Neutral Citation Number: [2024] EWHC 236 (Comm)

Case No: CL-2023-000760

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/02/2024

Before :

CHRISTOPHER HANCOCK KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

TYSON INTERNATIONAL COMPANY LIMITED	**Claimant**
- and -	
GIC RE, INDIA, CORPORATE MEMBER LIMITED (sued as the sole corporate member for Syndicate 1947 at Lloyd's of London for the 2021 and 2022 years of account)	**Defendant**

- -
- -

Timothy Killen and Benjamin Phelps (instructed by **Reed Smith**) for the Claimant
Peter MacDonald Eggers KC and Tim Jenns (instructed by **RPC**) for the Defendant

Hearing dates: 6 December 2023

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Wednesday 7th February 2024.

Christopher Hancock KC :

I INTRODUCTION.

1. On 23 October 2023 the Claimant applied *ex parte* for an interim anti-suit injunction, which was granted by Foxton J on the same day. The Defendant now applies (by an application notice dated 30 October 2023) to set aside the interim anti-suit injunction. The Claimant applies (by an application notice dated 17 November 2023) to make the interim anti-suit relief final (or in the alternative, to continue the interim anti-suit injunction pending the result of any jurisdiction challenge that may be brought by the Defendant).

2. In this judgment the Claimant is referred to as "**TICL**", and the Defendant as "**GIC**".

II RELEVANT BACKGROUND.

3. Tyson Foods Inc ("**Tyson Foods**") is a multi-national company operating in the food industry. Its activities include the processing, sale and marketing of chicken, beef, and pork products. It is a company registered in Arkansas, US.

4. TICL is the captive insurer of Tyson Foods. TICL is incorporated and registered in Bermuda. Tyson Foods owns a large property portfolio and insured its property risks with TICL pursuant to a policy of insurance ("**the Captive Policy**"). The insurance provided by TICL was against "*all risks of direct physical loss of or damage to property*" situated in the US or Puerto Rico for the period 1 July 2021 to 1 July 2022. The Captive Policy was governed by Arkansas law and was subject to a US service of suit clause.

5. TICL in turn reinsured the property risks on a facultative basis with various reinsurers. GIC is a subscribing reinsurer to two layers of TICL's property insurance of Tyson Foods, including for the period 1 July 2021 to 1 July 2022. GIC had also been a subscribing reinsurer with TICL the previous policy year (1 July 2020 to 1 July 2021).

6. GIC is a limited company registered in England and Wales with company number 07792458 and a registered address at 40 Lime Street, 3rd Floor, London, United Kingdom, EC3M 7AW. GIC operates (and for the 2021 and 2022 years of account did operate) as the sole corporate member for Lloyd's of London Syndicate 1947 and carries (and carried) on business including as an underwriter of reinsurance.

7. GIC issued two "All Risks of Direct Physical Loss or Damage" reinsurance policies to TICL with policy numbers PRPNA2104091 and PRPNA2104667 for the period 1 July 2021 to 1 July 2022 (together "**the Reinsurance**"). GIC underwrote 10% on each of the two layers, one being for $25m excess of $175m and the other being for $75m excess of $225m.

8. GIC claims, but TICL denies, that on the renewal of the Reinsurance for 2021/2022, TICL misrepresented the values of the Hanceville Facility to GIC by the submission of a significantly understated statement of value, upon which GIC's reinsurance premium was based. By reason of that misrepresentation, by letter dated 3 November 2022 GIC claims to have rescinded and avoided the Reinsurance *ab initio*.

9. PRPNA2104091 and PRPNA2104667 were both signed by GIC on 30 June 2021. In submissions the parties referred to these documents in different ways, variously describing them as "Slip Policy/Policies, MRC(s) (which stands for "Market Reform Contract"), Slip(s), or Reinsurance Slip(s)", this Judgment refers to these documents as "the Slip

Policies/MRCs". Both PRPNA2104091 and PRPNA2104667, when signed, contained identical choice of law and jurisdiction provisions in the following terms:

> "This Reinsurance shall be governed by and construed according to the Laws of England and Wales. The Courts of England and Wales shall have exclusive jurisdiction of the parties hereto on all matters relating to this insurance."

10. The Slip Policies/MRCs contained brief details of the risk, a list of the clauses used in the Captive Policy (as well as attaching those clauses), and provisions applicable to the excess nature of the reinsurances. The Slip Policies/MRCs were described in the footer under the security details as "*Market Submission – Security Details*". The Slip Policies/MRCs included a subscription agreement which provided "*Basis of Agreement to Contract Changes: All changes to be managed and agreed in accordance with the General Underwriters Agreement (version 2.0) February 2014 and the GUA Non-Marine Schedule (*October *2001)*".

11. After GIC signed PRPNA2104091 and PRPNA2104667 a document called a Facultative Certificate was issued in respect of each Slip Policy/MRC. The Facultative Certificates were agreed by GIC on 9 July 2021. In submissions the parties also referred to these documents in different ways, variously describing them as "Certificate(s), Reinsurance Certificate(s), Facultative (Reinsurance) Certificate(s), Reinsurance Agreement(s) or the "MURA" (which stands for the "Market Uniform Reinsurance Agreement"). This Judgment refers to these documents as the "Facultative Certificate(s)". These Facultative Certificates include the same agreement numbers as the Slip Policies/MRCs. They also provided as follows:

    (1) The documents are headed, and "*Agreement*" is defined as, "*Agreement of Facultative Reinsurance (the "Agreement")*". The Faculative Certificates comprise a section headed "*Declarations*" and a section headed "*Terms and Conditions*".

    (2) Page 1 under the Declarations includes a provision "*Reinsurances have made the following amendments to this Reinsurance Certificate:- … 2) RI slip to take precedence over reinsurance certificate in case of confusion*".

    (3) Clause 2 of the Terms and Conditions contains the reinsurance provision stipulating that the basis of cover is as set out in the Reinsurance Agreement:

        > "2. Reinsurance Agreement
        >
        > In consideration of the payment of the premium and subject to the terms, conditions and limits of liability set forth in this Agreement, in the Declarations and any endorsements made a part of this Agreement, the Reinsurer does hereby reinsure the Company [TICL] …"

    (4) Clause 13 of the Terms and Conditions headed "*Arbitration*" contains a detailed arbitration agreement in eight sub-paragraphs including:

        > "13. Arbitration

> a. As a condition precedent to any right of action hereunder, any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall be submitted for decision to a panel of three arbitrators. Notice requesting arbitration will be in writing and sent certified or registered mail, return receipt requested. …
>
> f. The panel shall be relieved of all judicial formality and shall not be bound by the strict rules of procedure and evidence. Unless the panel agrees otherwise, arbitration shall take place in New York, but the venue may be changed when deemed by the panel to be in the best interest of the arbitration proceeding. Insofar as the arbitration panel looks to substantive law, it shall follow the law of New York in accordance with the dictates of the Governing Law Clause. The decision of any two arbitrators when rendered in writing shall be final and binding. The panel is empowered to grant interim relief as it may deem appropriate."

(5) The reference to the "*Governing Law Clause*" in Clause 13(f) is to Clause 17 which provided:

> "17. Governing Law and Jurisdiction
>
> Insofar as the panel looks to the law of a jurisdiction as governing law, it will apply the substantive law of the State of New York without reference to that state's choice or conflict of laws rules; provided, however, that the substantive law of the State of New York shall not be used to supplant or override underlying court or other judicial body final decisions concerning the claim(s) at issue."

(6) Clause 19 is headed "*Service of Suit*" and sets out a non-exclusive jurisdiction clause in favour of any court of competent jurisdiction within the United States, and stipulates that service may be made on the New York firm Mendes & Mount (as stated in the Declarations). Clause 19 applies to reinsurers (such as GIC) which are not domiciled or authorised in the United States. Clause 19 is expressly made subject to Clause 13 (arbitration): "*The foregoing is not intended to conflict with or override the obligation of the Parties hereto to arbitrate their disputes as provided in the Arbitration Clause*".

(7) Clause 26 contains an entire agreement clause in these terms:

> "26. Entire Agreement
>
> This Agreement, including any duly executed written amendments and endorsements thereto, and appendices, schedules or other attachments made part thereof or expressly incorporated by reference, and the Policy and any written endorsements, modifications, alterations and cancellations thereto, and waivers and interpretations thereto but only with respect to the claim in dispute, all as permitted under Reinsurance Agreement Clause 2 and Reinsurance Accepted Clause 3, shall constitute the entire agreement

between the Parties and shall supersede all contemporaneous or prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter hereof provided, however, that this Clause 26 shall not override or take precedence over Clause 3 hereof."

(8) The final page of each Facultative Certificate is an Endorsement on Lockton headed paper, stating the same unique market reference numbers as stated on the Slip Policies/MRCs. It bears the title (at the bottom of the page) "*Market Endorsement – Security Details*", which GIC contends means that the Facultative Certificate took effect as an amendment and endorsement to the Slip Policies/MRCs. It provides, among other things, "*Endorsement Name Reinsurance Certificate*"; "*Agreement Practice GUA A*" (a reference to the General Underwriters Agreement); "*Agreement Instructions Endorsement agreement parties only*" (i.e. TICL and GIC); a heading "*Confirmation of Agreement by required agreement parties*" under which it is stated "*Agreed 09 Jul 2021 0938*" followed by GIC's details as the underwriter company and the name of its underwriter, Mr Sameer Gupta.

12. As noted above, the Facultative Certificate also incorporated a clause, which has been referred to by the Claimant as the "**Hierarchy Clause**", and by the Defendant as the "Confusion Clause". For consistency, this judgment refers to the clause as the "Hierarchy Clause". The clause provided that *"RI slip to take precedence over reinsurance certificate in case of confusion"*.

13. On 30 July 2021, there was a fire at a poultry rendering plant owned by Tyson Foods at Hanceville (1170 Country Road 508, Hanceville, Alabama, USA). TICL accepted coverage under the Captive Policy for the losses incurred by Tyson Foods. TICL provided notice of the loss to GIC on or shortly after 30 July 2021. GIC has failed to confirm an indemnity to TICL under the terms of the Reinsurance. Rather, as noted above, GIC purported by a notice dated 3 November 2022 to rescind the Reinsurance.

