IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 140 OF 2020 (ASCJ)

IN THE MATTER OF SECTION 11 OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2018 REVISION) ("THE ELP LAW")

AND

IN THE MATTER OF ASEAN INFRASTRUCTURE FUND 11, LP ('THE PARTNERSHIP")

AND

IN THE MATTER OF A PETITION BY THE LIMITED PARTNERS OF THE PARTNERSHIP ("THE PETITION")

Representations:	Thomas Smith QC, instructed by Nick Dunne of Walkers for the Petitioners, the Limited Partners of the Partnership ("the Limited Partners" or "the Petitioners" as the context might require.). Jan Golaszewski of Carey Olsen for AEI Co. Ltd, the General Partner of the Partnership ("the General Partner").
Date of Hearing:	29 July 2020
Date of Decision	12 August 2020
Date of Written Reasons:	24 August 2020

REASONS FOR DECISION

Exempted limited partnership – removal of General Partner by unanimous resolutions of the Limited Partners- General Partner required by the ELP Law to file statement of its removal with the Registrar – refusal to file statement - petition to Court to appoint another suitable person to file statement in order to effect dissolution of partnership– whether Petition should be adjourned to allow for a stay application in deference to arbitral proceedings in Singapore between General Partner and one but not all Limited Partners – relief sought in the Petition available only by exercise of the exclusive jurisdiction of the Grand Court – relief not available by arbitration and not the subject of arbitration – whether adjournment justified.

Introduction

1. On 29 July 2020, the Petition, filed pursuant to section 11 of the ELP Law, came on for hearing. Submissions were then heard from Mr Smith QC on behalf of the Limited Partners and from Mr Golaszewski on behalf of the General Partner and the decision was reserved. On 12 August 2020, the decision was delivered granting the order sought by the Petition. These are the reasons for that decision.

2. The Partnership was registered in the Cayman Islands on 27 February 2018 under the ELP Law, as an exempted limited partnership with registration number 94929. It is governed by an Amended and Restated Limited Partnership Agreement dated 9 March 2018 ("the LPA")

   The Limited Partners are:

   (a) Daiwa PI Partners Ltd ("Daiwa PI")

   (b) Tokyo Century Corporation ("Tokyo Century")

   (c) Mizuho Securities Co. Ltd ("Mizuho"); and

   (d) Daiwa House Industry Co., Ltd (Daiwa House").

3. However, belatedly and for the first time at the hearing on 29 July 2020 , the General Partner, itself a Cayman Islands exempted limited company, asserted through counsel that it too should be regarded as a limited partner. This assertion would carry far-reaching implications for the resolution of the Petition because it would bring into question the decision which is said to have been taken by the unanimous consent of the Limited Partners to remove the General Partner and dissolve the Partnership. The assertion was however, at the hearing unsupported by any evidence and was refuted by the evidence of

the evidence of the Petitioners. It was ultimately rejected by me for further reasons also to be explained below.

4. The "Committed Capital" of the Partnership (as defined by Clause 1.1 (i)) of the LPA), was US$200 million and the respective commitments of the Limited Partners were (i) Daiwa PI- US$100 million; (ii) Tokyo Century – US$50 million; (iii) Mizuho –US$ 30 million and (iv) Daiwa House –US$20 million. Thus, Daiwa PI and Tokyo Century represent in aggregate, 75% of the Committed Capital of the Partnership. This is a fact of some significance but ultimately not crucial to the outcome of the Petition, given the unanimity of the Limited Partners upon which the Petition is premised.

5. The Petition is supported primarily by the evidence of Mr Hiroaki Ogino of Tokyo Century, where he is employed as Executive Officer, Specialty Finance Business Unit 1. At paragraph 2 of his First Affirmation, ("Ogino 1") Mr Ogino affirms that, in addition to Tokyo Century; Daiwa PI, Mizuho and Daiwa House are the only limited partners of the Partnership. While as already mentioned and to be further examined below, the General Partner came belatedly to challenge this important evidence, no credible evidence was filed in response to the Petition on its behalf to refute it. Rather, it was after the close of arguments and in response to an opportunity given by the Court to address the different subject of potential prejudice raised by the Petitioners in opposition to its application to adjourn the Petition, that the General Partner, through one of its directors, Mr Yohei Hora, filed an affidavit in which, among other things, he asserts that the LPA itself recognizes the General Partner as being also a limited partner. But this assertion too had to be rejected. The reasons for this conclusion will become apparent.

