 2, 2022, Owner's Letter to Strabag.) Indeed, according to the Owner, the earliest evidence of a problem was "November 24-25, 2022 during performance testing of [another contracto]'s work." (NYSCEF 56, Corredor aff ¶ 27.)

Even if the collapsed tunnels, and not a lack of water, are to blame for Strabag's failure to achieve substantial completion, Strabag's assertion that the collapses occurred during the warranty period is supported by a clear reading of the contract and the Owner fails to address Strabag's warranty argument.[13] Accordingly, the court is left with Strabag's argument that its substantial completion delay was excused by lack of water.

The parties entered into Amendment 2 on May 2, 2022, which allowed the Owner to take over two of the powerplants and to generate desperately needed revenue. (NYSCEF 100, Amendment 2.) In exchange, "Strabag would be excused from any delays caused by [the Owner], delays to testing caused by a lack of available water, and delays caused by events set out in Section 11 of the Amended & Restated Contract," e.g., delays caused by "Contractor encounters any national, archaeological, paleontological or other historically significant artifact or any valuable resource." (NYSCEF 117, Theurl aff ¶ 34; NYSCEF 120, Contract § 11.3.1.4.) Section 17 of Part II of Amendment 2 states:

> "Contractor shall be excused from any delay in achieving a Guaranteed Critical Milestone Date due to the unavailability

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[13] It is uncontested that the parties are in the Warranty Period. "Basic Warranty Period" means (a) with respect to any Critical Milestone Work for which Owner delivers a Critical Milestone Work Transfer Notice, the period beginning on the applicable Critical Milestone Work Transfer Date and ending two (2) years thereafter or (b) with respect to any other portion of the Work, the period beginning on the Tunnel Complex Substantial Completion Date and ending two (2) years thereafter. (NYSCEF 120, Contract at 3/146.) The Owner issued he transfer notices on May 2, 2022. There is a limited exception to the initiation of the Warranty Period for ventilation. "Owner shall issue the Critical Milestone Work Transfer Notice for Critical Milestone E on May 2, 2022; after (i) COD (which, for the avoidance of doubt, has already been achieved as of the date hereof) and provided that (ii) the Basic Warranty Period for Critical Milestone E Works, related to the ventilation system, will not start on the delivery of the Critical Milestone Work Transfer Notice." (NYSCEF 100, Amendment 2, ¶7 [emphasis added].) Otherwise, Amendment 2 is silent on the Warranty Period for Critical Milestone D.

> for water necessary to perform Owner's testing or any other Acceptance Test…."

NYSCEF 100, Amendment 2 at 7.)

Section 18 of Part II of Amendment 2 provides:

> "Contractor shall be entitled to a Day for Day extension of the Guaranteed Critical Milestone Dates for any delays caused by Owner (including due to any non-performance by Owner of the Owner obligations under Article 3) and for any delays attributable to the events identified in Section 11.3.1."

(*Id.*)

To give Amendment 2 context, Therul explained that in August 2021, the Project was nearing completion, but the Owner was again insolvent. (NYSCEF 117, Therul aff ¶ 26.) "As part of [the Owner's] [bankruptcy] announcement, [the Owner] disclosed that it believed the Project would generate less than expected revenues due in large part to reduced water flows stemming from climate change and reduced electricity demand in Chile." (*Id.*)

In its brief on this motion, the Owner utterly fails to mention Amendment 2 or its water delay provisions. Instead, the Owner repeatedly mentions the collapsed tunnels and Corredor summarily denies any delay caused by lack of water instead blaming Strabag for its failure to achieve substantial completion and the tunnel collapses, which had yet to be discovered. However, the Owner's contemporaneous communications overwhelmingly contradict the Owner's rejection of an extension of time under Amendment 2.

> June 7, 2022 letter from the Owner to Strabag which states "remaining Acceptance Tests, but also remaining Commissioning activities, can only be completed once sufficient water is available to perform specific tests to individual components and general tests related to the entire Volcan System (among others)." (NYSCEF 106, Exhibit 11.);

August 12, 2022 letter from the Owner to Strabag which states "Amendment No. 2 clarifies that remaining Acceptance Tests, but also remaining Commissioning activities, can only be completed once sufficient water is available to perform specific tests and general tests related to the Project. As such, the Acceptance Test Reports can only be submitted after completion of Commissioning and after all Acceptance Tests have been successfully performed. Consequently, no acceptance of Contractor's reports is foreseen at this point in time." (NYSCEF 107, Exhibit 12; *see also* NYSCEF 108, Exhibit 13.);