14. On 19 October 2023, TICL became aware through a press enquiry of an *ex parte* motion made by GIC in the Southern District of New York. TICL was able to obtain a copy of the motion (with Docket Number 1:23-cv-09175, Doc. Nos. 1-5) ("**the Motion**") on 20 October 2023. The Motion sought an order restraining TICL from commencing proceedings in England "*concerning any and all claims subjects [sic] to Article 13*". The reference to *"Article 13*" was understood to be a reference to clause 13 of the Facultative Certificates as set out above which provides for arbitration as a "*condition precedent to any right of action arising hereunder*". The Motion also sought an order preventing TICL from seeking injunctive relief (thus including anti-suit relief) from the Court of England and Wales.

15. TICL issued a claim in the Commercial Court (CL-2023-000769) on 20 October 2023 seeking a declaration that GIC is obliged to indemnify TICL under the Reinsurance contracts and/or seeking payment of an indemnity from GIC and/ or damages for breach of contract.

16. On 23 October 2023, TICL's *ex parte* application for an interim anti-suit injunction was heard by Foxton J. Foxton J granted interim anti-suit relief ("**the Order**") on 23 October 2023. The Order provided:

> "Pursuant to section 37 of the Senior Courts Act 1981, until the return date, or further Order, the Defendant, whether by itself, its servants, agents or otherwise, is restrained (save as is otherwise addressed in this paragraph) from commencing or prosecuting or continuing or taking any steps in or otherwise participating in proceedings in any court or tribunal other than in the Courts of England and Wales, against the Claimant in respect of all matters relating to the reinsurance provided by the Defendant to the Claimant for the period 1 July 2021 to 1 July 2022. This includes the motion filed in the United States District Court for the Southern District of New York with Docket Number 1:23-cv-09175, Doc. Nos. 1-5. For the avoidance of doubt nothing in this paragraph shall prevent GIC from serving a notice of arbitration on TICL pursuant to clause 13(a) of the Facultative Certificates, albeit GIC may not seek anti-suit relief or equivalent in any form from any Court, forum or arbitral tribunal such that may be constituted."

17. The Order, also, in paragraph 4, required GIC to withdraw or discontinue the Motion.

18. The Order was served on GIC's London offices shortly after the conclusion of the hearing and emailed to GIC. The Order was also transmitted via the New York offices of Reed Smith to GIC's New York legal representatives and to the Southern District of New York.

19. On 23 October 2023, GIC via its New York representatives voluntarily dismissed the New York Motion. On 24 October 2023, the Southern District of New York issued a ruling to that effect.

20. On 20 October 2023 i.e. the working day prior to the hearing of TICL's application for interim relief, GIC had posted a Demand for Arbitration via the United States Postal Service to: Tyson International Company, LTD, Power House 7 Par-La-Vulle Road, Hamilton HM 11, Bermuda, Att.: Brian Rogers. TICL was, it says, not aware that a Demand for Arbitration had been posted. That Demand for Arbitration was, I was told, not received by TICL at the above Bermuda address until 7 November 2023. I was told that from 20 October 2023 until 7 November 2023 the Demand for Arbitration was under carriage by the United States Postal Service to Bermuda.

21. In the Demand for Arbitration dated 20 October 2023, TICL notes that GIC purportedly appointed an arbitrator, a Mr Mark Gurevitz. When informed of this putative appointment TICL (via the New York offices of Reed Smith) wrote to GIC's New York representatives on 8 November 2023 reminding them of the terms of the Order and taking issue with the appointment. The letter noted that in any event, the effect of the Order and of TICL not appointing its arbitrator was that the arbitration was effectively stayed prior to the Tribunal being constituted. As at the date of the hearing before me, no response had been received from GIC's New York representatives to this letter, and TICL sought an order revoking the appointment of Mr Gurevitz, although this latter application was not pursued before me.

22. On 30 October 2023 GIC filed an acknowledgment of service indicating an intention to contest jurisdiction, together with the first statement of Ms Sherratt in support of GIC's application to set aside the interim anti-suit injunction. GIC contended in its set aside application that the Reinsurance is "*subject to and governed by the arbitration agreement contained in Clause 13*" of the Facultative Certificates.

23. On 17 November 2023 (the same date on which TICL responded to GIC's application to set aside the Order of Foxton J) TICL applied to make the anti-suit injunction final, and the parties agreed that this application should be heard together with GIC's set aside

application, both parties recognising that the two are closely bound up. TICL's application was supported by a further witness statement of Mr Pring and the first witness statement of Mr Whitcombe, the broker who placed the insurance, whilst GIC have filed a further witness statement of Ms Sherratt resisting the application for a final anti-suit injunction, to which is exhibited a report of a Mr Cook dated 24 November 2023.

24. The parties have agreed that the time for GIC to bring any jurisdiction challenge should be extended until 14 days after the decision on the anti-suit injunction or any appeal therefrom.

25. The issue at the heart of these applications is narrow and straightforward: Did the parties agree a contract which is subject to an exclusive English Court's jurisdiction clause, or to New York seated arbitration?

III THE LAW.

(a) Anti-Suit Relief.

26. TICL's application for anti-suit relief is brought pursuant to s37(1) of the Senior Courts Act 1981.

27. The relevant principles were recently summarised by Cockerill J in Times Trading Corporation v National Bank of Fujairah (Dubai Branch*)* [2020] EWHC 1078 (Comm) at paragraph [38]. *Times Trading* concerned anti-suit relief sought in support of an arbitration agreement. Subsequently, Jacobs J in Catlin Syndicate Limited (as the sole member of the Lloyds Syndicate 2003 for the 2015 year of account) v AMEC Foster Wheeler USA Corporation [2020] EWHC 2530 (Comm) considered that Cockerill J's summary of the principles was equally applicable to relief sought in support of an exclusive jurisdiction clause (see Catlin Syndicate at [33]).

28. Cockerill J's summary of the "*general principles*" in Times Trading was as follows:

> "i) The Court has the power to grant an interim injunction "in all cases in which it appears to the court to be just and convenient to do so": section 37(1) of the Senior Courts Act 1981 ("SCA 1981"). "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just": section 37(2).
>
> ii) The touchstone is what the ends of justice require: Emmott v Michael Wilson & Partners Ltd [2018] 1 Lloyd's Rep 299 at [36] per Sir Terence Etherton MR.
>
> iii) The Court has jurisdiction under section 37(1) of the Senior Courts Act 1981 to restrain foreign proceedings when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration: Ust-Kamenogorsk Hydropower Plant JSC v AES Kamenogorsk Hydropower Plant LLP [2013] 1 WLR 1889 (SC).
>
> iv) The jurisdiction to grant an anti-suit injunction must be exercised with caution: Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] UKPC 12, [1987] AC 871, 892E per Lord Goff.

> v) As to the meaning of "caution" in this context, it has been described thus in The "Angelic Grace" [1995] 1 Lloyd's Rep 87 at 92:1 per Leggatt LJ: "The exercise of caution does not involve that the Court refrains from taking the action sought, but merely that it does not do so except with circumspection."
>
> vi) The Claimant must therefore demonstrate such a negative right not to be sued. The standard of proof is "a high degree of probability that there is an arbitration agreement which governs the dispute in question": Emmott at [39]. The test of high degree of probability is one of long standing and boasts an impeccable pedigree going back to Colman J in Bankers Trust Co v PT Mayora Indah (unreported) 20 January 1999 and American International Specialty Lines Insurance Co v Abbott Laboratories [2003] 1 Lloyd's Rep 267 and has been recently affirmed on the high authority of Christopher Clarke LJ in Ecobank v Tanoh [2016] 1 WLR 2231 at 2250.
>
> vii) The Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause unless the Defendant can show strong reasons to refuse the relief: The Angelic Grace [1995] 1 Lloyd's Rep 87; The Jay Bola [1997] 2 Lloyd's Rep 279 (CA) at page 286 per Hobhouse LJ.
>
> viii) The Defendant bears the burden of proving that there are strong reasons to refuse the relief: Donohue v Armco Inc [2002] 1 All ER 749 at [24]-[25] per Lord Bingham."

29. The essential principles are the same whether the Court is granting interim or final relief, see Aon UK Limited v Lamia Corporation SRL [2022] EWHC 3323 (Comm)[1] at [95]:

> "The legal principles governing this primary basis for Aon's application were largely common ground before me. The authorities in this area generally do not distinguish between interlocutory and final relief, perhaps because in many anti-suit cases, the interlocutory decision will for practical purposes be final."

(b) Contractual Interpretation.

30. There was no dispute as to the relevant principles in this regard. These were recently helpfully summarised by Mr John Kimbell KC (sitting as a Deputy Judge of the High Court) in *The Witz Company LLC v Edmund Truell* [2023] EWHC 2877 (Comm) at paragraphs [25] and [26], in which the judge said:

[1] See also RSM Production Corporation v Gaz Du Cameroun SA [2023] EWHC 2820 (Comm) at [21] read with [51]

"25. The applicable principles were not in dispute. The principles to be derived from Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 ; Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 ; Re Sigma Finance Corp [2010] 1 All ER 571 ; Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 ; Arnold v Britton [2015] AC 1619 ; and Wood v Capita Insurance Services Ltd [2017] AC 1173 were helpfully distilled into a single paragraph by Popplewell J (as then was) in The Ocean Neptune [2018] EWHC 163 (Comm) at [8] . This one paragraph summary is reproduced by the editors of Chitty on Contracts (34th edition, 2022) at paragraph 15-053:

"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

26. As to the role of "commercial common sense" in interpretating contracts under English law, there are three key points which emerge from the case law:

a. If there are two possible constructions, the court is entitled to prefer the construction which is more consistent with

> business common sense and to reject the other – see BNP at [100] citing Lord Clarke in Rainy Sky SA v Kookmin Bank [2011] UKSC 50 and Adaptive Spectrum and Signal Alignment Inc v British Telecommunications Plc [2023] EWCA Civ 451 (26 April 2023) at [19] per Birss LJ and at [50] per Nugee LJ.
>
> b. Commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party see BNP at [101] citing Lord Neuberger in Arnold v Britton [2015] UKSC 36 .
>
> c. There is no class or type of contract for which commercial common sense is irrelevant. Evidence of commercial context and commercial consequences are both part of the iterative process of interpretation under English law: "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements" per Lord Hodge in Wood v Capita [2017] UKSC 24 at [13] ."

(c) London Market Practice and the MRC.

31. There was a substantial dispute between the parties as to London market practice. I was taken to various textbooks and each party relied on expert evidence. Mr Whitcombe's evidence was relied on by TICL and Mr Cook's evidence was relied on by GIC. I deal with the market evidence below.

TICL's case.

32. As to the textbooks, TICL submitted that the centrality of the Slip Policy/ MRC is well explained in Colinvaux's Law of Insurance (13th Edition) in Section 4 "London Market Procedure". 1-067 to 1-069 chart the reform of London Market practice that occurred from 2000 to 2007, and which culminated in the adoption of the MRC. Colinvaux at 1-070 and 1-071 explains:

> "The Market Reform Contract (MRC) is now the standardised form of agreement used in the London market. The slip has in principle disappeared, but it is still common for draft contracts put forward for comment by brokers to be described as "slips". When a risk is presented by the broker to the market, the presentation consists of an introductory section setting out the most important details of the risk (which more or less corresponds to the old slip) but attached to this document is a

> "schedule" which sets out the terms of the policy. The effect, therefore, is that all of the documents are prepared up-front, and when the underwriters scratch the documents the contract is in its entire form.
>
> An MRC must contain the details set out in the published guidance. The MRC consists of a series of sections:
>
> (1) Risk details, consisting of unique market reference; type of policy; name and address of assured; period; the interest insured; monetary limits; geographical scope; conditions; choice of law and jurisdiction; amount of premium and premium payment terms; any taxes payable by the assured and administered by the insurers; storage of information; and documentation including a copy of the contract document or policy.
>
> (2) Information, consisting of any information provided to insurers to support the assessment of the risk at the time of placement, either in full or, if inappropriate, clearly referenced and made available to all subscribing insurers.
>
> (3) Security details, consisting of the subscriptions of subscribing insurers in percentage terms of the financial limits; terms of signing down (so that if a line is written "to stand" it may not be signed down). It is not permitted to include a line condition "wording to be agreed": all wording must be agreed before the insurer commits to the contract.
>
> (4) Subscription agreement: this establishes the rules to be followed for processing and administration of post-placement amendments and transactions. The name of the slip leader must be clearly identified, any leading underwriter agreement must be specified and the claims agreement procedure is to be specified.
>
> (5) Fiscal and regulatory: issues specific to the insurers involved in the risk must be shown, in particular, taxes which are deducted from the premium retained by the insurer.
>
> (6) Broker remuneration and deductions: information relating to brokerage, fees and deductions from premium." [Emphasis added]

33. In AIG Europe SA v John Wood Group PLC [2021] EWHC 2567 (Comm) at [49] to [51] Jacobs J endorsed similar text to the above extract which had appeared in an earlier edition of Colinvaux and said that:

> "49. Each of the 4 policies began with a number of pages which started with the heading "Risk Details". The background to the form of these policies is described in Merkin: Colinvaux's Law

> of Insurance 12th Edition paragraphs 1-082 – 1-094. In summary, the position is that prior to reforms resulting from steps taken between 2004-2007, the typical procedure in Lloyd's and the London market was for the broker to prepare a "slip" which contained brief details of the risk and its terms. Formal policy wording would be prepared at a later stage. On occasion, and particularly at the reinsurance level, the parties might agree that no formal policy was to be issued, in which case the slip was referred to as a "slip policy". However, in many cases there was no policy wording in existence at the time when the contract came into effect (ie when the slip was signed), which Merkin describes as one of the "weaknesses in the system".
>
> 50. Following intermediate reforms, the insurance regulator (the FSA) challenged the London market to find a solution to the problem of inadequate documentation. This resulted in the formation of two working groups in the London market. This included the Subscription Market Reform Group, whose work is relevant to policies such as those in the present case. Codes of Practice were later issued. This work resulted in the "Market Reform Contract", which is now the standardised form of agreement used in the London market. There is no longer any reference to the "slip". Instead, as Merkin describes:
>
> "... when a risk is presented by the broker to the market, the presentation consists of an introductory section setting out the most important details of the risk (which more or less corresponds to the old slip) but attached to this document is a "schedule" which sets out the terms of the policy. The effect therefore is that all of the documents are prepared up-front, and when the underwriters scratch the documents the contract is in its entire form."
>
> 51. A Market Reform Contract must contain the details set out in the published guidance. It consists of a series of sections, including Risk details. The Risk details include, for example, the unique market reference, the type of policy, the interest insured, the monetary limits and the choice of law and jurisdiction." [Emphasis added]

34. Butler and Merkin at A-0403 also concurs with the above.

GIC's case.

35. For their part, GIC contended that London market practice was as follows:

(1) The Captive Policy set out the terms and conditions between the insured (Tyson Foods) and insurer (TICL). GIC had sight of the Captive Policy wording when agreeing the Slip Policies/MRCs and, accordingly, was aware of the cover being afforded to the insured by the reinsured (TICL). The Captive Policy is referred to in the Reinsurance.

(2) TICL's broker, Lockton, submitted the Slip Policies/MRCs to reinsurers setting out the particulars of the risk proposed for insurance. Since June 2007 the standard placing document/slip is the Market Reform Contract (MRC). The MRC is a pro-forma document that the broker completes with the relevant information including details of the risk and the underlying policy. The Slip Policies/MRCs included the reference number of the original policy wording to refer to the original basis of cover.

(3) The Slip Policies/MRCs evidence the outline of cover effected by the facultative reinsurance broker and the reinsurers. GIC said that the Slip Policy/MRC is not typically shared with the cedant. It is a document (either physical or digital) that contains a summary of the pertinent information regarding the risk and the insurance terms and conditions that the broker submits to the underwriters on risk.

(4) The Slip Policies/MRCs do not, at least not on their own, constitute the binding contract of reinsurance or policy wording. Rather, GIC said, it is akin to a cover note, which is then superseded by the issuance of a facultative reinsurance certificate / reinsurance agreement which sets out the specific terms that govern the contract between the reinsured and each reinsurer.

(5) The Slip Policies/MRCs set out the terms of the Captive Policy which were incorporated into the Reinsurance. Thus, the Slip Policies/MRCs provide under "*Conditions*" that "*LPO348C(MRC) (Amended) Excess Physical Damage Form, following terms, clauses and endorsements of the Original Policy Wording (being Policy Number PRPNA2103094 issued by Certain Underwriters at Lloyd's), including the following and as detailed herein*", and then set out a list of such clauses and endorsements including the Property Cyber and Data Endorsement and the Sanction Limitation and Exclusion Clause which comprise part of the Original Policy Wording.

36. The Faculative Certificates, once agreed, set out the full and final terms of the Reinsurances and became the operative and binding reinsurance agreement between the cedant and the reinsurer and supersedes the Slip Policies/MRCs. The Faculative Certificates therefore finalise and contain the terms of the Reinsurance.

37. The key difference between the Slip Policies/MRCs and the Faculative Certificates in terms of placement is that the latter are signed by a director of the broker and shared with both the reinsurance underwriters and the cedant, whereas as noted above the cedant does not usually see the Slip Policies/MRCs.

38. In the London reinsurance market, it is understood, GIC contends, that a facultative certificate is the equivalent of and an alternative to, a policy wording and therefore is the actual reinsurance contract and the "*controlling contractual document"* between the reinsured and the reinsurers. The purpose of issuing a facultative certificate is that it is quicker and easier than producing a formal policy wording, but it serves the same purpose and has the same contractual effect.

39. The Faculative Certificate are not, therefore, as TICL contends, merely an administrative document. There is nothing in the Certificates which suggest that they are administrative documents. Indeed, if there were purely administrative, GIC's underwriter would not have included amendments to the Certificates. Indeed, all of the evidence is to the contrary. Claims subscription agreements may be administrative, but even they can affect the substantive obligations of the parties.

40. The Faculative Certificates provide that "*COVERAGE: All Risk of Direct Physical Loss or Damage as per the Policy Reinsured*". The Policy Reinsured is "*the Policy(ies) all issued to the Original Insured(s) by the Company*" (clause 1(c) of the Faculative Certificates). This expressly incorporates into the Faculative Certificates the clauses and endorsements which are identified in the Slip Policies/MRCs as being part of the Original Policy Wording (see also Clauses 2 and 3 the Faculative Certificates).

41. Formally, the Faculative Certificates took effect as an amendment or endorsement of the Slip Policies/MRCs. The Faculative Certificates were submitted by Lockton through the "PPL" online placing platform as an endorsement requiring GIC's agreement, which was given at 0938 on 9 July 2021, and not merely for information.

42. The scope of Clauses 2 and 26 make clear that the Faculative Certificates each take effect as the conclusive and entire agreement of reinsurance in accordance with their terms (subject, in this case, only to the limited carve out in the Faculative Certificates "*RI slip to take precedence over reinsurance certificate in case of confusion*", which I discuss below). It is for this reason that the governing reinsurance provisions are set out in full in the Faculative Certificates (see Clauses 2 and 3).

43. The Faculative Certificates include additional terms required as between the reinsurer (GIC) and reinsured (TICL), including the arbitration, governing law and service of suit clauses (Clauses 13, 17 and 19) and the intermediary clause (Clause 28) which are not included in the standard MRC wording.

44. The Faculative Certificates are based on the MURA (the Market Uniform Reinsurance Agreement) form. However, the arbitration, governing law and service of suit clauses are bespoke terms because each MURA wording is specific to the individual cedant. There is no "standard" MURA wording unless the appropriate London market naming conventions and version controls are applied, which they were not in this case.

(IV) GIC's APPLICATION TO SET ASIDE THE INTERIM ASI.

GIC's submissions at the hearing.

45. GIC's case was that the Order must be set aside because the underlying coverage dispute between TICL and GIC under the Reinsurance and the arbitrability of that dispute are, in each case, subject to and governed by the New York arbitration agreement contained in Clause 13 of the Faculative Certificates and the New York governing law provisions under Clause 13(f) and Clause 17 thereof. The dispute and its arbitrability are not to be determined in accordance with the English law and jurisdiction clause contained in the Slip Policies/MRCs.

46. GIC submitted that this is so for three independent and freestanding reasons each of which mean that the Court cannot be satisfied to the relevant standard that there was a binding exclusive English jurisdiction clause governing disputes under the Reinsurance, justifying the continuation of the Order, namely:

    (1) The Faculative Certificates supersede the Slip Policies/MRCs, with the result that the New York arbitration agreement is applicable to any dispute between TICL and GIC.

    (2) Clause 13(a) is a *Scott v Avery* Clause so that any proceedings, even proceedings in England and Wales, would not be permitted until the conclusion of the arbitration.

(3) If the English Court has any jurisdiction, it is an auxiliary jurisdiction in respect of the agreed New York arbitration.

47. Each of these considerations demonstrated, it was argued, that there can have been no "*high degree of probability*" that the parties had agreed that any disputed claim under the Reinsurance would be subject to the exclusive jurisdiction of the English Court, with the result that the Order should be set aside. In this connection, the test (ie high degree of probability) was that laid down in the QBE case, mentioned by Cockerill J in the extract from Times Trading, set out above.

The Faculative Certificates supersede the Slip Policies/MRCs.

48. The starting point was that the Faculative Certificates were agreed between the parties after the Slip Policies/MRCs and therefore, in the case of inconsistency, as the later agreements in time ought to prevail, absent any clear intention to the contrary. Here, there was no such clear intention for the following reasons.

(1) The Faculative Certificates were presented by TICL's broker for acceptance and agreement by GIC and were duly agreed by GIC on 9 July 2021, some 9 days after the Slip Policies/MRCs had been concluded.

(2) Although it is ultimately a question of construction, there is a general presumption in the London market that if policy wording is issued after a reinsurance slip it is intended to supersede it. As Rix LJ observed in HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161, "*I would, however, agree that in the absence of a plea of rectification a slip could not be used to alter or contradict the construction of a policy which had superseded a slip … In the insurance market … it may well by now be possible to talk of a general presumption that a policy is intended to supersede a slip*" (at [92]-[93]).[2]

(3) The reference on the final page of the Faculative Certificates (the Endorsement) to the General Underwriter's Agreement "(*GUA*)" and the statement that both parties had agreed the terms at 0938 on 9 July 2021 indicate that the parties intended the Faculative Certificates to take effect as an amendment to the earlier contract terms by way of agreed endorsement and therefore take priority over the terms of the Slip Policies/MRCs.

(4) The Faculative Certificates cover the same subject matter as the Slip Policies MRCs. As referred to above, unlike the Slip Policies/MRCs, the Faculative Certificates were full and complete contracts of reinsurance which expressly incorporated the clauses and endorsements identified in the Slip Policies/MRCs as being part of the Captive Policy: see Clauses 1, 2 and 3. It is plain from the terms of the Faculative Certificates and the manner of their agreement and execution that they were intended to have contractual force.

(5) The Faculative Certificates contain an entire agreement clause which makes clear that they "*shall supersede all contemporaneous or prior agreements and understandings,*

[2] See also Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep 127 and Punjab National Bank v De Boinville [1992] 1 Lloyd's Rep 7, to which Rix LJ referred at [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161, [73]-[77].

both written and oral, between the Parties with respect to the subject matter hereof". Therefore, subject to one exception, the parties expressly agreed that the terms of the Slip Policies/MRCs are superseded by the Faculative Certificates.

(6) The exception is that there is a limited carve out from the entire agreement clause provided by the provision "*RI slip to take precedence over reinsurance certificate in case of confusion*". However, the reference to "*confusion*" does not mean inconsistency or conflict.[3] If it had been so intended, the words "*inconsistency*" or "*conflict*" would have been used in this provision (as they often are in a real hierarchy clause),[4] but they were not. GIC submitted that the hierarchy clause was not a conflict hierarchy clause. The purpose of that provision is not that conflicting clauses in the Faculative Certificates must give way to the terms of the Slip Policies/MRCs. Rather, the Faculative Certificates, including their extensive law and jurisdiction provisions should apply in full, without reference to the Slip Policies/MRCs, unless there is a lack of clarity or uncertainty as to the meaning or operation of the terms of the Faculative Certificates. In the case of such a lack of clarity or uncertainty, then it would be permissible to refer to the Slip Policies/MRCs, but not otherwise. GIC argued that if TICL's reading of this provision were correct, a highly implausible situation would result, namely that only 9 days after agreeing the Slip Policies/MRCs, the parties consciously agreed to a detailed New York arbitration agreement, identified as one of the "*Required Terms and Conditions*", which on TICL's case would then (bizarrely) be removed - along with the New York governing law clause - by reason of the "*confusion*" provision.

(7) There is no lack of clarity and no uncertainty, and therefore no confusion, as to the meaning or operation of the arbitration agreement and therefore the arbitration agreement stands. Accordingly, the provisions in the Slip Policies/MRCs as to law and jurisdiction afford no assistance. As Rix LJ said in HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161 at [83], there are limits on the utility of using an antecedent contract or document as an aid to construction of a later contract and such is the case here (with bold emphasis added):

> **"… where the later contract is intended to supersede the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesis, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a**

[3] The Oxford English Dictionary does not support the meaning of conflict. Instead, the word "*confusion*" conforms with the OED's definition no. 8 ("*The quality of being confused, indistinct, or obscure* …").
[4] Foxton J noted with respect to the word "*confusion*" during the hearing of the without notice application: "*It is an odd word. One would have expected inconsistency*".

deliberate decision to depart from the earlier wording, which again provides no assistance."

Accordingly, since there is no confusion or uncertainty, as a matter of construction, no reference is to be made to the Slip Policies/MRCs.

49. In summary, the parties by executing the Faculative Certificates consciously chose New York law and arbitration, instead of the English law and jurisdiction clause contained in the Slip Policies/MRCs to govern any disputes in relation to the Reinsurance and the construction of the Facultative Certificates including the arbitration agreement contained within in it. Pursuant to Clause 13(a) the parties agreed that the arbitrators shall have jurisdiction to resolve "*any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof"*, which includes any dispute as to the arbitrability of disputes under the Facultative Certificates.

50. The choice of New York law plainly applies both to the arbitration agreement (clause 13(f)) and the parties' substantive rights and obligations under the Facultative Certificates (clause 17).

51. Finally, GIC relied on the evidence of Mr Cook as showing that market practice was in accord with their submissions.

Clause 13(a) is a Scott v Avery clause.

52. The second ground in support of GIC's application is that Clause 13(a) of the Facultative Certificates is expressed to be a "*condition precedent*" to any right of action. It is a *Scott v Avery* clause which bars all proceedings under the Facultative Certificate including claims of substance and ancillary proceedings and including TICL's application for an anti-suit injunction, prior to determination of the dispute by arbitration in accordance with Clause 13.[5]

53. This is made clear by the language of condition precedent[6] and by the provision in Clause 19 of the Facultative Certificates which provides that any right of action before the United States courts pursuant to that provision is subject to the "*obligation of the Parties hereto to arbitrate their disputes as provided in the Arbitration Clause"*.

54. Therefore, even if (which GIC disputes) there is an applicable English jurisdiction agreement, the parties must still arbitrate in accordance with Clause 13 before commencing and pursuing any legal proceedings, whether in the United States under the Clause 19 service of suit provision, or - to the extent it applies - in England under the jurisdiction clause in the Slip Policies/MRCs.

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[5] See B v S [2011] EWHC 691 (Comm); [2011] 2 Lloyd's Rep 18 at [68]-[70]; Chitty on Contracts (35th ed., 2023) at [35-047]; Russell on Arbitration (24th ed., 2015) at [2.023].

[6] Which, GIC submitted, makes the position clear beyond doubt. But the Courts have recognised that a binding dispute resolution procedure need not be expressed as a condition precedent to be given effect to so long as it is a mandatory obligation that was sufficiently clear and certain by reference to objective criteria: Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd [2022] EWHC 1595 (TCC); affirmed [2023] EWCA Civ 292. Clause 13 satisfies that test.

55. It follows that the Order should be set aside, at least insofar as it would prevent GIC from referring the dispute under the Reinsurances to New York arbitration and from pursuing those arbitration proceedings.

The English Court has auxiliary jurisdiction over the New York arbitration.

56. The third ground in support of GIC's application is that if the Court does not consider that the New York arbitration clause is subject to the auxiliary jurisdiction of the New York Courts, the English jurisdiction clause in the Slip Policies/MRCs - if it is to have any influence - may be read consistently with the New York law arbitration agreement to provide that the English Court shall have auxiliary jurisdiction over the arbitration.

57. This conclusion would be at odds with the choice of New York law as the applicable law and the choice of New York as the seat of the arbitration (clause 13(f)),[7] but it is juristically plausible.

58. In Surrey CC v Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015 (TCC); [2021] BLR 625, Alexander Nissan QC (sitting as a High Court judge) considered the relevant authorities concerning competing arbitration and jurisdiction clauses from which he derived the following principles (at [77]):[8]

> "(a) Whilst the exercise is ultimately one of routine construction, where possible the Court should strive to give effect to an arbitration clause in the presence of a competing jurisdiction clause. It has latitude to do so where there is infelicitous drafting but cannot do so where the clauses are in direct conflict with each other and wholly irreconcilable, so that no sense whatever can be given to the intention of the parties.
>
> (b) Unless they expressly and clearly say otherwise, there is a strong presumption that parties are assumed to have agreed on a single tribunal for the determination of all their disputes, at least when there is only one agreement between them. Dispute resolution clauses require certainty so parties know where they should go when a dispute arises.
>
> (c) Where there are two agreements each containing different provisions for dispute resolution, the outcome may depend on the nature of the second agreement and its relationship to the first. A second agreement which varies the first one will probably be regarded differently from a second agreement which makes a clean break from the first one. The desire for one-stop shopping means that, where possible, the clauses

[7] Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638; [2012] 1 Lloyd's Rep 671; Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" [2020] UKSC 38; [2020] 1 WLR 4117.

[8] See also Paul Smith Ltd v H&S International Holding Inc [1991] 2 Lloyd's Rep 127; Adactive Media Inc v Ingrouille [2021] EWCA Civ 313; [2022] 1 Lloyd's Rep 235, at [40]-[44]; Melford Capital Partners (Holdings) LLP v Wingfield Digby [2021] EWHC 872 (Ch).

> should be regarded as mutually exclusive in their scope of application, rather than overlapping. However, some degree of fragmentation may be inherent in what has been agreed, in which case the centre of gravity of a given dispute will be relevant.
>
> (d) Where a contract contains a hierarchy or conflicts clause, there should be no predisposition to find or not find a conflict between two clauses. The ordinary rules of construction should first be deployed and only if those result in a conclusion that the two provisions are irreconcilable is recourse to the conflicts clause required. I did not understand Mr Constable to dispute this approach."