Background to the filing of the Petition

6. Mr Ogino affirms that the process which ultimately led to the filing of the Petition commenced with steps taken by the Partnership's Investment Committee (the "IC") to promote investment in a Philippines incorporated company called Mabuhay Energy Corporation by way of subscribing for its convertible bonds to the tune of US$50 million ("MECO" and the "Investment", respectively).

7. The IC is comprised of three companies nominated by the General Partner (hereinafter the "AEI IC Members") and Mr Hideki Araki ("Mr Araki"), the President of Daiwa PI, who was appointed by the consent of the Limited Partners pursuant to Clause 10.5 of the LPA, and as further discussed below.

8. The circumstances surrounding the Investment and the subsequent drawdown notices purportedly to fund it, are detailed at paragraphs 11 to 20 of Ogino 1. In summary, the Petitioners were sufficiently concerned about the Investment causing them to file the Petition because:

   (a) MECO had not commenced its business and no explanation had been provided as to why the Partnership should invest US$50 million in MECO in a lump sum, or indeed at all;

   (b) Documents and information in respect of the Investment were only provided two hours prior to the meeting of the IC taking place and which was called to examine the business model of MECO, followed by a substantively revised and unexplained version from the General Partner immediately before the meeting;

(c) Those versions included an amendment to the figure for the "After tax equity internal rate of return ("IRR")" on the Investment from 25.21% to 41.75%. The General Partner refused to explain this substantial change;

(d) Questions raised by representatives of the Limited Partners, viz: Mr Akari (as an IC member), Mr Ogino (present at the meeting as an observer on behalf of Tokyo Century) and the representative from Daiwa House (also present as an observer) during the IC meeting, about MECO's business model and the General Partner's analysis of growth potential, were ignored by the AEI IC Members.

(e) As a result of the lack of information and engagement, Mr Akari and Mr Ogino asked to postpone the resolution approving the Investment. That request was refused and the resolution was passed by the AEI IC Members. In doing so, the AEI IC Members failed to explain, affirms Mr Ogino, (a) why there was any urgency to the resolution being passed or (b) why the Investment was to be made at a time when MECO did not have any business operations.

9. In essence, the cause for concern was that the General Partner proposed an immediate and substantial investment in an embryonic company supported by only very limited, last minute information; refused to engage in any discussion and forced the Investment through in the face of reasonable requests from those Limited Partners present at the relevant meeting for time to consider matters. That situation, as Mr Smith QC submitted, understandably led to significant concerns amongst the Limited Partners, all the more so when, on the very same day as the meeting took place, and despite the questions raised, the General Partner issued drawdown notices requiring the Limited Partners to contribute the US$50 million for the Investment.

10. Those drawdown notices were subsequently cancelled and replaced with further notices stating sums which represented but 10% of that originally requested. But again, this reduction went entirely unexplained.

11. In light of their serious concerns about the Investment and the associated drawdown notices, Mr Ogino explains that on 6 March 2020, Daiwa PI and Tokyo Century (who between them, as already mentioned represent 75% of the Committed Capital of the Partnership) signed a Limited Partners' Request seeking the withdrawal of the General Partner ("the Request"). The terms of the Request were as follows:

    (a) Pursuant to section 36(1) of the ELP Law and Clause 13 of the LPA, the Partnership shall be wound up and dissolved;

    (b) The General Partner shall forthwith and without further notice withdraw from the Partnership by reason of the Request, for the purposes of Clause 9.8 (b)(i) and (iv) of the LPA;

    (c) The Partnership shall terminate automatically pursuant to Clauses 9.8 and 13. 1 (b)(i) of the LPA; and

    (d) The Request also serves as a Limited Partners' Consent pursuant to Clause 13.2(a) of the LPA, such that the FTI Liquidators (as defined in the Request) shall, following automatic termination of the Partnership, act as liquidators of the Partnership.

12. The Request was served on the General Partner's registered office on the same day (6 March 2020) and was accompanied by a cover letter from Walkers writing on behalf of the Limited Partners. The letter stated that, in accordance with the Request, the General

Partner should withdraw from the Partnership forthwith and requested that the General Partner:

(a) file a statement pursuant to section 10 of the ELP Law (the "Section 10 Statement"); and

(b) serve a notice of its withdrawal pursuant to section 36(7) of the ELP Law (the "Section 36 Notice").

13. The Request was refused on the basis that it was said to be " *manifestly deficient, calling into serious question its validity and legitimacy*", albeit, as Mr Ogino explains, the General Partner's response did not condescend to explain why that was said to be the case. Instead of complying with the request to withdraw, the General Partner issued default notices purportedly in respect of the existing drawdown notices. Further drawdown notices in respect of management fees were issued in mid-March 2020, with purported default notices relating to the further drawdowns, in early April.

14. Given the General Partner's conduct and refusal to withdraw from the Partnership, on 6 April 2020, all the Petitioners exercised their rights under the LPA as the Limited Partners of the Partnership by signing resolutions to, among other things:

(a) terminate the Partnership pursuant to Clause 13.1(a)(iv) of the LPA (as explained further below);

(b) remove the General Partner as general partner pursuant to Clause 9.8(c); and

(c) wind up and dissolve the Partnership and to ratify the appointment of David Griffin and John Batchelor from FTI Consulting as liquidators; (together the "Termination Resolutions").

15. Notwithstanding the Termination Resolutions, the General Partner had to date of the hearing of the Petition failed to sign the Section 10 Statement as required by section 10 of the ELP Law confirming a change in the particulars of the Partnership, namely, the removal of the General Partner as general partner. That default has extended for long beyond the period provided for filing under section 10(1) of the ELP Law (extracted below), and notwithstanding that, under section 10(4), a failure to comply with section 10(1) is punishable by a daily fine to be levied on a non-compliant general partner.

Terms of the LPA.

16. The LPA in material parts, provides as follows:

The General Partner must withdraw from the Partnership if (pursuant to Clauses 1.1 (i) – (iii) and 9.8(b)(i) and (iv):

(i) the Limited Partners, by Limited Partners' Consent (defined in the LPA as a resolution passed by Limited Partners holding 75% or more of Committed Capital) reasonably determine that the General Partner has become unable to carry out its functions and duties under the LPA and make request in writing to the General Partner seeking its withdrawal from the Partnership; and

(ii) the General Partner breaches any material obligation under the LPA;

(iii) provided that all Limited Partners consent, the Limited Partners may remove the General Partner from the Partnership by at least 60 days' prior written notice to the General Partner (Clause 9.8(c));

(iv) if the General Partner has withdrawn from the Partnership following a request from the Limited Partners or removed by unanimous consent of the Limited

Partners, the Limited Partners shall unanimously appoint a new general partner or determine to terminate and dissolve the Partnership (Clause 9.8(d))

(v) the Partnership shall terminate upon service of a notice by the General Partner to the Limited Partners informing the Limited Partners that all of the Limited Partners "excluding the General Partner in its capacity as Limited Partner"[1] has resolved to terminate the Partnership for any reason whatsoever (Clause 13.1(a)(iv)); and

(vi) the Partnership shall automatically terminate if the General Partner withdraws or is removed from the Partnership pursuant to Clause 9.8 of the LPA without the appointment of a new general partner (Clause 13.1(b)(i).

17. Mr Smith QC submitted, by reference to the foregoing provisions of the LPA, that the Commitments of the Petitioners are such that Daiwa PI and Tokyo Century represent in aggregate 75% of the Committed Capital of the Partnership and thus were in a position to compel the withdrawal of the General Partner pursuant to Clause 9.8(b)(i) without additional support in circumstances where they reasonably determined that the General Partner was unable to properly carry out its functions and duties. That he also submits,

[1] It was by reference to this sub-clause that Mr Golazewski on behalf of the General Partner asserted in argument that it is also a limited partner and has not consented to the Termination Resolutions. But as mentioned above and as will be further discussed below, despite Mr Hora's assertions to support the proposition, no credible evidence has been filed in support. Instead at [28] of his affidavit, Mr Hora asserts: *"AEI's capacity as a Limited Partner is reflected in documentary evidence – including the LPA – which the Petitioners have omitted from the Petition. (a) Under the Declaration page of AEI's subscription agreement dated 9 March 2018, EAI applied to subscribe for the Limited Partnership Interest, committing USD 2 million to the Partnership as a Limited Partner [page 174/YH-1]"* However, when the referenced document at YH-I page 174 of the exhibits to Mr Hora's affidavit is examined in its proper context at Clause 5 of the LPA dealing with Partnership Interests, it is clear that the commitment of USD 2 million is what is described at Clause 5.2 (b) as the "GP Commitment" in these terms: *"The General Partner shall commit to the Partnership an amount equal to 1% of the Committed Capital at the(sic) each Closing Date including the First Closing Date and the Final Closing Date in its capacity as a Limited Partner (the "GP Commitment..."*). As Mr Smith submitted, quite apart from whether that provision for a commitment would qualify the General Partner as a limited partner, there is no evidence presented to confirm or even assert that it was ever paid.

was plainly the case given the astonishing conduct of the General Partner and its appointees in connection with the Investment.

18. However, as he also submitted, that issue became moot, given that there is unanimity between the Limited Partners, who have all resolved to remove the General Partner as general partner, pursuant to Clause 9.8(c) of the LPA and to terminate the Partnership by way of the Termination Resolutions.

19. I found that the Petitioners are the Limited Partners of the Partnership and are the only entities affected by the failure and/or refusal of the General Partner to execute and file the Section 10 Statement.

20. As such, pursuant to the terms of the LPA, upon receiving the Request, and thereafter upon receiving the Termination Resolutions, the General Partner was obliged to withdraw from the Partnership and carry out the statutory formalities relating to its removal as General Partner. It has not done so and hence the Petition which seeks an order that Mr Ogino be directed pursuant to section 11 of the ELP Law, to complete the formalities by filing the Section 10 Statement.

Relevant provisions of the ELP Law.

21. Section 9(1) of the ELP Law provides in relevant part, as follows:

"(1) The registration of an exempted limited partnership shall be effected by payment to the Registrar of a registration fee of an amount that the Cabinet shall, from time to time, by regulation prescribe and by filing with the Registrar a statement signed, subject to section 11, by or on behalf of a general partner containing –

(a) the name ... of the exempted limited partnership;

(b) the general nature of the business of the exempted limited partnership;

(c) ...

(d) ...

(e) *the full name and address of the general partner* ... " [emphasis added].

22. Section 10 of the ELP Law provides as follows:

(1) Without prejudice to subsection (2), if, during the continuance of an exempted limited partnership, any change is made or occurs in any matter specified in paragraphs (a) to (e) of section 9(1), a statement signed, subject to section 11, by a general manager specifying the nature of the change shall, within sixty days of the change, be filed with the [Registrar of Exempted Limited Partnerships] (the "Registrar").

(2) *A statement signed in accordance with subsection (1) in respect of any arrangement or transaction consequent upon which any person will be removed, replaced or admitted as a general partner in any exempted limited partnership, shall, within fifteen days of the arrangement or transaction, be filed with the Registrar and, until the statement is so filed, the arrangement or transaction shall, for the purposes of [the ELP Law] and the [LPA] not be effective to remove, replace or admit that person as a general partner of the exempt limited partnership* ...[emphases added]".

23. Section 11 of the ELP Law provides as follows:

> "*If a person required by section 10(2) to execute and file a statement or notice fails to do so, any other partner, and any assignee of a partnership interest who is or may be affected by the failure or refusal may petition the court to direct a person the court sees fit to sign the statement and file the same on behalf of the person in default.*"

24. It is in reliance on the foregoing provisions, that the primary relief sought by the Petition is that Mr Ogino be directed, in keeping with section 11 of the ELP Law, to sign the Section 10 Statement and file the same with the Registrar on behalf of the General Partner in light of the change in the name (and status) of the General Partner (as contemplated by section 10(1) as read with section 9(1)(e)) and the General Partner's apparent refusal and ongoing failure to file the Section 10 Statement.

Preliminary Discussion

25. The first question is whether the events which have transpired leading to the Termination Resolutions, constitute an "*arrangement or transaction consequent upon which any person will be removed*" within the meaning of section 10.

26. I accepted that the exercise by the Petitioners of their right to remove the General Partner as actioned by the Termination Resolutions, constitutes a "transaction" by which the General Partner, a person[2], will be removed as a general partner as referred to in section 10(2) of the ELP Law. And the Section 10 Statement is the "*statement*" in respect of the "*transaction*" consequent upon which the General Partner is removed, which must be filed with the Registrar pursuant to section 10 (2) of the ELP Law.

27. Accordingly, it must also be accepted that, in keeping with section 10(2) of the ELP Law, the signed Section 10 Statement should have been filed with the Registrar within 15 days of the passing of the Termination Resolutions.

28. Further, it was the inescapable conclusion that, in failing to take the steps prescribed by section 10 of the ELP Law, the General Partner has been acting in continuing breach of both the ELP Law and the LPA.

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[2] "Person" is defined for the purposes of the ELP Law by sections 2 and 4(3) as including a general partnership, whether or not an exempted limited partnership.

The General Partner's response to the Petition.

29. On behalf of the General Partner, Mr Golazeswki has not taken issue with the foregoing propositions as to the ordinary operation or effect of either the LPA or the ELP Law. Indeed, as already mentioned, no formal response to the Petition has been filed despite it having been served upon the registered office of the General Partner some six weeks prior to and, as endorsed with notice of the date for hearing, some three weeks prior to, the date of hearing.

30. Instead, Mr Golazeswki, acting upon the instructions of the General Partner and with only two day's prior notice to the Petitioners of the intention to do so, applied at the hearing for an adjournment. This was not so as to allow, as one might expect, for a response to the Petition as such but to allow the General Partner to apply for a stay of the Petition, said to be in deference to arbitral proceedings which the General Partner has commenced against one of the Limited Partners – Daiwa PI - in Singapore, pursuant to Clause 23.2 of the LPA.

31. By reference to section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) ('the FAAEL"), Mr Golazeswki's primary submission was that these proceedings should be automatically stayed in deference to the arbitral proceedings. His secondary submission was that even if the requirements of section 4 of the FAAEL are not applicable, a case management stay should be granted by the exercise of discretion on the basis that the dispute which is the subject of arbitration is essentially the same as that which is the subject of the Petition. Notwithstanding his client's unexplained six- week delay leading up to the hearing of the Petition, he urged that if granted an adjournment,

he would undertake on behalf of his client to file the application for the stay in a timely manner.

32. Given Mr Golazeswki's primary submission, it was necessary to consider the terms of section 4 of the FAAEL in coming to my decision. They are as follows:

> *"4. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."* [emphases added]

33. As appears from the words first in emphasis above in section 4, the obvious question was whether the Petition, as a legal proceeding commenced in this Court, could properly be described as being *in respect of any matter agreed to be referred to arbitration* as between any of the parties, in this case, as so regarded by the arbitration agreement contained within the LPA. There were at least two immediately apparent reasons why this was not the case.

34. The first was that the relief sought by the Petition is statutory, obtainable not by way of arbitration but only pursuant to section 11 of the ELP Law and is therefore subject to the exclusive jurisdiction of this Court. Here, the underlying dispute raised in the Petition for resolution was whether, in the words of section 11 of the ELP Law, "*a person required by section 10(2) to execute and file a statement or notice (has failed) to do so*". This is a dispute which can ultimately be determined only by this Court in keeping with the terms of the LPA and the ELP Law. Thus, the Petition seeks a remedy which cannot be

obtained by way of arbitration. Where that is the case, section 4 of the FAAEL does not operate an automatic stay as it would in deference to an arbitral dispute which is properly the subject of an arbitration agreement between parties who are also parties to a proceeding before the Court.

35. This principle was recognized and reaffirmed very recently by the Court of Appeal in ***Re China CVS (Cayman Islands) Holding Corp.*** (CICA 7 and 8 of 2019), written judgment delivered 23 April 2020. In that case it was held, at [108], among other things, that a petition to wind up on just and equitable grounds under section 92(e) of the Companies Law is a statutory remedy which, when properly grounded and is not an abuse of the process[3], is within the exclusive jurisdiction of this Court and even if the underlying dispute relates to issues which may themselves be amenable to arbitration, a petition to a wind up a Cayman Islands company under the Companies Law will not be stayed on the basis of the operation of section 4 of the FAAEL "*despite the fact that alternative remedies to winding up (eg: arbitration) will be available*".

36. As Justice Moses explained at [102] and [109]: *"The cases which in common law jurisdictions have followed and developed* ***Fulham***[4] *have maintained the exclusive jurisdiction of the court to decide the question whether a company should be wound up by identifying discrete substantive issues relating to the grounds on which the petition is brought rather than the relief which might follow once those grounds are made out... The cases which have followed and developed* ***Fulham*** *have all depended upon the court's*

[3] Citing at [108] to [109] as regards abuse, the Court's earlier decisions in ***Tianrui (International) Holding Co ltd v China Shanshui Cement Group Ltd*** , ()CICA 5 April 2019 and ***Camulos Partners Offshore Ltd v Kathrein and Company*** 2010 (1) CILR 303.

[4] ***Fulham Football Club (1987) Ltd v Richards*** [2011] EWCA Civ 855; [2012] Ch 333, which decided, as Moses JA explains at [81], that because the issues in that case which were submitted to arbitration did not necessarily involve the exercise of the exclusive jurisdiction of the court to make an order winding up the company, the choice the parties had made as to the method of disposal of their dispute should be upheld.

ability to identify discrete substantive issues [(which may be arbitrable and)] which do not invoke the exclusive jurisdiction of the court. Where the underlying issues are central and inextricably connected to determination of the statutory question whether the company should be wound up on just and equitable grounds, the possibility of hiving off those issues becomes more difficult".

37. Here, by analogy, there is indeed a statutory question for determination (viz: whether the Section 10 Statement is required to be filed as properly and duly required to terminate the Partnership) which, like in the case of a question whether a company should be wound up on just and equitable grounds, cannot either as a matter of jurisdiction or practicability, be hived off for determination by arbitration.

38. Moreover, here it is also perfectly clear, not only that the parties to the arbitration[5] are not the same or identical to the parties to the Petition but also that the underlying issues are not at all the same as those covered by the Petition. Invoking first Clause 23.2 of the LPA (the "Arbitration Clause"), in its Statement of Claim, the General Partner states at [18] that "*This arbitration concerns Daiwa PI's failure to honour its obligations (as a Limited Partner) to contribute to the Partnership's capital under the LPA. AEI's (the General Partner's) action is essentially a straightforward debt claim brought on behalf of the Partnership*". That pleading does not engage with the issues raised in the Petition which go to the right of the Limited Partners to remove the General Partner and dissolve the Partnership.

39. The General Partner moreover continues in its Statement of Claim in the following terms:

> *"19. In early 2020, AEI – acting in its capacity as General partner- issued two Drawdown Notices (as defined in the LPA) to Daiwa PI – as a*

[5] Instituted by the General Partner as between itself and Daiwa PI only, not involving any others of the Limited Partners nor the Partnership itself.

Limited Partner – demanding that Daiwa PI pay USD2, 973,878.00 in total into the Partnership's bank account.

20. *Under clause 4.1 (c) of the LPA, Daiwa is under strict liability to comply with the General Partner's Drawdown Notices.*
21. *However, to date, Daiwa PI has failed to comply with AEI's two Drawdown Notices.*
22. *In summary, AEI seeks an award that Daiwa PI be ordered to pay the default sum of USD 2, 973,878.00 , with contractual default interest, into the Partnership's stipulated bank account in compliance with the two Drawdown Notices and the LPA, as well as legal costs on an indemnity basis".*

40. It is the case, and it is striking, that nowhere in its Statement of Claim does the General Partner refer to the Termination Resolutions of 6 April 2020 (of which by 1 June 2020 when it filed for arbitration it would certainly have been aware) or the circumstances which gave rise to them. It seems to me that it is therefore to be reasonably inferred, that the General Partner itself did not consider there to be a real dispute relating to the validity or efficacy of the Termination Resolutions or if such dispute existed, did not consider it to be amenable to arbitration. Indeed, as its Statement of Claim avers at [18] as shown above: "*AEI's action is essentially a straightforward debt claim brought on behalf of the Partnership.*"

41. In pressing nonetheless for the adjournment, Mr Golawezski argued[6] that the matters raised by the Petition are matters which are "*in dispute*" with AEI and hence subject to the arbitration clause found at Clause 23 of the LPA and that a number of matters relevant to the resolution of the Petition are already subject to the pending arbitral proceedings in Singapore.

42. When pressed to make this proposition good, the best Mr Golawezski could do was to refer, not to anything pleaded by the General Partner in its Statement of Claim in the

[6] As foreshadowed in a letter from the Singapore office of his firm to Walkers dated 27 July 2020 giving the aforementioned 2 days' notice of the intention to seek the adjournment of the Petition.

arbitration proceedings but to Daiwa PI's pleadings in its Counter-Claim. There, among other things, Daiwa PI responds as follows:

> *"Preliminary Observations*
> 2. *Daiwa PI denies the claims set out in the Notice of Arbitration... Daiwa PI submits the following preliminary comments on the content of the Notice of Motion.*
> 3. *The claim articulated in the Notice of Arbitration is anything but "a straightforward debt claim." That characterization is misleading, at best. The real story lies in what AEI (and the individuals who control it, principally Mr Yohei Hora and Mr Hiroshi Saitama) chose to omit.*
> 4. *AEI failed to disclose, much less to engage with, the following realities:*
>   a. *AEI became contractually obliged to withdraw as the General Partner before any of the drawdown notices fell due, and its refusal to do so was a breach of the LPA;*
>   b. *AEI was in any event removed as the General Partner by unanimous consent of all four of the Limited Partners on 6 April 2020, which became effective on 5 June 2020."*

43. The Counter-Claim goes on to aver as to the effectiveness of the Termination Resolutions under the LPA and the reason why the Limited Partners removed AEI as General Partner and therefore why the drawdown notices were in breach of the LPA and invalid.

44. That singular and predictable response from Daiwa PI to the General Partner's claim does not to my mind and contrary to Mr Golaweszki's argument, make the matters raised by the Petition the same or substantially the same as the matters in dispute in the arbitration. At most, it is conceivable that there might be an evidential overlap (depending on how the pleadings are finally settled) in the context of an emerging dispute about whether the General Partner's actions gave grounds for its removal, going perhaps to the question of the validity and effectiveness of the drawdown notices. But that could not be tantamount to a real dispute whether under the LPA and the ELP Law, the Termination Resolutions must be given effect by operation of section 11 of the ELP Law directing that the Section

10 Statement is filed – a matter which, in any event as we have seen, does not factor in the arbitral proceedings.

45. In sum, in refusing the application for adjournment, I was satisfied that the relief sought in the Petition is not arbitrable and that, as at the date properly set for the hearing of the Petition, the relief sought by the General Partner in the arbitration proceedings in Singapore was substantially different from the issues joined in and the relief sought in the Petition. This is the unavoidable conclusion whether or not the General Partner has a plausible basis for claiming also to be a limited partner, a proposition which, if sustainable, one would have expected to have been raised in response to the Petition itself, as it would go to the unanimity and so the validity of the consent of the Limited Partners and their asserted right to have passed the Termination Resolutions.

Potential Prejudice

46. As a further reason for refusing the General Partner's application for adjournment, Mr Smith QC submitted that the Petitioners would be prejudiced if the Partnership Fund is left under the control of the General Partner, as would happen if the dissolution of the Partnership is not strictly completed by the filing of the Section 10 Statement, and notwithstanding that, in any case by 22 June 2020 at latest[7] the Section 10 Statement should have been filed.

47. In order to substantiate this concern about potential prejudice relating to the Partnership Fund, some evidence was obviously required and so I reserved my decision for a short period to allow for the filing of evidence. This was immediately provided on behalf of the Petitioners in the form of an affidavit from Mr Mikito Ishida, a partner at Mori Hamada

[7] Being the first business day after the elapse of the 15 day period after 5 June 2020 (which date represents the expiry of the 60 day notice period for removal of the General Partner pursuant to Clause 9.89(c) of the LPA).

& Matsumoto, the Petitioners' Japanese lawyers. In summary, the potential prejudice is described at [7] of his affidavit in these terms:

> *"The main areas of prejudice to the Petitioners can be summarized under the following headings which are addressed below:*
> *(a) Delay to the liquidation of the Partnership and to the distribution of the Partnership's assets and the risk of dissipation or misuse of assets;*
> *(b) The risk that the General Partner will continue to issue drawdown notices with respect to the Investment; and*
> *(c) The risk that the General Partner will continue to issue notices with respect to management fees."*

48. Mr Ishida goes on to elaborate upon these concerns in terms which I need not set out, given the peripheral significance of this evidence going only to whether or not an adjournment should have been granted. Suffice to say, his explanations are quite understandable in the context of an investment partnership being kept in limbo, so to speak, while the relationships of trust and confidence in its General Partner upon which it necessarily depends, have clearly broken down.

49. There was nonetheless, as mentioned above, a request from the General Partner for an opportunity to respond to this evidence from Mr Ishida and this was afforded. The response came in the form of the aforementioned affidavit from Mr Yohei Hora, the director of the General Partner, in which, notwithstanding the specified issue of potential prejudice to be addressed, Mr Hora for the first time, presented what is tantamount to a general refutation of the factual averments of the Petition, seeking, in effect to challenge its veracity. The terms of his response, which could be regarded as in any way relevant to the specified issue of potential prejudice, is effectively confined simply to his refutation of Mr Ishida's perceptions in that regard and so took the issue no further. For instance, where he responds to Mr Ishida's concerns about the General Partner continuing to issue further drawdown notices, Mr Hora's rebuttal at [42] and [43], while disclaiming any

intention on the part of the General Partner to issue any such further notices, is that the allegations are baseless and pose no prejudice to the Petitioners "(because) *the Petitioners have failed to comply with the drawdown notices of 12 February 2020 and 13 March 2020. It is clear that the Petitioners have no intention of complying with any further drawdown notices, even if such notices were issued*".

50. That proposition only had to be noted for its sophistry to be revealed: whether or not drawdown notices will be complied with is a different matter from whether or not the General Partner should be allowed to continue as such and so be able, at least purportedly, to issue them. The potential prejudice of having to respond to or refute any such drawdown notices is the real matter of concern.

51. Of further concern to my mind on the question of the adjournment, was the resoundingly opportunistic tenor of Mr Hora's affidavit, aimed as it is at not only at belatedly joining issue with the averments of the Petition but also at forging a bond between the issues raised in the Petition and those in the arbitration proceedings, in ways which, even as at the time of his affidavit, did not appear in the pleadings in the arbitration, nor within the General Partners Statement of Claim nor even for that matter, within Daiwa PI's Counter-Claim[8]. Thus, his affidavit left me with the distinct impression of an impermissible, *ex post facto* attempt to "shift the goal posts" of these proceedings, confirming only that the grant of an adjournment would be unjustified.

Conclusions

52. It appears from the evidence presented in support of the Petition that the General Partner has shown a disregard for its obligations in relation to the Partnership such as would

[8] For instance at [11] to [22] of his affidavit, Mr Hora asserts for the first time in the Petition proceedings on its behalf that AEI is not obliged to withdraw as General Partner under Clause 9.8(b) of the LPA, nor obliged to remove itself under Clause 9.8 (c) of the LPA and that these are issues joined in the arbitral proceedings.

ground reasonable concerns that the relationships of trust have broken down and still yet appears determined to cling to control in the face of the unanimous opposition of all the Limited Partners.

53. Section 11 of the ELP Law is specifically designed to ensure that a recalcitrant general partner cannot retain power in this manner. It does so by empowering the Court to appoint another person to sign and file the Section 10 Statement on behalf of the General Partner.

54. I am convinced that this is a paradigm case for the exercise of the Court's power in this regard. The longer the General Partner refuses to respect the operation of the LPA and the ELP Law, the greater the potential prejudice to the Limited Partners, of which I am convinced, despite Mr Hora's last ditch effort to affirm to the contrary, the General Partner is not one. I was satisfied that the Court should act now and not at some indeterminable future date of adjournment pending the outcome of the arbitral proceedings, to bring matters to an end so that the Partnership can proceed to be wound up under the control of the proposed independent officeholders, FTI Consultants.

55. Any genuine claim as pleaded in the arbitral proceedings that the General Partner may have for vindication of an accrued contractual debt as against Daiwa PI, should still be provable without having to interfere with the due dissolution of the Partnership and no arguments to the contrary were raised.

Hon Anthony Smellie
Chief Justice

24 August 2020