September 13, 2022, letter from the Owner to Strabag which states "Commissioning was not yet completed, among others, due to lack of water during the 4th quarter of 2021 and the 1st quarter of 2022." (NYSCEF 109, Exhibit 14.);

September 13, 2022 letter from the Owner to Strabag, which states "In addition, due to insufficient water, Owner has not been able to perform other tests, in particular tests related to its Electromechanical Contractor's work. Consequently, Owner has not determined whether Contractor achieved some of the conditions set forth in Section 7.1.1.1(c)." (NYSCEF 104, Exhibit 9.);

October 26, 2022, letter from the Owner to Strabag which states "Load rejection tests, which are subject to water availability, which depends on, among others, the snow melting season in Chile, are anticipated to be performed either in December 2022 or March 2023." (NYSCEF 87, Exhibit 15.); and

December 2, 2022, letter from the Owner to Strabag which states "Owner acknowledges that the completion of commissioning, commissioning tests (Wet Tests), Acceptance Tests, and tests by Owner depend on the availability of water, among other factors. Article 17 of Amendment No 2 is applicable to that scenario." (NYSCEF 105, Exhibit 10).

The Owner fails to acknowledge these communications. Further, Corredor's recitation of the history gives context to the Owner's unrebutted communications concerning water shortages. Corredor admits that "[a] main premise of Amendment No. 2 was to make sure the Project was sufficiently completed by August 31, 2022 so that Acceptance Tests could be performed during the spring wet season, which typically begins in September." (NYSCEF 56, Corredor aff ¶ 51.) Further, Corredor admits that "[b]ecause there was a possibility of insufficient water in the 2022 melting season," the

parties extended a deadline to March 31, 2023 in the May 2022 Amendment 2. (*Id.* ¶ 52.) According to Corredor, tests were "instead" to "be conducted toward the end of the year when waterflow was at its highest due to snowmelt." (*Id.* ¶ 26.) This was long before the collapsed tunnels were discovered and renders the Owner's position, that Strabag and the collapsed tunnels are to blame for Strabag's failure to achieve substantial completion, disingenuous at best.

Corredor's recitation of the history of Amendment 2 supports Strabag's contention that the Owner's motive for the drawdown is to counter its financial difficulties, not to ensure Strabag's performance which is the purpose of the letter of credit. While the "motivations of a beneficiary of a letter of credit are irrelevant," here they support Strabag's contention that the reason for the drawdown is for an improper reason. (*Rockwell*, 719 F2d at 589.) However, in assessing the fraud exception to the independence principle when a preliminary injunction is requested to stop a draw on a letter of credit, the court must assess whether the beneficiary has a plausible explanation for the draw and motive, or ulterior motive, is a consideration. While the parties have a legitimate dispute about whether Strabag achieved substantial completion, the Owner has no "plausible" explanation for agreeing to excuse failure to achieve substantial completion due to water shortages in exchange for taking control of the plant earlier than allowed in the Contract, but disavowing Strabag's rights in Amendment 2 with two words: "collapsed tunnels," which had yet to be discovered when the Owner denied substantial completion. (*3M Co.,* 2018 WL 1989563 at *12.)

When a contract provision is crystal clear, as Amendment 2 is here, but a party effectively denies that provision's applicability based on something that has yet to

happen, this basic contract dispute becomes fraud. (See 3M Co., 2018 WL 1989563.) The Owner cannot agree in May 2022 to excuse delays caused by lack of water, acknowledge such anticipated water shortages from June to December 2022, but refuse to excuse those delays in December 2022. That Strabag changed its position by agreeing to the Owner's early operation of the Project in exchange for excusing delays caused by lack of water supports this court's finding of likelihood of success. Accordingly, the Owner has no colorable right to draw down by denying water shortages in contravention of its own communications. While a legitimate dispute exists under the Contract as to substantial completion, the Owner's conduct vitiates Strabag's rights under Amendment 2 with a bare denial contradicted by the Owner's unrebutted documentary evidence and suspicious timing.