59. The first principle is a specific application of the general principle that arbitration clauses should be broadly construed.[9] In ACE Capital Ltd v CMS Energy Corporation [2009] Lloyd's Rep IR 414 at [83], Christopher Clarke J stated:

> "But the principle of liberal interpretation in favour of arbitration encourages, as it seems to me, not only an expansive reading of what an arbitration clause includes but also a restrictive reading of any other clause which is said, notwithstanding an arbitration clause providing for all disputes to be referred to arbitration, to exclude particular disputes from arbitration … without expressly saying so."

60. As the Courts have held, even if the exclusive jurisdiction clause in the Slip Policies/MRCs is left with very little purpose in practice, that is not a reason to reject the broad application of the arbitration clause in Clause 13 of the Facultative Certificates.[10]

61. In the Facultative Certificates, which were concluded later in time, the parties agreed a New York arbitration clause. There is no question that it is expressed broadly and is of broad application. GIC submitted that effect should be given to it and that it was obvious that the parties intended to give full effect to their arbitration agreement in circumstances where (a) the Certificates were agreed 9 days after the Slip Policies/MRCs, and (b) the Certificates not only included a detailed arbitration provision, but referred to the arbitration provision as one of the "*Required Terms and Conditions*".

62. The Facultative Certificates cover the entirety of the subject matter of the Slip Policies/MRCs and, for that reason and the other reasons set out above under the first ground, the parties must objectively have intended that the New York arbitration agreement contained within would cover any and all disputes arising under the reinsurance.

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[9] Fiona Trust & Holding Corp v Privalov [2007] UKHL 40; [2008] Lloyd's Rep 254; Surrey CC v Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015 (TCC); [2021] BLR 625 at [92].

[10] Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWHC 42 (Comm); [2012] 1 Lloyd's Rep 275 at [48]-[50]; affirmed [2012] EWCA Civ 638; [2012] 1 Lloyd's Rep 671; ACE Capital Ltd v CMS Energy Corporation [2008] EWHC 1843 (Comm); [2009] Lloyd's Rep IR 414 at [82]; Surrey CC v Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015 (TCC); [2021] BLR 625 at [92].

63. TICL contends that reading the New York arbitration agreement and English jurisdiction clause together would fundamentally change the meaning of the latter and would give rise to commercially absurd results. GIC submitted that is incorrect for the following reasons.

    (1) The English Courts have on numerous occasions read arbitration clauses broadly and competing jurisdiction clauses contained in the same or separate contracts restrictively in order to give effect to the principles of one-stop shop adjudication and in favour of arbitration.

    (2) Such a construction will not lead to commercial absurdity. In Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA,[11] the High Court and Court of Appeal saw no difficulty in concluding that a policy condition which provided for exclusive jurisdiction of the Brazilian Courts and Brazilian law did not also mean that an arbitration agreement mandating London arbitration governed by English law should not be given effect. This is in accordance with "*the strong legal policy in favour of arbitration*".

    (3) Here, the parties have agreed that arbitration shall take place in New York and be governed by New York law.[12] The English Courts may retain auxiliary jurisdiction, for example to compel arbitration or enforce any award.

    (4) Any dispute between the parties as to which governing law is to be applied is not a matter for the English Court to decide, but rather for the Arbitral Tribunal pursuant to Clause 13(a) of the Certificates.

    (5) If the consequence of the parties' agreement is that some fragmentation of the dispute may occur e.g. under other policies of reinsurance, that is a consequence of the parties' agreement. In the matter of arbitration, party autonomy is key.[13]

TICL's submissions at the hearing.

64. TICL's case was, they said, straight-forward, namely that the parties clearly agreed to the exclusive jurisdiction of the English court: the clear and objective intention of the parties was that the reinsurance contracts were complete when the Slip Policies/MRCs were signed. From that point onwards, the reinsurance was "bound" and it was so on terms which provided it was governed by English law and subject to English jurisdiction. Given that the contract of reinsurance was concluded by the agreement of the Slip Policies/MRCs, the issuing of the Facultative Certificate later was simply an administrative act, and was not intended to be such as to vary or change the fundamental terms of the parties' bargain. Were it otherwise, the parties would have been in the bizarre position whereby they agreed to reinsurance governed by English law and jurisdiction on 30th June 2021 only to then substantially (and without any discussion or negotiation as to doing so) amend that agreement by imposing New York law and arbitration some 9 days later on the issue of the Facultative Certificates on 9th July 2021.

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[11] [2012] EWHC 42 (Comm); [2012] 1 Lloyd's Rep 275 at [48]-[50], [2012] EWCA Civ 638; [2012] 1 Lloyd's Rep 671.

[12] The Supreme Court's judgment in Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" [2020] UKSC 38; [2020] 1 WLR 4117 does not mandate a different conclusion as to the proper law of the arbitration agreement, which has been clearly expressed as New York law (in Clause 17).

[13] Merkin, Arbitration Law, (Informa), [1.4].

65. It was TICL's case that to make it absolutely clear beyond any doubt that this was obviously not intended, as noted above, the Facultative Certificates included express writing on their face noting that in case of "confusion", the terms of the Slip Policies/MRCs were to "take precedence".

66. It is obvious, said TICL, that where there are inconsistent forum selection clauses, there is in every sense of the word "confusion", and thus the parties clearly agreed that the exclusive jurisdiction clauses in the Slip Policies/MRCs were to prevail. This is simply the effect of the ordinary and natural meaning of the hierarchy clause.

67. That the Slip Policy/ MRC would prevail over the Facultative Certificate is also consistent with the status of the MRC as the fundamental document for the placement of reinsurance in the London market as demonstrated by the evidence of Mr Whitcombe and the leading texts and authorities set out above.

68. The Slip Policy/MRC is the standard form of placing insurance and reinsurance in the London market. It is therefore commercially sensible for parties placing insurance and reinsurance in the London market to seek to ensure that, notwithstanding that subsequent documents may be agreed and issued between the parties, that the MRC would nonetheless govern.

69. The choice of law provisions, TICL contended, also supported its case. The Slip Policy/MRC is governed by English law. The Facultative Certificate contains a choice of New York law. The parties are unlikely to be taken to have intended that two laws apply to their dispute simultaneously. That would be a commercially absurd outcome. Rather the parties likely intended for only a single law to apply to their dispute, and hence it was necessary to provide for a mechanism to identify the applicable law. The Hierarchy Clause provides the answer to this issue. There would be obvious "*confusion*" as to whether any term of the Reinsurance was governed by New York law or English law, and accordingly the Hierarchy Clause acts to provide that the Slip Policy/MRC (and English law) prevails.

70. Turning to GIC's submissions, TICL contended that GIC argued for a profoundly uncommercial and bizarre result, namely that a contractually agreed English law and jurisdiction clause was superseded a matter of only 9 days later by both a change in forum and a change in law without discussion or negotiation on the point. TICL then responded to each of GIC's arguments in turn.

The supersession argument and GIC's narrow reading of the Hierarchy Clause.

71. TICL argued that core to GIC's primary case was that the Hierarchy Clause had a narrow and unnatural meaning, namely, "*that the [Facultative Certificates], including their extensive law and jurisdiction provisions should apply in full, without reference to the Slips, unless there is a lack of clarity or uncertainty as to the meaning or operation of the terms of the Reinsurance Agreements.*" That is to say that "confusion" only relates to terms of the Facultative Certificate assessed in isolation e.g. because their meaning is not clear on their face, rather than confusion created by the interrelationship between the Slip Policy/MRC and the Facultative Certificate, and meant ambiguity rather than inconsistency. TICL argued that this was wrong, for various reasons:

    (1) Only TICL's construction was consistent with the ordinary and natural meaning of the Hierarchy Clause. The clause refers to the Slip Policy/MRC taking "precedence" rather

than merely being an interpretative aid. In order for one document to take "precedence" over another, it is self-evident that the two documents must be being read together.

(2) TICL's construction also made sense when considering the objective context. The MRC is, as addressed above, the fundamental document to the placement of insurance and reinsurance in the London Market. Once it is agreed, the reinsurance is in final form. Given this, it would be surprising if it were, without clear explanation, to be relegated to a mere interpretative aid.

(3) The Facultative Certificate contains a choice of New York law, whilst the Slip Policy/MRC is subject to English law. The end point of GIC's construction is that the English law terms of the Slip Policy/MRC are used as an interpretative aid where the seemingly New York law governed terms of the Facultative Certificate are opaque. It is not clear how that is intended to work in practice and such a result appears logically (not to say commercially) non-sensical.

Reference in the arbitration clause to a "condition precedent" is immaterial.

72. TICL contended that this point added nothing to GIC's other arguments.

73. The short point, said TICL, was that the precise nature and language of clause 13(a) is only relevant if clause 13(a) in fact applies. As set out above, it does not because of the inconsistency between it and the exclusive jurisdiction clause in the Slip Policy/MRC, which creates "confusion" with the effect that the Slip Policy/MRC takes precedence.[14]

The forum selection clauses cannot be read together.

74. Next, GIC contends that the English jurisdiction clause can be read consistently with the arbitration agreement to provide that the English Court shall have supervisory jurisdiction over the arbitration.

75. This argument is immediately problematic in light of the express Hierarchy Clause: where the parties have expressly decided which document, and thus which forum selection clause, is to take precedence, the parties' decision should be respected. This is not a case where the forum selection clauses appear in the same document without any clear hierarchy. The express Hierarchy Clause is therefore a complete answer to this point.

76. In any event, an attempt to read the forum selection clauses together is obviously difficult and, TICL submits, unlikely:

(1) The Slip Policy/MRC provides that the Reinsurance shall be governed by a single law, English law, and disputes resolved in a single jurisdiction, the Courts of England and Wales. The parties clearly intended to link the applicable law to the forum of resolution.[15] GIC's argument attempts to disturb this commercially sensible (and obvious) conclusion in favour of an uncertain hybrid approach.

[14] And as noted above, TICL submits that the ordinary and natural meaning of the clause is that it applies where there is confusion when reading the Slip Policy/MRC and Facultative Certificate alongside each other. That might arise where there are inconsistent provisions in the two documents but it is not limited to inconsistency. "Confusion" has, as a matter of ordinary and natural language, a broader meaning. Where "confusion" occurs, the hierarchy clause directs that the Slip Policy/MRC is where the answer is to be found.

[15] See *Global Maritime Investments Cyprus v OW Supply & Trading A/S* [2015] EWHC 2690 (Comm)

(2) To read the jurisdiction clause in the Slip Policy/MRC as referring to only a supervisory jurisdiction is not consistent with the clear wording of the clause and would require a fundamental change in its natural meaning and effect. The clause clearly refers to the Courts of England and Wales having exclusive jurisdiction "*on all matters relating to this insurance*". A narrower reading of this clause which refers only to supervisory jurisdiction does quite some violence to the obviously broad and expansive words on the page.

(3) Further, the context of the Slip Policy/ MRC is important. Each Slip Policy/MRC may be underwritten by more than one reinsurer. That did not in fact happen here, but it is a clear possibility in the use of the Slip Policy/MRC format that one Slip Policy/MRC can be subscribed to by multiple reinsurers. If GIC was right that the clauses could be read together to provide for a mere supervisory jurisdiction of the English Court it would mean that there was the potential for issues under the Slip Policy/MRC to be litigated in arbitration with GIC and (in respect of a following market) in the English Court thus giving rise to "splintering".[16] This serves to demonstrate the commercial good sense in including the hierarchy clause; explains why the parties likely adopted the robust form of wording that appears in the Slip Policies'/MRCs' jurisdiction and choice of law clause; and makes clear the extreme difficulty in attempting to read the clauses together such as to provide for a mere supervisory jurisdiction.

(4) Where a document contains an "inconsistency clause", one should *"approach the documents in a cool and objective spirit to see whether there is inconsistency or not*"; see *Alexander v West Bromwich Mortgage Company Ltd* [2016] EWCA Civ 496 at [35]). Further, inconsistency is not confined to cases of literal contradiction, but extends to where clauses "*cannot "fairly" or "sensibly" be read together; not merely cases where they cannot literally be read together*. *One should approach that question having due regard to considerations of reasonableness and business common sense."* (*Alexander* at [41]). The Court should not strive to avoid inconsistency where there is a hierarchy clause. The forum selection clauses in the Facultative Certificate and Slip Policy/MRC are inconsistent, and the hierarchy clause provides the path through such inconsistency. The position is *a fortiori* where the clause speaks not of "inconsistency" but merely "confusion".

Exchanges after the hearing.

77. Following the hearing, Mr Killen sent me a copy of the decision in TICL v Partner Re [2023] EWHC 3243 (Comm) which was very similar to the case before me.

78. In that case, there was an application for a stay pursuant to s.9 in favour of New York arbitration, and a counter application for an anti-suit injunction to prevent the further pursuit of the New York arbitration proceedings. Because it was a s.9 application, the standard of proof was that there was, on the balance of probabilities, an arbitration agreement. Mr Houseman also concluded that because the dispute was which of two jurisdiction clauses applied, each side had to prove its case to the final standard, and not to any interlocutory standard. There was no sustained argument in that case to the effect that both arbitration and jurisdiction clauses applied. Essentially, the issue was which one of the clauses applied.

[16] See *Generali Italia SpA v Pelagic Fisheries Corp* [2020] EWHC 1228 (Comm) at [92] and [93]

79. In addition, as both parties before me accepted, there was no clause equivalent to the Hierarchy Clause in the case before me. Other than this, however, the case was essentially on all fours with the case before me. Mr Houseman KC decided that the Certificate superseded the slip policy, or MRC, and granted the stay. He did however grant permission to appeal from his decision.

80. In the light of this case, I invited further submissions from both parties in writing.

81. Starting with TICL's submissions, they argued that:

    (1) There was no wording equivalent to the Hierarchy Clause in that case. This clause made clear that the earlier wording was intended to be the governing wording in case of confusion. The simple solution adopted by the judge in Partner Re could not therefore be adopted in the current case.

    (2) There were two other distinctions between the cases which indicated that, whilst in Partner Re, the parties had intended to replace the earlier agreement with the later one, this was not the case in the current case. These other distinctions were as follows:

        (a) The Certificate in the case before me described itself as a Certificate, whilst in Partner Re the document was referred to as an agreement;

        (b) Weight was placed by Mr Houseman KC on the fact that in Partner Re the certificate was signed by a representative of Partner Re, whilst here the certificate was not signed or stamped.

82. Turning to GIC's submissions, they accepted that in the Partner Re case, there was no equivalent provision in the Certificates to the Confusion clause. That said, they submitted, Mr Houseman KC's judgment is consistent with GIC's case in this respect, for the following reasons:

    (1) The Court's determination in TICL v Partner Re of the issues which are common to both sets of proceedings are striking, in particular Mr Houseman KC's decision that the English law/jurisdiction clause in the Slip Policy/MRC was replaced by the New York law/arbitration agreement in the MURA/Certificate.

    (2) As in the present case, the Slip Policy/MRC and the Facultative Certificate in TICL v Partner Re "*cover precisely the same risk, period and parties. Each of them could or would be a self-standing and self-sufficient contract if viewed in isolation from the other*".

    (3) The Certificate in TICL v Partner Re was agreed just 8 days after (9 days in the present case) the agreement of the Slip Policy/MRC and, as here, the substantive dispute was whether the Facultative Certificate varied or superseded the Slip Policy/MRC.

    (4) As in the present case, the Facultative Certificate was foreshadowed by the brokers in correspondence as forthcoming and the premium would not be administered until the later document was executed.

    (5) The Court in TICL v Partner Re determined the issue of construction in Partner Re's favour on a final basis.

    (6) There then followed the Court's assessment and rejection of a series of objections advanced on behalf of TICL. TICL's objections by and large mirrored TICL's

submissions before this Court. In addition, the Court recorded TICL's contention that the MURA (the Certificate) was an administrative document, but the Court plainly did not accept that submission.

(7) One of TICL's objections was that the Certificate did not comply with the GUA change of contract mechanism contained in the MRC. The Court held that it did not matter whether the change of contract process was followed, the parties "*exercised such sovereignty to replace the MRC with the MURA, at least to the extent of the forum selection and governing law provisions*". Of course, in the present case, to the extent that it matters, it is common ground the Certificate did comply with the change of contract provisions in the Slip Policy/MRC.

(8) The Court concluded that the Certificate superseded the Slip Policy/MRC and the parties therefore agreed to refer their disputes to arbitration in New York.

83. As to the issue of the construction of the "*confusion*" clause, GIC submitted that it would be contrary to both initial impression and considered analysis to construe this provision as applying to inconsistencies between the Certificate and the Slip Policy/MRC - rather than cases of uncertainty within the Certificate - in circumstances where:

(1) The parties have agreed to a replacement of the English law/jurisdiction clause with the New York law/arbitration agreement. This is so whether or not both parties or either party read or digested the contents of the documents; indeed, the Court should assume that the parties had understood the contents of the document to which they had agreed.

(2) That agreement of the New York law/arbitration provisions in the Certificate was reached only 9 days after the Slip Policy/MRC was agreed.

(3) There was no uncertainty in the Certificate, at least in respect of the New York law/arbitration agreement. As Mr Houseman KC said in paragraph 39 of his judgment, "*no such uncertainty or complexity has been identified*".

84. If TICL's construction of the "*confusion*" clause were correct, it would be a very odd state of affairs for the parties to reverse a fully considered agreement by means of the "*confusion*" clause, rather than simply striking out the New York law/arbitration clause. The Court's reasoning in TICL v Partner Re supports that conclusion by analogy at paras. 36 to 39, and in particular paragraph 37, where it was said that:

> "I am satisfied that, however unlikely or unusual it is for contracting parties to replace one specific agreement with another specific agreement in the space of a week or so, there is nothing problematic with them doing so. It all depends on what they said and did. Here, as summarised above, the contracting parties concluded a new legally binding contract of reinsurance on the terms of the MURA. This was contemplated in advance, albeit different from what they did in the prior year, for what it is worth."

(V) THE FUTURE CONDUCT OF THE ACTION IN THE LIGHT OF MY DECISION.

GIC's contentions.

85. GIC contended that if I concluded that it was inappropriate for the Court to grant the application to set aside the ASI at this stage, then, in any event, prior to the determination of GIC's application to challenge the jurisdiction of the English Court, and prior to a determination of all issues at trial with the benefit of fully particularised statements of case, disclosure, factual and expert evidence (including any evidence relating to market practice), no final injunction should be granted.

86. In this regard, the first point made by GIC was a procedural one. As a matter of law, GIC submitted that the application for final relief had not been properly brought and that the relief could not be granted, because the claim for final anti-suit injunctive relief for breach of an exclusive English jurisdiction clause ought to be brought by way of claim form, claiming substantive relief, and particularised in Particulars of Claim. The Claim Form which has been issued by TICL omits any reference to such a claim, and no application has been made for permission to amend the Claim Form. It should not be brought by way of application notice.[17] The Final ASI Application has not been properly brought because it has been made by application notice and not by Claim Form or Particulars of Claim pleading the facts upon which TICL relies. It is therefore defective and should be dismissed.

87. GIC's second point is that I should decline to make any final order because further relevant material might become available. This is because the Court may decline to exercise jurisdiction or, even if it does decide to exercise jurisdiction, the factual evidence given by TICL's witnesses for the purposes of the current application may not be accepted by the Court at trial, because further documentary, factual and expert evidence will inevitably become available, and because the circumstances may change between now and trial. For example:

    (1) The factual assertions on which TICL relies and in respect of which TICL adduces evidence may not be supported at trial.

    (2) The market practice to which Mr Whitcombe and Mr Cook attest may be different from any market practice the Court decides exists or does not exist on an interlocutory application.

    (3) The circumstances in which the Slip Policies/MRCs and Certificates were agreed may alter once there has been full disclosure, which might well lead to additional allegations (*e.g.* estoppel).

88. Further it is inappropriate for the Court to grant final relief at this interlocutory stage. Final relief should only be granted following the trial of the substantive issue whether there is a binding exclusive jurisdiction agreement in favour of the English Courts. Thus:

    (1) In The Eras Eil Actions [1995] 1 Lloyd's Rep 64 at 74, Potter J said:

> "in a case where an anti-suit injunction is applied for in relation to proceedings in which the issue sought to be litigated abroad is already before the English Court for determination, the Court would be unlikely to grant relief of a truly final nature, in that

[17] Masri v Consolidated Contractors International (UK) Ltd [2008] EWCA Civ 625; [2009] QB 503 at [57]; 2023 White Book at [25.1.9]; Raphael, The Anti-Suit Injunction (2nd ed., 2019) at [3.32].

> there would be express or implied "liberty to apply" in the event of a change of circumstances which resulted in that issue being withdrawn from the English Court, or whereby, for any other reason, the oppression originally complained of were relieved".

(2) In Navigation Maritime Bulgare v Rustal Trading Ltd [2002] 1 Lloyd's Rep 106 at [123], Aikens J held:

> "There was some debate at the hearing on whether any injunction granted should be interlocutory or final. Mr. Baker invited me to determine finally the existence of the arbitration agreement and dispose finally of the claim for an injunction. I have decided that the injunction should be interlocutory. I accept that it is unlikely that further contested facts concerning the first to fifth defendants' attitude to the London arbitration proceedings will emerge. However the grant of the injunction is dependent on the conclusion that there is an arguable case that the arbitration agreement is binding between the claimants and the defendants. Formally that issue has yet to be determined in a final way. It seems wrong to grant a final injunction when the basis for that relief has itself not been either conceded or finally determined. So for the present I will make the order interlocutory."

89. The consequence of granting final or permanent relief is to fetter for all time the discretion of any court to determine on the facts of a particular case whether it was appropriate to prevent proceedings being brought in another jurisdiction by way of injunctive relief. That is not appropriate in circumstances where the Court always retains a discretion as to whether to grant such relief depending upon the facts of a particular case.[18]

90. There can be no prejudice to TICL if an Interim ASI were to remain in place pending a trial at which a claim for a permanent ASI is to be determined.

TICL's contentions.

91. TICL argued that, whilst GIC has sought to argue that:

(1) The application was not properly brought and cannot be made at this stage;

(2) It would not be appropriate to "entertain" TICL's application for final anti-suit relief pending determination of any jurisdiction challenge that may be brought by GIC.

(3) It would not be appropriate to grant TICL's application for relief prior to (i) the filing and service of statements of case (ii) the exchange of disclosure (iii) the exchange of evidence and (iv) trial. This is said to be "*because further documentary and factual evidence will inevitably become available, and because the circumstances may change between now and trial*."

each of these points is ill founded.

[18] Skype Technologies SA v Joltid Ltd [2009] EWHC 2783 (Ch); [2011] IL Pr 8 at [42].

92. In this regard:

(1) The Court has the power to make the application final pursuant to s37 of the Senior Courts Act. If TICL's case is accepted, and there is an exclusive jurisdiction clause in favour of England and Wales, it follows that TICL has an exclusive contractual right to litigate in England and Wales, which should be enforced.

(2) The essential dispute between TICL and GIC is straightforward. There are two competing forum clauses, and a hierarchy clause in respect of which GIC raises various points of construction. GIC has not alleged that there is any issue of factual evidence that requires disclosure or cross-examination at trial. It is hard to see why disclosure, and a trial is required to develop these points further. The reference to a need for a trial appears simply as a transparent attempt to delay that which is inevitable. The position in this respect is similar to the recent judgment of Butcher J in RSM Production Corporation v Gaz Du Cameroun SA [2023] EWHC 2820 (Comm), where at the return date of an ASI, the Judge granted a continuation of the anti-suit relief and further provided at [50] and [51] that:

> "Having considered all the points made by GdC, I am of the view that the ASI should be continued. Specifically, and to repeat, I am satisfied to a high degree of probability that there is an arbitration agreement which governs the dispute in question. I do not consider that there are strong reasons not to grant an injunction restraining its breach.
>
> I can see no good reason why the relief granted should not now be final. There does not seem to be a real prospect of evidence hereafter coming to light that would make a significant difference to the issues to be decided." [Emphasis added]

(3) GIC's argument that the Court should delay until the resolution of any putative jurisdiction challenge is similarly without merit in circumstances where GIC has continually failed to identify any basis for a "jurisdiction challenge" other than the points already made in the set aside argument. It cannot be the case that GIC simply wish to delay final anti-suit relief to re-run points which have already failed.

93. For those reasons, if the Court is satisfied that there is an exclusive jurisdiction clause in favour of the Courts of England and Wales in the Reinsurance, the Court should grant final relief.

94. TICL's alternative case was that if the Court is not minded to grant final relief at this stage, the Court should continue the anti-suit injunction pending the resolution of any jurisdiction challenge that may be brought. That is because, in the circumstances set out above, TICL should not – pending whatever "jurisdiction" challenge might be brought – be required to participate in an arbitration with GIC and spend time and money challenging the jurisdiction of Arbitral Tribunal when (a) the evidence before this Court is that there is clearly and obviously an exclusive jurisdiction clause in favour of the English Court; and (b) there has been no hint of a suggestion as to what further evidence (or indeed argument) might be brought at a jurisdiction challenge that may change matters.

VI DISCUSSION AND CONCLUSIONS.

95. I should start with a consideration of one preliminary matter which was, in my view, of no real importance. That was certain evidence as to New York law, in relation to how a New York tribunal might look at the matters before me. As I indicated early in the hearing, I did not regard the evidence as of any real assistance. That evidence was of a New York case in which certain observations were made as to London Market practice. Not only was that evidence of questionable utility in view of its antiquity, but I was also of the view that the only relevant evidence before me would be of New York principles of contractual interpretation. Neither party put any such evidence before me.

96. There were therefore, in my view, the following issues:

    (1) What was the test that I should apply to the question of whether I should grant an ASI?

    (2) To what extent would the duration of such ASI be of relevance to the first issue?

    (3) Applying that test, which parties' submissions should I prefer on the substantive issue, namely whether the contract included an English exclusive jurisdiction clause, on the one hand, or a New York arbitration clause, on the other?

    (4) What remedy should be granted in the light of my conclusions on the third issue?

    (5) Is it open to me to grant such remedy in the light of GIC's procedural point, which was that a claim had to be brought by way of Claim Form rather than application notice?

The relevant test.

97. Both Counsel were agreed that TICL had to show a high probability that there was a binding jurisdiction clause, and both Counsel agreed that this meant something more than a good arguable case. However, beyond this, neither Counsel was able to be of much assistance as to what that phrase meant, and how it should be applied in a case such as the present where there was a competition between a jurisdiction and an arbitration clause. Although Mr MacDonald Eggers KC suggested that this meant more than establishing the existence of the clause on the balance of probabilities, and that I would have to be satisfied that there was no real prospect that there was a binding arbitration clause, he also accepted that he could cite no authority in support of this proposition, and for my part, in the absence of authority, I would not accept that submission.

98. In this regard, I think it is helpful to look at the authorities which have led to the adoption of this test, and the reasons given in those authorities. First in time was an unreported decision of Colman J in Bankers Trust Co v PT Mayora Indah (2009), which dealt with an ASI in support of an arbitration clause. Colman J's dictum was cited in the later case of Bankers Trust Co v PT Jakarta International Hotels and Development [1999] 1 Lloyd's Rep 910 , 913, where Cresswell J said:

> "I refer to the judgment of Colman J. on 20 January 1999 in Bankers Trust Company, Bankers Trust International Plc v. P.T. Mayora Indah, unreported (see below). In the course of his judgment Colman J. said:
>
> "... at this stage the court has to be satisfied that there are strong grounds for believing that the relief sought by the plaintiff is

> relief to which it must in fact be entitled. This is not merely an American Cyanamid test; it goes beyond that because the injunctions which the plaintiff seeks are intended to continue until after the hearing of any arbitration pursuant to the arbitration clause and therefore have the effect of enforcing that arbitration agreement as distinct from preserving the status quo pending a trial prior to the arbitration going any further.
>
> "If the orders are granted an arbitration will take place and if the orders granted are obeyed by my order the arbitration will have taken place before any proceedings in Indonesia can be pursued. I must therefore be satisfied that the plaintiff has established a high degree of probability that its case against Mayora is right and that it is indeed entitled as of right to restrain Mayora from taking proceedings by way of action in Indonesia."
>
> See further the Supreme Court Practice 1999, para.29/L/15, "Whether an exception to American Cyanamid" and the cases there cited."

99. These cases were again cited in the later cases of American International Speciality Lines Insurance v Abbott Laboratories [2003] 1 Lloyd's Rep. 267 and Midgulf International Ltd v Groupe Chimische Tunisien [2009] EWHC 963 (Comm). In the latter case, Teare J said:

> "The required strength of Midgulf's case
>
> 36. This is a case where an anti-suit injunction is sought at the interlocutory stage of proceedings. However, if the injunction is granted its effect is likely to be final because it will end the Tunisian proceedings and enable the arbitration proceedings to be completed. In such circumstances this court has required the applicant for an anti-suit injunction to establish "a high degree of probability" that its case against the respondent is right and that it is indeed entitled as of right to restrain the respondent from taking proceedings abroad; see Bankers Trust v Jakarta Int. [1999] 1 Lloyd's Rep. 910 at p.913, and American International Speciality Lines Insurance v Abbott Laboratories [2003] 1 Lloyd's Rep. 267 at p.275. It was not suggested that I should apply any higher test (cf Sheffield United v West Ham United [2009] 1 Lloyd's Rep. 167 at paragraphs 8-10). In oral submissions it may have been suggested that a lesser test should be applied but it was not clear to me what that was. I consider that I should follow the approach adopted in Bankers Trust v Jakarta Int. and American International Speciality Lines Insurance v Abbott Laboratories ."

100. Teare J went on to consider what to do in that case, where there was a dispute of fact as to what had happened. His conclusion was as follows:

> "Discussion

37. Midgulf's case that the fax dated 7 July was an acceptance of the offer contained in the fax dated 2 July is certainly arguable. The language of "confirmation" and "conclusion" is a clear indication that the deal had been done. For that to be so GCT must have accepted all of the terms in Midgulf's offer, including the incorporation of "the contract dated 27 June" amongst which was the London arbitration clause. On this construction the reference to "the following conditions" in the fax dated 7 July was simply a summary of the principal terms agreed. Of course, if the written exchanges are construed in the context of Midgulf's case as to the telephone conversation of 4 July Midgulf's case gains strength.

38. But GCT's case that its fax dated 7 July, notwithstanding the use of the language of "confirmation" and "conclusion", was a counter offer, accepted by Midgulf's fax dated 9 July, is also arguable. The fax is, on objective analysis, to be regarded as a counter offer because it introduced a condition regarding drafts and the list of conditions on the basis of which GCT stated that it was willing to contract did not include an incorporation of the "contract dated 27 June." The contract formed by the acceptance of that counter offer on 9 July was one which contained only the main terms of the agreement, with the detailed terms, including law and jurisdiction, to be agreed later; see Pagnan v Feed Products [1987] 2 Lloyd's Rep. 601 at p.619 (principles (4)-(6)). It is possible that this argument derives some support from GCT's account of the telephone conversation of the 4 July.

39. Had the terms of the July contract depended solely on the construction of the written exchanges between the parties this court would have been able to determine whether Midgulf had established to a high degree of probability that its case was correct. Indeed the court could have determined whether the July contract contained a London arbitration clause. But the content of the conversation of 4 July has, or may have, an important bearing upon the correct objective construction of the written exchanges in their context (because that context must include that conversation which took place between the faxes dated 2 and 7 July). The court is not therefore able to reach the conclusion that Midgulf has established "a high degree of probability" that its case against GCT, that the July contract included a London arbitration clause, is right and that it is therefore entitled as of right to restrain GCT from taking proceedings in Tunisia. I accept that Midgulf has a strongly arguable case to that effect but that is not sufficient in the present context for the reasons stated in Bankers Trust v Jakarta Int. and American International Speciality Lines Insurance v Abbott Laboratories.

40. That would suggest that the anti-suit injunction granted *ex parte* on notice by Burton J. must be refused.

> 41. I confess to a sense of unease in reaching that conclusion because the Tunisian court has refused to decide whether the parties had agreed a London arbitration clause. I suggested to counsel that if this court refused to grant an anti-suit injunction and the decision of the Tunisian court were upheld on appeal there would be a stalemate. Neither court would determine whether the July contract contained a London arbitration clause. However, counsel for GCT said that the Tunisian court will determine whether the July contract contained a London arbitration clause if, as it is said will be the case, that question is raised in the damages action in Tunisia regarding the July contract. Counsel further said that if GCT loses on that issue it will arbitrate in London. It was therefore said that there is no risk of a stalemate.
>
> 42. However, it is not clear to me that the Tunisian court will decide the question if it is raised in the damages action. It may nevertheless say that it is a matter for the arbitral tribunal on the principle of kompetenz kompetenz. The doubt arises from the uncertainty as to the reasons for the Tunisian court's decision and as to what the Tunisian court of appeal will do. There is therefore a risk of stalemate.
>
> 43. In those circumstances I consider that the just and appropriate course is, on case management grounds, to order a speedy trial of the issue as to the terms on which the July contract was agreed (at which trial oral evidence can be given as to the conversation of 4 July) and to continue the anti-suit injunction only until such time as that issue is determined. Once that issue is decided the court can then decide whether or not to appoint an arbitrator and continue the anti-suit injunction indefinitely. This course reflects the third of the four possible courses identified in Al-Nami v Islamic Press [2000] 1 Lloyd's Rep. 522 at p.524 where a stay of proceedings is sought."

101. It only remains for me to note that the phrase high degree of probability has been adopted in a number of later cases, including by the Court of Appeal in Ecobank v Tanoh [2015] EWCA Civ 1309 and AIG Europe SA & Others v John Wood Group PLC [2022] EWCA Civ 781.

102. I note therefore that the use of this test is a time honoured one. I note also that the rationale for adopting a higher than normal test for an interim injunction is that the likelihood is that even an interim injunction is likely, in practice, to be equivalent to a final injunction and it goes further than preserving the *status quo ante*. Finally, I note that other ways can be adopted to avoid the necessity for a final injunction, as the Midgulf case illustrates.

The relevance of the duration of the ASI.

103. I turn therefore to a consideration of the second of the issues I have identified above, namely the relevance of the duration of the ASI to the test to be applied in determining whether there is an exclusive jurisdiction clause in this case. In this regard, I have found the Midgulf case of great assistance. In that case, Teare J, faced with a dispute of fact which would determine whether there was in fact an arbitration clause, utilising an analogy with s.9 of the Arbitration Act and jurisprudence on the courses open to the Court in such cases, ordered a speedy trial of the factual issue. In this way, the Court had to determine on the balance of probabilities whether the arbitration clause applied.

104. In my view, therefore, it is necessary for me to consider whether, on the current evidence, the answer to the question before me – ie which of the two competing dispute resolution clauses governs is clear. If it is clear at this stage without the need for a further hearing, then I would accept that, by analogy with the law on summary judgment, I should grasp the nettle now. However, if the answer is not clear, and especially if further evidence may be of relevance, then in my view it is necessary for me to consider appropriate case management directions to enable a determination of the point.

The merits of the substantive arguments.

105. Next, I will consider the points which arise herein, beginning with the supersession argument put forward by GIC.

106. If I leave aside the evidence of market practice, and simply view the documentation which has been produced, I would conclude as follows:

(1) The Slip Policy/ MRC was, in my view, a binding contract at the moment it was issued. There was no requirement, on the face of things, for any further contractual document. The MRC identified all the necessary matters for a valid and binding contract, including the jurisdiction clause, which provided for exclusive jurisdiction to be vested in the Courts of England and Wales.

(2) However, that Slip Policy/MRC was followed by a further agreement in the form of the Certificate. If the market evidence is left out of account and, if the hierarchy clause was not included in the later document, then I would respectfully agree with the conclusion of Mr Houseman KC in the Partner Re case (which I would regard myself as bound by, in any event). In particular, the process following the issuance of the MRC contract followed the practice for contractual variations, as I understand the evidence, with the result that it would be anticipated that the later agreement would vary or indeed replace the earlier one. This is also in accord with the provisions of the GUA.

(3) The simple question is thus whether the later agreement did indeed operate to entirely replace the earlier one. Again, leaving out of account market evidence, this depends on the true construction of the hierarchy clause. Here, the parties' respective cases were (as I have set out above) essentially simple. TICL focussed on the use of the words "take precedence over" as informing the meaning of the word "confusion", and indicating that the earlier agreement was to take precedence over the later one in case of inconsistency; conversely GIC focussed on the word "confusion" as meaning ambiguity, and pointing to the need for an ambiguity in the later agreement to justify resort to the earlier agreement.

(4) For my part, I did not find the reference to the earlier cases, which dealt with the issue of the admissibility of slips as aids to policy construction, against the background of a market where the slip was in general replaced by the policy, of any real assistance. It seemed to me that the issue was, as Mr Houseman KC indicated, really one of simple contractual construction (absent market evidence).

(5) Viewed in this way, I was inclined to prefer the submissions of TICL. In my judgment, its submissions on the Hierarchy Clause were correct. Thus, the jurisdiction provisions of the earlier agreement took precedence over the arbitration provisions of the later agreement.

107. I should however say a further word at this point about market practice. Whilst Mr Houseman KC regarded this as irrelevant, I would myself not go this far. If there were market practices which were sufficiently well known to both parties, I would regard this as potentially relevant to the questions of construction which were before me. However, I did not regard it as possible to place any weight on the evidence of market practice because I had evidence from two market professionals, each of whom was, on the face of it, qualified to express opinions, expressing diametrically opposed opinions. Absent cross examination, I did not feel able to draw any conclusions as to who was right.

The Scott v Avery clause.

108. I can deal with this point relatively briefly. In my view, for the reasons I have given, the jurisdiction provisions of the original agreement and not the arbitration provisions in the later agreement apply. The Scott v Avery clause is part of the latter provision. Since those provisions are inapplicable, then the Scott v Avery provision is also inapplicable.

Supervisory jurisdiction?

109. I can also deal with this point briefly. The cases to which I was referred, such as Sul-Americana, were cases in which both arbitration and jurisdiction clauses were to be found in the same agreement. The Court, not unnaturally, therefore strived to give effect to both; and the only way of doing so was to hold that the jurisdiction of the Court was a supervisory one, not a dispute resolution one. The Courts recognised that this did not leave the jurisdiction clause with much content.

110. In the current case, the question is whether the jurisdiction clause (which was clearly a dispute resolution clause at the time it was agreed) was changed in nature so as to become a supervisory jurisdiction clause, leaving arbitration to be the dispute resolution mechanism. I would regard this as an extremely unlikely result even in the absence of the hierarchy clause, but in the light of that clause I have concluded that it is really not sensibly arguable. Indeed, GIC themselves only argued the point relatively faintly, arguing that the conclusion would be one which was "juristically plausible." I do not regard it as even plausible, let alone likely or correct.

111. However, I should make clear that my conclusions on construction as set out above, in the light of the course that I propose to take, are not to be regarded as final. They are however my clear interim conclusion on the issues of construction.

112. In the light of my conclusion on construction, the burden is then on GIC to demonstrate strong reasons not to grant the anti-suit injunction. The Court also retains a discretion not to grant the anti-suit injunction.

113. As I understood the position, GIC has at no point suggested that there may be any strong reasons not to grant relief, nor that the Court should exercise its discretion not to grant anti-suit relief. Rather, GIC's sole argument was that there is an arbitration clause in the Reinsurance. In those circumstances, then in my judgment I should clearly continue the ASI. The further question however arises as to what period that continuance should be. In this regard, the case management considerations to which I have made reference above come into play, as does GIC's procedural argument.

The duration of the ASI.

114. I have concluded that the appropriate course in this case is to continue the ASI until the determination of any challenge by GIC to the jurisdiction of the English Court, including any application made under s.9 of the Arbitration Act 1996.

115. In this regard, I have drawn support from the approach of Teare J in the Midgulf case. In addition, I am fortified in this approach by the fact that it will enable evidence of market practice to be put forward and argued more fully, with that evidence being properly tested.

116. There should also, in my view, be a timetable for the making of such an application, and the service of any further evidence to be relied on by either party.

117. I would encourage the parties to seek to agree such a timetable, although if necessary then I will rule on the matter.

118. Finally, as to GIC's procedural point, I understood that this only arose in the event that a final injunction was sought and granted. Since I am not proposing to grant a final injunction, I understand that this point falls away and I do not propose to say any more about it. If my understanding is incorrect, I would be grateful if the parties would let me know.