Strabag asserts irreparable harm because the Owner is a special purpose non-recourse entity that has recently emerged from Chapter 11 bankruptcy, but which is not currently generating revenue and thus its financial instability continues. Strabag argues that if Strabag's funds are wrongfully seized via the letter of credit, Strabag will have no recourse against the Owner. Irreparable injury is established where there is "at least a 'substantial chance'" that movant "cannot be returned to the position[ ] [it] previously occupied" if a preliminary injunction is denied." (*3M Co.,* 2018 WL 1989563 at *9 .) Indeed, the Emergency Arbitrator found that Strabag satisfied the irreparable harm requirement because it would suffer serious or grave harm, even if compensable by money, which is the standard in international arbitration.[14] (NYSCEF 77, Arbitration

[14] As to irreparable harm, the Owner concedes that the Emergency Arbitrator used a different standard than that applicable in New York which undermines the Owner's

Award ¶ 177.) Strabag contends that the Owner is drawing down the letter of credit to cover its liquidity gap and to pay for operational expenses; not to ensure Strabag's performance. Indeed, the Owner laments that "[g]iven the total Project shutdown, the TRO results in [the Owner] having no means to pay for ongoing Project costs. [The Owner] estimates that without access to the [Late Critical Milestone Payments] to which it is entitled under the Contract, it will run out of operating funds within approximately 45 to 75 days." (NYSCEF 78, Owner's Memo of Law in Opposition at 9.) The court agrees that Strabag's inability to claw back the letter of credit proceeds if the ICC arbitrator finds that Strabag has achieved substantial completion or is entitled to a delay caused by lack of water, constitutes irreparable harm, particularly when Strabag's likelihood of success to enforce its rights under Amendment 2 is solid.

The court notes that these facts also satisfy CPLR 7502(c)'s requirement that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."

The balance of the equities favors Strabag. The Owner asserts its irreparable harm is that it cannot access the $90 million letter of credit and thus the project is shut down and will continue to be shut down until the tunnels are fixed. However, the Owner's argument overlooks Amendment 2's provision to excuse delays caused by lack of water. The undisputed evidence is that the Owner acknowledges such water delays between June and December. The problem with the Owner's focus on the collapsed tunnels, in addition to the fact that they were discovered after the Owner rejected

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earlier insistence that the Emergency Arbitrator's award collaterally estops this court. (NYSCEF 78, Owner's Memo of Law in Opposition, at 13, n 2.)

Strabag's assertion of substantial completion and refused to excuse the delay pursuant to Amendment 2, is that even if true, it would not preclude an extension of time due to lack of water for testing. The two are not mutually exclusive.

The irreparable harm potentially suffered by Strabag is more significant because it could be permanent while the harm suffered by the Owner is a brief[15] delay while the ICC resolves the substantial completion issue. The court is well aware of the commonweal purpose of the Project, but the purpose cannot be achieved with a bait and switch and disavowing Amendment 2. Accordingly, a preliminary injunction preserves the status quo. Indeed, the purpose of a preliminary injunction is to maintain the status quo. (*Schlosser v United Presbyterian Home at Syosset*, 56 AD2d 615 [2d Dept 1977].)

The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result. The court is in receipt of Owner's Rule 18 letter (NYSCEF 129, Rule 18 Letter [Apr. 6, 2023]), which also does not alter the result.

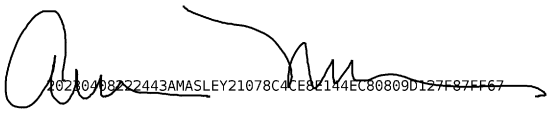
It appearing to this Court that a cause of action exists in favor of Strabag and against the Owner and that Strabag is entitled to a preliminary injunction on the ground that the Owner threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights under Amendment 2 respecting the

[15] The court notes and admires the speed with which the Independent Adjudicator and the Emergency Arbitrator issued their thoughtful and thorough decisions. (NYSCEF 76, Independent Adjudicator's Ruling: time from initiation to decision: January 3, 2023 to March 2, 2023; NYSCEF 77, Emergency Arbitrator: time from appointment to decision: February 18, 2023 to March 3, 2023.)

subject of the action and tending to render the judgment ineffectual, as set forth in this decision, it is

ORDERED that the undertaking is fixed in the sum of $1.6 million conditioned that Strabag, if it is finally determined that it was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction. The court notes that the letter of credit also protects defendant; and it is further

ORDERED that defendants, the Bank and the Owner, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendants or otherwise, any of the following acts: Alto Maipo SPA is enjoined from drawing down on the Crédit Agricole CIB letter of credit until the ICC arbitration resolves the issue of substantial completion.



4/8/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE