Neutral Citation Number: [2011] IEHC 343

THE HIGH COURT

COMMERCIAL

2010 10396 P

BETWEEN:

ICDL GCC FOUNDATION FZ-LLC

AND

SHARIKAT TAKNIAYAT ALMAAREFA LIL TAALIM AL MUTATAWER AL MOHADODA, TRADING AS ICDL SAUDI ARABIA

PLAINTIFFS

AND

THE EUROPEAN COMPUTER DRIVING LICENCE FOUNDATION LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered the 4th August, 2011

1. Introduction

1.1 The so-called Computer Driving Licence was introduced as a scheme for certifying skills and literacy in Information Technology. The licensing system originated in Europe but has since acquired an international dimension. It was started by a combination of national computer societies in Europe which established the defendant ("the Foundation") which, it would appear, holds the Intellectual Property rights in the licence.

1.2 The advantages of the licensing system appear to be that there is provided an internationally recognisable certification which makes skills transportable. In addition, it would seem that those wishing to acquire certification are not confined to one location in so doing, so that, for example, part of the certification may occur in one location, but an individual, who, for whatever reason, moves to another location before completing the programme, can easily fit in with completing the programme in a second location.

1.3 In substance, the Foundation works by licensing individual entities to carry out the works of the programme in different regions or countries. Of particular relevance to this case is the licensing of the operation of the programme in the Gulf region (and, in particular, in Saudi Arabia) ultimately to the second named plaintiff ("TAM"). I will return to the precise details of that licensing arrangement in due course.

1.4 However, a problem emerged (or, at least, did so on one view) in relation to the operation of the Programme in Saudi Arabia. That problem was concerned with the jurisdiction of a Saudi Arabian public body, to which it will again be necessary to refer to in more detail in due course. A suggestion was made that it was no longer lawful to operate the programme in Saudi Arabia, and, on that basis, and on foot of the terms of the relevant licence, the Foundation purported to terminate same.

1.5 These proceedings ensued. While there are a number of sub-issues, the kernel of the case concerns the lawfulness or otherwise of the termination of the licence in question. It was agreed between the parties and accepted by me that it would be appropriate to deal with all questions of liability first, and to leave over any question concerning the quantification of damages, save in one limited respect. As will become clear, there is a damages limitation clause in the licence which, on one view, would limit any possible claim which might be made to €50,000. This judgment is also concerned with whether that clause applies on the facts of this case, for if it does, then the undoubtedly complex questions which would arise concerning the calculation of damages would be most unlikely to arise.

1.6 One of the features of this case is that it has involved a considerable amount of interpretation and translation or oral and written evidence from Arabic to English. This brings its own challenges.

1.7 Against this brief background it is next appropriate to turn to the reliefs claimed.

2. Reliefs Sought

2.1 The first plaintiff ("the Dubai Company") is seeking a declaration that its contract with the Foundation remains in force. The Dubai Company also seeks an order for specific performance or damages in lieu and also damages for breach of contract. Both plaintiffs make claims in tort for damages/compensation under the laws of Saudi Arabia. In the alternative both seek damages for wrongful interference with their economic interests or for negligence, or both.

2.2 The Foundation counterclaims seeking injunctions to restrain the plaintiffs from operating or promoting the European Computer Driving Licence ("ECDL") concept in Saudi Arabia and from taking such steps as would induce the belief that they were licensed to operate or promote the ECDL concept or that they are connected to the Foundation. The Foundation also counterclaims for damages for breach of contract, negligence and breach of duty.

2.3 As can be seen, the counterclaim is, in substance, the counterpart of the claim. The Dubai Company asks the court to declare that its contract with the Foundation remains in force where the Foundation seeks, in substance, orders stemming from its assertion that the contract is no longer in force. That is the key question. If the contract has been validly terminated, then that is the end of the case. If, however, the contract has not been validly terminated, then some of the other issues which arise from the specific reliefs claimed in both directions will then require determination. Against the background of those issues, it is next necessary to turn to the facts.

3. Factual Background

3.1 The ECDL is an information technology skills and literacy certification programme, which demonstrates levels of competence in computer use. The ECDL programme (the "Programme") consists of three components, namely: a syllabus, a skills card and a question test base. Outside of Europe the ECDL is branded as the International Computer Driving Licence ("ICDL") and was launched in 1999.

3.2 The Dubai Company is a body corporate which has its headquarters in Dubai, United Arab Emirates. TAM, which trades as ICDL Saudi Arabia, is a company incorporated in Riyadh, Saudi Arabia. Mr Marwan Al Bawardi is the Chief Executive Officer of both plaintiffs. TAM has also traded under the name "Element K" as a provider of IT training materials and e-learning solutions serving a variety of organisations over a period in excess of 20 years, both in the Middle East and elsewhere. It would appear that while there was some overlap during the early stages of the introduction of the ICDL programme into Saudi Arabia, latterly Element K and ICDL Saudi Arabia were separated and run as individual business units.

3.3 The Foundation is a company limited by guarantee, not having a share capital, registered in Ireland. Its members are computer societies or associations of IT professionals, one from each of 28 European countries, who are also members of the Council of European Professional Informatics Societies. The purpose of the Foundation is the development of the ECDL programme and its implementation across Europe and internationally. Mr. Damien O'Sullivan is the Foundation's Chief Executive.

3.4 In late 2002, TAM approached the Foundation with a view to introducing the ICDL programme to Saudi Arabia. This is reflected in the board minutes of the Foundation dated 11th March, 2003.

3.5 At this point, TAM had a close working relationship with the General Organisation for Technical Education and Vocational Training ("GOTEVOT"), which later became the Technical and Vocational Training Corporation ("TVTC"). TVTC is a governmental body charged with the responsibility for vocational education and training in Saudi Arabia. The precise nature of its role and authority along with its contractual arrangements with TAM in the context of these proceedings is a matter of some dispute and will be questions which I will return to later in this judgment.

3.6 A meeting subsequently took place between the Foundation, a representative from TVTC and TAM in Heathrow Airport in March 2003 to discuss potential licensing arrangements for the programme in Saudi Arabia.

3.7 From that meeting, there emerged a letter of understanding dated 22nd March, 2003, between the Foundation and TVTC regarding the International Computer Driving Licence in Saudi Arabia. It was envisaged that TVTC would become the licensee for the programme in Saudi Arabia and a business plan was submitted by TVTC and TAM to that effect. A second letter of understanding, in similar terms but with the inclusion of Element K Middle East, a trading name of TAM, as one of the parties, was also signed on the same date. However, following a review of the Foundation's standard licence agreement, TVTC baulked on the grounds that, as a governmental organisation, it could not sign the agreement as it contained warranties and indemnities to a non-national organisation. Given its position as an oversight body of vocational training within its own schools and public training centres, it was not considered possible to sign and operate a licensing agreement of that type.

3.8 A second letter of understanding, dated the 30th May, 2003, resulted in which it was agreed that TAM would become the licensee for the ICDL programme in Saudi Arabia and would take on all of the financial obligations and provide the necessary warranties. A licence agreement to that effect was signed between the Foundation and TAM on the 30th May, 2003. Of note is that the letter of understanding included a number of provisions regarding the role of TVTC (then GOTEVOT) which were not ultimately reflected in the Licence Agreement. They are as follows:

> (2) "Since Element K Middle East is signing the licence agreement with ECDL-F to implement the ICDL program in Saudi Arabia as the Sole National Operator, Element K Middle East will be fully responsible to ECDL-F for the ICDL program and subject to the supervision of GOTEVOT.
>
> (3) GOTEVOT agrees to oversee and certify the localisation of all ECDL-F approved coursework and testing offered for sale within the Saudi Arabia market."

3.9 In October 2003, TAM proposed to expand and consolidate operations within the Gulf region, otherwise referred to as the Gulf Cooperation Council ("GCC") which is comprised of Saudi Arabia, Bahrain, Oman, Qatar and the United Arab Emirates. This was to be done through the creation of the Dubai Company. There was a suggestion that it would have been more difficult to operate regionally as a Saudi Arabian company, rather than as a Dubai-based company operating in a freezone. This approach was accepted by the Foundation and consequently the Dubai Company became the ICDL licensee for the Gulf region, with Iraq and Kuwait added later. It does not appear to be out of the ordinary, in the course of the ECDL licensing regime, for a licence holder of a territory to be a separate or distinct entity from the national operator, who will operate the Programme as a sub-licensee. A new licence agreement was signed by the Foundation and TAM on the 23rd April, 2004, and was revised again on the 25th April, 2006, (the "Licence") with the Dubai Company becoming the licensee for a period of five years.

3.10 By a written agreement, dated the 1st January, 2006, and later renewed on the 1st January, 2009, the Dubai Company appointed TAM as a sub-licensee for Saudi Arabia, under the terms of the Licence and a sub-licence agreement. The terms of the sub-licence largely replicate those of the Licence. There are a number of, relatively minor, though noteworthy deviations between the two. They are threefold: first, the sub-licence does not contain an equivalent to clause 14.1 in the Licence which requires the licensee to obtain all licenses, permits and consents necessary; second, the limitation of liability clause in the sub-licence restricts TAM's liability to the sub-licensor to a maximum of €5,000.00 as opposed to €50,000.00 in the Licence; and finally, the governing law for the sub-licence is the laws of the UAE, with the courts of the UAE having non-exclusive jurisdiction to hear any case.

3.11 On the 28th October, 2003, TAM entered into a five year agreement with TVTC (then GOTEVOT) (the "TVTC Agreement") entitled the "Agreement Contract for Publishing ICDL Certification" and which provided in section one the following recital:

> "Since (the corporation) provides education and training artistic in the technical faculties and the institutes and the centers belonging to them, and it is the governmental authority entrusted with the supervision over the activity of the civil training in Kingdom of Saudi Arabia;
>
> and (the Company) is certified by (ECDL-F) to be the only authorized company in operating the licensee for the ICDL program in the Kingdom of Saudi Arabia – head – and it is called (The certification), which also includes accrediting Testing Centers, selling skills cards & issuing certifications,
>
> This agreement contained company work authorization for certificate marketing, according to the allowed authority

which is given to the company all of these will be according to the arranged instructions and systems, for Private Training Foundations work in Saudi Arabia and the cooperation between the organization and the company will be for distributing the specified certificate for all of students." (sic)

3.12 The TVTC agreement continued in section 2, on certifications, in the following terms:

> "1- the organization will approves certificate as the following
>
> A. The corporation approves certificate ICDL which contains seven training units as the round of its period six months
>
> B. The corporation approves certificate ICDL Start that includes four training courses from the original seven courses as the round of its period three months
>
> 2- the organization documents the certificate according to it's adapted and regular instructions, and that's will be by specified a unique approbated number for the training course, concerning of some participants who wants to do the exams, but will not enrol in the training course as one of the students, that's will be respected.. (sic)
>
> […]"

3.13 Finally, section 4 on support and distribution, provides, in part, the following:

> 1. "(The corporation) must do its best to make ICDL well known & explain its objectives to all trainers inside & outside group that would encourage them to obtain the certificate and proposing proper incentives.
>
> 2. The organization will spend all efforts to insure that the certificate is recognized by civil military, as well as the private sectors employing agencies." (sic)
>
> […]

3.14 Although the original term of this agreement was for five years and thus concluded at the end of October 2008, it continued thereafter and was reviewed annually by the parties. The latest review, as reflected by TVTC's minutes, was dated the 11th March, 2008. It is entitled the "Supplementary Minutes to the Agreement Concluded between the Corporation and Saudi ICDL to Activate the Supervisory Role of Private Training for the International Computer Driving License Program". The document supplied to the court, namely a set of minutes with an appended agreement which purport to reflect identical provisions, demonstrate some inconsistencies. Whether it is a translation issue or otherwise, I propose to set out the relevant provisions from the minutes followed by the equivalent from the agreement.

> 1. "Accreditation of private training facilities, holding training licenses from the Corporation indicating the activity of the qualifying courses or diplomas in computer, is only given to them as ICDL test and training centers.
>
> 2. The training facility, holding a valid training license from the Corporation and requesting to be approved as an ICDL test and training center or renew its license, should address the General Directorate for Private Training or any of its branches or coordinators all over the Kingdom to obtain its approval. This is to be done via the attached Form (Accreditation Form of ICDL Test and Training Center). In case of approval, the ICDL Saudi shall complete the requirements of the center's accreditation procedures according to its authorized standards.
>
> […]
>
> 8- The General Directorate for Private Training shall coordinate with ICDL Saudi to specify the bodies accredited as ICDL Test and Training centers. ICDL Saudi shall be committed to cancel the accreditation of other bodies not approved by the General Directorate for Private Training, except for universities, colleges (and schools for their students and affiliates only) and governmental bodies (for their affiliates).
>
> 9- ICDL Saudi shall notify all the bodies neither following the Corporation nor being supervised by the General Directorate for Private Training – and which hold accreditation as ICDL Test and Training Centers – that the General Directorate for Private Training has the right to supervise their testing processes."
>
> 1. "ICDL accreditation to private training centers to be ICDL Training and Testing centers will be limited-only to the centers that have a license from TVTC to conduct programs that include Qualification courses track and Computer's related Diploma.
>
> 2. The private training centers that have valid license from TVTC and want to be an accredited ICDL training and testing center or renew their accreditation license, should take the permission through filling the attached document (accreditation of ICDL training and testing center form), and in case of approval, ICDL Saudi will continue in requirement completion to accredit the center according to company standards.
>
> […]
>
> 8. Both of General Directorate and ICDL Saudi will coordinate to determine the Accredited Centers for Training and Testing ICDL program, ICDL Saudi is committed to cancel the Accreditation of any center not authorized by General Directorate **except** Universities, Colleges, (Schools for their Students and employees) and Government entities (Employees of Government centers).
>
> 9. ICDL Saudi will announce for the Accredited ICDL Training and Test centers, which isn't managed by TVTC and isn't supervised by General Director, to allow General Directorate personnel to supervise/attend ICDL Test Sessions."

3.15 The TVTC agreement also included a number of financial provisions which provided that TAM would pay certain sums to TVTC in certain circumstances.

3.16 Although, there was clearly a contractual relationship between TAM and TVTC, the precise nature of that relationship is not entirely obvious from the face of the documentation before the court. Coupled with any consideration of this material and before any

decision can be made on its import, regard must be had for the statutory foundation on which TVTC derives its legal capacity. This latter consideration and the broader question of its relationship with TAM will be dealt with later in this judgment.

3.17 In December 2009, TAM was in discussions with TVTC regarding the financial terms of their agreement, in particular in light of the Al Yasser Project, which involved the provision of the ICDL programme to all government employees across a number Saudi Arabian governmental ministries. This project would have encompassed several hundred thousand candidates. TVTC had secured this contract which required it to train the Al Yasser project's participants using ICDL's standards. TVTC were seeking 20% of TAM's total revenues and to hold the ICDL licence for Saudi Arabia, in exchange for which they proposed to allow TAM to operate the Programme as a sub-licensee. TAM indicated that it was not minded to significantly deviate from its standard pricing model and as a result relations between the two parties further deteriorated. TAM had previously informed the Foundation of the difficulties in its relationship with TVTC in November 2009. At that time it was the plaintiffs' view that it had developed its business to such an extent that they remained confident of its prospects even in circumstances where TVTC proved unreasonable.

3.18 On the 31st May, 2010, TVTC issued a letter to TAM directing that they stop the ICDL Programme on the grounds that had not expressed "seriousness in signing new agreement with TVTC" and as such must "stop all dealings related to this expired agreement and put an end to all test sessions."

3.19 TAM has initiated proceedings before the Saudi Arabian courts against TVTC seeking a number of reliefs, namely: the quashing of its decision to terminate the TVTC Agreement; an order for specific performance of the TVTC Agreement and an order for compensation for all damages and losses suffered by TAM as a result of TVTC's actions.

3.20 There were discussions between TAM, TVTC and the Foundation regarding the ICDL Programme in Saudi Arabia in early 2010, which largely took place through the exchange of emails.

3.21 Separately, Dr Saleh, Vice Governor of TVTC, sought to open a dialogue with Mr. O'Sullivan in an email of the 3rd December, 2009 in which he invited him to Saudi Arabia to discuss the operation of the Programme in Saudi Arabia. An exchange of correspondence followed between Mr. O'Sullivan and Mr. Al Bawardi wherein a response regarding the approach from TVTC appeared to be agreed. In particular, the following passages from Mr. Al Bawardi's email are of note:

> "While TVTC are an important organization, you should be aware that Dr. Saleh has overstated a number of points. TVTC's role in the program is confined to TVTC centers and private training centers under its jurisdiction. TVTC has no role in the operation of the ICDL program in the education and higher education ministries where we are now experiencing our strongest growth and plan new partnerships.
>
> I appreciate your offer of support and understand your desire not to become involved in an internal Licensee issue. On that basis I think it advisable for now to deal cautiously with Dr. Saleh, reinforce our position as the ICDL National Licensee and politely decline his invitation or agree to meet when we have our awards ceremony. I believe that travelling to meet with Dr. Saleh at this time would not be helpful to maintaining their endorsement and may only complicate other key relationships in Saudi."

3.22 Mr. O'Sullivan then responded to Dr. Saleh accepting his invitation to meet and proposing that the awards ceremony, as had been suggested by Mr. Al Bawardi, would be the appropriate time. Further correspondence followed from the Foundation in which the plaintiffs were informed of the response to TVTC but where Mr. Al Bawardi was also encouraged to find an amicable resolution with TVTC.

3.23 A lengthy response followed on the 14th January, 2010, from Dr. Saleh, in which he suggested that TAM was breaching its obligations under the TVTC Agreement and also that it was operating without a valid licence from the Saudi government. The relevant excerpts from the email are in the following terms:

> "Since the commencement and execution of the ICDL program under the Sharikat Takniat AlMarifah, the TVTC noticed that the company is breaching certain obligations, terms and conditions in the Contract Agreement and failing to abide by the standard level of the TVTC and ECDL-F in implementing the ICDL program. These violations and breaches in the Contract Agreement by the company have been noticed and recognized in the program's delivery and implementation. Below are the defaults and breaches made by the provider:
>
> […]
>
> Undeniably, the TVTC is unhappy and unsatisfied with the present performance and operation of the company and will not tolerate the above breaches of terms and obligations under the Contract Agreement and the unlawful operation of the company, since the company has no valid Licence from the Saudi government right now. The TVTC wants to inform you that all technical trainings and qualification activities should first seek approval from the TVTC to guarantee the quality assurance and government approval. Any programs to be delivered must be informed and approved by the TVTC because the TVTC is the only organization authorized to license any technical operation in the Kingdom, also accrediting non-profit organization to work in the country. (sic)
>
> […]
>
> The TVTC is seeking your involvement to solve these problems, otherwise, the TVTC will take all legal and lawful actions and remedies to protect its rights and the rights of other parties and will be forced to stop all the implementation, operation and support to the ICDL program and will be forced to re-evaluate the program's quality and accreditation and to introduce other options."

3.24 On foot of this Mr. O'Sullivan agreed to expedite his trip to Saudi Arabia to meet with TVTC. He also corresponded with the plaintiffs and one passage, from his email of the 19th January, 2010, is of particular note:

> "I have also confirmed my willingness to visit him but it may take a little time to arrange. My purpose there was to allow time for you and he to engage again with a view to resolving this. Clearly there are commercial issues to be determined and ECDL Foundation would not be the competent authority to do so. I am very anxious to have the dispute resolved to your satisfaction and to maintain TVTC involvement in the programme. Apart from resolving the disagreement in regard to the previous agreement, there is a need to conclude a new agreement. Perhaps there is room to separate the issues."

3.25 In an earlier email on the same date, Mr. O'Sullivan also explained to TVTC the structure behind the licensing arrangement that was in place between the parties. In an internal email dated the 20th January, 2010, Mr. O'Sullivan noted that:

> "Marwan isn't objecting to me going but just warned Jim that I would be put under a lot of pressure when I'm there and that really TVTC want an excuse to dump ICDL and do their own thing and put the blame on ICDL Saudi – I don't buy that."

3.26 Nevertheless, TVTC's response of the 27th January, 2010, appeared to demonstrate an increased urgency that the matter be resolved quickly and in particular that any resolution would only come from a direct meeting with the Foundation, and without the involvement of the plaintiffs. In addition, TVTC again raised concerns regarding the identity of the companies and trading names involved in the licensing arrangement for the Programme. Mr. O'Sullivan thereafter arranged to fly Saudi Arabia on the 3rd February to meet with TVTC. Although Mr. Al Bawardi was away, he arranged for another member of the plaintiffs' organisation to host Mr. O'Sullivan during his visit to Saudi Arabia.

3.27 Mr. O'Sullivan met with Dr. Saleh at TVTC on the 10th February, 2010. At this meeting, a "roadmap" was agreed, apparently at Dr. Saleh's insistence, which provided for TVTC to hold the ICDL licence and TAM to act as the national operator. This was essentially the structure that had been discussed in 2003 but not proceeded with. There is some suggestion from the correspondence that TVTC were under the mistaken view that this was the structure under which the Programme had been operating in Saudi Arabia. The Foundation later had discussions with Mr. Al Bawardi and a form of compromise was proposed whereby a dual licensing arrangement would be entered into, with TVTC holding the licence for its sector and TAM holding the licence for the remainder. At a further meeting on the 11th, Dr. Saleh rejected this suggestion outright. He followed up with a letter dated the 13th February, 2010, in the following terms:-

> "I would like to Inform you that due to weak quality assurance measures and violations of the contract, TVTC will not extend its contract with Sharikat Takniat Al Marifah. Moreover, since the contract with Sharikat Takniat Al Marifah is already expired, We deem that Sharikat Takniat Al Marifah is illegally operating a training related program and awarding certifications in Saudi Arabia." (sic)

3.28 This was followed by an email dated the 23rd February, 2010 which informed the defendant that TVTC was sending an official letter to TAM suspending all ICDL related activities in Saudi Arabia. This letter did not appear to form part of the evidence before the court.

3.29 On the same day the Foundation issued a letter (the "Cure Notice") to the Dubai Company in which it noted that it had not received a copy of the sub-licence agreement with TAM. The Foundation wrote that it had been informed by TVTC that TAM did not have a current licence, as required by the law of Saudi Arabia, for the operation of the Programme in that country. This, the Foundation stated, was a breach of the Licence Agreement under clause 14.1. The Foundation then called on the Dubai Company to rectify the breach and communicate same within 60 days, in default of which the Licence would terminate in accordance with clause 16.1.4. Finally, it was noted that the Dubai Company was not permitted to operate the Programme in Saudi Arabia in the interim.

3.30 A copy of this letter was concurrently shared with Dr. Saleh of TVTC. It would appear that this letter was thereafter shared further as an email from Thirdforce, which is a competitor of the plaintiffs, dated the 25th February, 2010, which purports to enclose a copy of its contract with Nodhm, a company run by a former TVTC employee, includes the following sentence:-

> "I understand from our partner that you have issued a letter to GCC giving them 60 days to resolve the dispute, which sounds like good progress."

It would appear that Thirdforce entered into an agreement with Nodhm for the distribution of materials for and the operation of the Programme in Saudi Arabia. However, as the agreement itself was not discovered, or may not have been included in the email, there is some doubt over on this.

3.31 The minutes of a board meeting of the Foundation on the 25th February, 2010, record that the board approved of the action taken by Mr. O'Sullivan, and noted that such action was taken in reliance on the statement by TVTC and was designed to protect the integrity of the ICDL programme and the Foundation in Saudi Arabia and throughout the region.

3.32 The Dubai Company then formally responded to the Foundation, through a London based law firm, by letter dated 2nd March, 2010, in which issue was taken with the Foundation's letter of 23rd February. One particular point raised was the fact that TVTC "deemed" TAM to be operating illegally and there was, therefore, no evidence of any breach of Saudi Arabian law. This inspired the Foundation to correspond with TVTC seeking a more positive statement that TAM had, in fact, been operating the ICDL Programme in breach of the law in Saudi Arabia. TVTC then responded, on the 24th March, in the following terms:-

> "We, hereby refer to you that TVTC is a governmental body responsible for technical and vocational training in the Kingdom in all its domains and levels which include the licensing and approving of training certificates granted by the private institutes recognized by TVTC. Among such certificates is the ICDL certificate which is granted as per the authority of TVTC according to the rules and regulations applied in the Kingdom of Saudi Arabia. As both TVTC and Sharikat Takniat Almarifa were entitled previously by an agreement for five years whereas this agreement has given a legal capacity on performing the required job. An henceforth, this agreement is expired, the continuation of issuing ICDL certificates by Sharikat Takniat Almarifa after the expiry date of the agreement is illegal and violates the laws in the Kingdom of Saudi Arabia." (sic)

3.33 In April 2010 the Foundation sought an indemnity from TVTC regarding any possible costs which might arise out of the termination of the Licence. No such indemnity was forthcoming and it would appear that TVTC would not be drawn on the matter.

3.34 In May 2010 a memorandum of understanding was exchanged between the plaintiffs, the Foundation and TVTC which provided for the Dubai Company to hold the regional licence, TVTC to hold a national or a sub-licence and TAM to act as the sole national operator. However, nothing appears to have come of this. From the evidence, it appears that one of the conditions that TVTC laid down for any agreement with the plaintiffs was that the proceedings against the Foundation be abandoned. The plaintiffs refused and no agreement was reached.

3.35 Under the terms of the Licence dated 25th April, 2006, the agreement was for a period of five years, however it was renewable on the condition that the Licensee had complied with the terms of the Licence, including those relating to the performance criteria. It is the plaintiffs' contention that, but for the Foundation's alleged breach of contract, the Licence would have rolled over for a

subsequent term of five years on that basis.

3.36 In November 2010, the Foundation commenced the process of seeking to identify an alternative operator. This was done through notices in Saudi Arabian newspapers seeking expressions of interest. It is worth noting, however, that at the commencement of these proceedings, following an injunction application, the Foundation gave an undertaking not to appoint anyone as the licensee for the Programme in Saudi Arabia pending the outcome of this case, in return for which the plaintiffs gave the usual undertaking in damages. Against that factual background it is next necessary to turn to the terms of the key provision of the licence.

4. Necessary Licences and Permissions

4.1 The Licence provides, at clause 14.1, for the following:-

> "The Licensee understands and agrees that the exercise of the licence granted to the Licensee under this Contract is subject to all applicable laws, enactments, regulations and other similar instruments in the Designated Territory (including, without limitation, all applicable local laws relating to advertising, broadcasting, health and safety and telecommunications), and that the Licensee shall at all times be solely liable and responsible for such due observance and performance. The Licensee shall obtain at its own expense all licenses, permits and consents necessary for it to carry on its business in the Designated Territory."

4.2 The question of what "all licenses, permits and consents necessary" means is, on one level, a matter of construction of an Irish contract to be arrived at according to the rules which have been well rehearsed in this jurisdiction. However, apart from the legal question as to what the clause means, there is the factual question as to role of TVTC and its right to licence the business, in whole or in part, of TAM in Saudi Arabia. I turn first to the question of the applicable rules of construction.

4.3 The rules of construction under Irish law are now to a large extent settled. This follows the Supreme Court decision in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274 where the court adopted the following statement of Lord Hoffman in the House of Lords decision in *Investors Compensation Scheme v. West Bromich Building Society* [1998] 1 WLR 896, at pp. 912-3:-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see *Mannai Ltd. v. Eagle Star Ass. Co. Ltd.* [1997] A.C. 749.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania S.A. v. Salen A.B.* [1985] A.C. 191, 201:-
>
> > 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."

4.4 More recently I considered the principles applicable to the construction of contracts in the case of *BNY Trust Company (Ireland) Ltd. v. Treasury Holdings* [2007] IEHC 271 where I followed *Analog Devices*. In addition, I quoted with approval the speech of Lord Wilberforce in *Reardon Smith Line Ltd v. Young Hansen-Tangen* (1976) 3 All ER 570 where he made the following statement:-

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes a knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating … When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of the aim, or objective, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties … what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were."

4.5 The Licence is, of course, intended to provide the legal basis on which the Dubai Company (and through it, TAM) are to operate in Saudi Arabia. However, the Licence is, as I understand it, in a standard form applicable to almost, if not all, jurisdictions where a licence to operate the ICDL exists. The need for such a term is obvious. The licensee will be required to operate in accordance with the laws and regulations of the jurisdiction or jurisdictions to which the License relates. As it is the licensee who will be engaged in

the day-to-day operation of running the Programme, then it is hardly surprising that the License requires the licensee to obtain all "licenses, permits and consents" which are regarded as "necessary" for it to carry on its business. There seem to me to be two elements of that terminology. First, there may be "licenses, permits and consents". Second, such must be "necessary".

4.6 It must be recalled that the way in which business is done varies enormously from country to country and legal system to legal system. It would be impossible for a body such as the Foundation to set out with any degree of specificity the precise requirements that might be necessary in each jurisdiction. Indeed, even the names which might be given to the type of requirements that exist in different jurisdictions may vary (and not just as a matter of translation). However, it seems to me that the terms "licenses, permits and consents" carry with them an implication of something which, as a matter of law, is required rather than something which might be commercially useful.

4.7 It must be recollected that there are other provisions in the Licence which create minimum targets for the level of operation which the licensee must achieve. A licensee who does not achieve those minimum targets runs the risk that the Licence will, thereby, be terminated (at least if there is not a speedy remedy to the shortfall). Therefore, the way in which commercial advantage is dealt with in the Licence is that the licensee is required to meet those targets. A failure to secure something that might be vital to the commercial success of the venture (in terms of the numbers undergoing the ICDL programme) in a manner that would significantly impact on that commercial success may lead to a failure to meet the numbers required with consequent risk to the ongoing status of the License.

4.8 However, it does not seem to me that clause 14.1 is concerned with such matters. Rather, clause 14.1 is concerned with matters which are required in order that the operation be lawful, rather than commercially successful. Obviously, if the operation is not lawful, then it is highly unlikely to last very long, and thus, will not be commercially successful. However, it is easy to envisage many circumstances in many jurisdictions where a venture may be lawful, but for one reason or another, may not make the necessary contacts or obtain the necessary recommendations or approvals of public and/or private bodies so as to put at risk its commercial success. The first port of call is, therefore, to identify that clause 14.1 is concerned with lawfulness rather than commercial success. It seems to me that that view is strengthened by the use of the word "necessary". Something might come in useful in promoting commercial success but it is not necessary "to carry on . . . business". Likewise, words such as "license, permit or consents" imply matters that are required in order than an activity be lawful.

4.9 As a matter of interpretation, I am, therefore, satisfied that the obligation placed on the licensee (in this case, the Dubai Company) is to ensure that it has all licenses, permits and consents where the absence of such licenses, permits or consents would render the operation of the programme in Saudi Arabia unlawful. There is, as has been pointed out, a dispute between the expert witnesses called as to the precise powers of TVTC in Saudi Arabia. It will be necessary to turn to that dispute in due course. However, as an initial point, counsel on behalf of the Foundation argued that, even if I were to be against the view propounded by the Foundation's expert witnesses in relation to Saudi law, it was nonetheless clear that TAM did not have the necessary consent to carry on its business in Saudi Arabia, for it manifestly did not have the consent of TVTC which, it was commoncase, had effective control over, at a minimum, the provision and/or regulation of private training.

4.10 That a practical inability to access the market for private training would be a significant commercial disadvantage in operating in the Saudi market cannot be doubted. That the opposition of TVTC to TAM in respect of permitting TAM to operate in that sector existed and would have a significant commercial consequence cannot either, in my view, be doubted. However, unless the opposition of TVTC rendered TAM's operation in Saudi Arabia unlawful, then it does not seem to me that the fact that TAM might not find it possible to access the private training centre sector would, of itself, mean that TAM had failed to obtain a licence, permit or consent necessary to carrying on business in Saudi Arabia. On that first point raised on behalf of the Foundation, I, therefore, find in favour of the plaintiffs and hold that the fact of being unable to access the private training sector without TVTC's assistance, and in the absence of TVTC's consent, does not, of itself, amount to a breach of clause 14.1. Clearly, if, as asserted by the Foundation, however, the true position goes further and renders TAM's activities in Saudi Arabia unlawful, then the position would, of course, be different. That is an issue to which it will be necessary to turn in due course. I, therefore, turn to the role of TVTC in Saudi Arabia.

5. The Role of TVTC

5.1 As has become clear, the precise role of TVTC in Saudi Arabia is a matter of some importance in this case. This may explain why it a matter of no small controversy between the parties. As a preliminary comment it is to be noted that TVTC is a public body, which is governed by the law of Saudi Arabia. The interpretation of a foreign public law statute by any non-national jurist is always a task to be approached with caution. Indeed, more so when it falls to a court for determination. It may be remarked that as a general rule it is preferable to leave such questions to be addressed by the appropriate Saudi tribunal, assuming of course that there is the necessary jurisdiction for such a case to be tried.

5.2 Nevertheless, this is the situation the court now finds itself in. Turning therefore to the translated Statute of the Technical & Vocational Training Corporation, a number of sections are of note for the present purposes. They are:-

> "Article 1
>
> The following word and phrases, wherever mentioned in this Statute, shall have the meanings assigned to them, unless the context requires otherwise:
>
> […]
>
> Training Units: Premises or facilities of different organizational forms, names and locations where the Corporation provides training.
>
> Training: Non-academic programmes of different forms, levels and durations aimed at providing trainees with applied technical or vocational skills and knowledge."
>
> […]
>
> Article 2
>
> The Corporation shall be a corporate public entity with financial and administrative independence. Its headquarters shall be in the City of Riyadh, and it may establish branches in different provinces of the Kingdom.
>
> Article 3

> The Corporation aims at developing national human resources through training in order to participate in meeting labor market demand for qualified manpower. To this end, it may, amongst other things, undertake the following:
>
> […]
>
> 4. Licensing, overseeing and setting technical standards for private sector training.
>
> 5. Entering into strategic partnerships with training institutions in both private and public sectors; to manage and operate different training units.
>
> […]
>
> Article 5
>
> The Board [of Directors] shall be the highest authority of the Corporation and shall oversee the management and conduct of business thereof. The Board shall particularly have power to:
>
> 4. Approve regulations for training at training units, particularly those related to setting training hours, plans, durations, vacations as well as admission requirements, examinations and certificates.
>
> 5. Approve regulations for private sector training, particularly those related to technical standards.
>
> […]
>
> 7. Approve the establishment of training units in different provinces in the Kingdom, in accordance with national development plans."

5.3 Dr. Waleed Nasser Al-Nuwaiser, a Saudi Arabian lawyer, who has represented TAM in proceedings against TVTC in Saudi Arabia, gave expert evidence on behalf of the plaintiffs in the following terms:-

> "In my opinion, TVTC's authority is restricted to private training centers. Training centers that are not private or that are under the authority of other governmental bodies (such as health training centers and centers under the umbrella of the Ministry of Higher Education) do not fall within the jurisdiction of TVTC. As mentioned in 4.1 above, we have been instructed that, ICDL Saudi Arabia does not provide training, nor does it operate as a training center, therefore, it is not under the jurisdiction of TVTC.
>
> In my opinion, under Saudi Arabian law, the only license required from ICDL Saudi Arabia to undertake its activities is the commercial registration issued by the Ministry of Commerce and Industry, which ICDL Saudi Arabia has duly obtained. ICDL Saudi Arabia, in my opinion, is authorized to carry on its described activities in 4.1 above and to perform its obligations under the licensing arrangement of the ICDL Program lawfully under the laws of the Kingdom of Saudi Arabia." (sic)

5.4 In his evidence, Dr. Waleed also made reference to a letter from the Saudi Arabia Ministry of Higher Education dated the 21st February, 2011, which appeared on its face to support his opinion, and which was in the following terms:-

> "Reference to the letter submitted by the Manager of Knowledge Technology for Advanced Education Co. Ltd. No. 27/12/G. dated 27/02/1432H., which includes the suspension of the ICDL program at Universities by the Technical and Vocational Training Corporation.
>
> Whereas the abovementioned program is considered part of the educational courses as a preparatory course, which is not subject to the training rules and conditions under the umbrella of the Technical and Vocational Training Corporation, and for the need of the universities for such comprehensive computer program.
>
> Therefore, we have no objection to resume the aforesaid program in light of its scientific value as a global program."

5.5 This letter from the Ministry of Higher Education was sent in circumstances where the plaintiffs queried TVTC's authority following a request by TVTC that all Saudi universities cease their use of the Programme.

5.6 A second lawyer from Saudi Arabia, Dr. Adli A. Hammad, also gave expert testimony on behalf of the plaintiffs. His view largely echoed that of Dr. Waleed. Of particular note were the following passages from his statement:-

> "18. It is my understanding that TVTC has jurisdiction over private training centers providing vocational and technical training and therefore those training centers which undertake technical and vocational training activities in Saudi Arabia may be required to obtain the approval of TVTC (which activities, I am instructed, the Second Plaintiff does not provide).
>
> 19. The agreement between TVTC and the Second Plaintiff dated 28 October 2003 appears to have been executed in accordance with the Second Plaintiff's activities as per its Articles of Association. Since the Second Plaintiff was not involved in the training of the ICDL Program; it does not fall within the definition of "training center" as provided in the TVTC regulations and therefore the Second Plaintiff, being a limited liability company, has all the permissions and licenses required as per the activities operated by the Second Plaintiff in Saudi Arabia (i.e. non training activities).
>
> 20. As a matter of Saudi law, the Plaintiffs do not need a license, permit or consent from TVTC in order to operate in Saudi Arabia. Without prejudice to the above, TVTC approval may be required by those private centers which operate vocational (technical and professional) training facilities in Saudi Arabia which (although part of the Second Plaintiff's permitted activities as per its Articles of Association) are not practiced by the Second Plaintiff. I am informed that the First Plaintiff is the licensee for the Defendant in Saudi Arabia. Pursuant to the agreement between the Second Plaintiff and TVTC, the role of the Second Plaintiff was to introduce the ICDL Program to the students of TVTC controlled centers (the Second Plaintiff is the sub licensee of the First Plaintiff who performs such activities in respect of Saudi Arabia). In this context I am of the view that as the Plaintiffs are not operating

training facilities, they are not required to have any license from TVTC to perform their roles.

21. It is my understanding that TVTC approval is only required from TVTC in respect of TVTC controlled training and vocational centers in Saudi Arabia. This statement does not affect the capacity of the Second Plaintiff to operate lawfully as a commercial company under the laws of Saudi Arabia" (sic)

5.7 In response, the Foundation called its own expert evidence. The first expert witness was Dr. Fahd Al Kodair, who is the Director of the TVTC legal department. His evidence, in relevant part, was in the following terms:-

> "I agree that the Second Plaintiff does not operate training centres. However, the provision of computer skills for the purpose of obtaining an ICDL certificate is considered training activities because of its link to a certificate. Therefore, it comes under the authority of TVTC with regards to licensing, supervising and settling the appropriate technical standards."

He then continued by stating that TAM required a licence or approval from TVTC in order to issue ICDL certificates:-

> "The activity of the Second Plaintiff in issuing ICDL certificates came after it obtained the licence from TVTC in accordance with the agreement signed with TVTC on the 28/10/2003. After the expiry of that agreement, the Second Plaintiff has no right to issue any certificate without the approval of TVTC."

5.8 Dr. Al Kodair took issue with the letter from the Minister of Higher Education on two grounds. First, he suggested that the exemption referenced in the letter cannot be considered a licence permitting TAM to operate in Saudi Arabia as the Ministry for Higher Education is not a competent body for the issuance of such licences; second, he drew attention to the statement that the ICDL Programme was to be considered a preparatory subject in education which he asserted was incorrect.

5.9 The second expert tendered by the Foundation was Dr. Majed M. Garoub, a lawyer from Saudi Arabia. His view supported that of Dr. Al Kodair and as such was in direct conflict with that of the plaintiffs' witnesses. His view was that TAM required approval from TVTC, and concluded that, where there was no valid working licence from or agreement with TVTC, TAM was in breach of Saudi Arabian law.

5.10 I should also note that a witness statement had been furnished from a Dr. Al Tami, which was withdrawn, and that statement does not, therefore, form part of the evidence which I have to consider.

5.11 It is with some very considerable diffidence that I embark on the task of attempting to interpret what are, as a matter of Saudi Arabian law, the parameters of the jurisdiction of a Saudi governmental body, TVTC. Reference has already been made to the fact that proceedings are in existence before the Saudi courts between TAM and TVTC. However, all of the experts called agreed that those proceedings were based on what would be termed contract law in this jurisdiction, and did not involve any questions concerning what, in this jurisdiction, would be termed the public law questions as to the jurisdiction of TVTC.

5.12 That leads to a second question of difficulty. It was not entirely clear to me on the evidence as to the extent to which it would have been possible to invoke the jurisdiction of the Saudi Arabian Courts to resolve this question of Saudi Arabian public law. In general terms, the expert witnesses seemed to agree that parties aggrieved by the actions of Saudi public bodies could have recourse to the courts in proceedings against the body concerned. Precisely why this was not done in the circumstances of this case was much less clear. First, it was not clear to me as to whether a jurisdiction which broadly resembles the judicial review jurisdiction of the courts in this and other common law countries (and, indeed, the administrative courts of many civil law countries) exists in Saudi Arabia. Whether, for example, declaratory or other similar relief would be available was not clear. There was some suggestion that it would be possible to bring proceedings against a public body, such as TVTC, if the public body concerned actually took action which was inconsistent with its legal powers and entitlements. There may have been an inference in that evidence that TVTC had not acted in a way which exposed it to legal proceedings of a public law nature in Saudi Arabia (although, of course, TAM has sued TVTC for breach of contract as I have already noted). It may be, therefore, that there are limitations on the forms of action which could have been taken by TAM in Saudi Arabia.

5.13 Apart from that theoretical issue it is also important to note the sequence of events which led to the purported termination of the Licence. The Cure Notice specified the breach that required to be cured as the absence of a current licence from TVTC. The response from the Dubai Company and TAM ultimately placed reliance on the opinion of a Saudi Arabian law firm which was the Saudi correspondent of a major London law firm, whose opinion was to the effect that no TVTC licence was required for TAM to operate lawfully. There was, at a minimum, a clear dispute in existence, even at that stage, as to the precise extent of TVTC's powers. Indeed the fact that the Foundation sought, and ultimately failed, to obtain some form of warranty or the like from TVTC adds to the real nature of that dispute. It is surprising, unless there is an absence of an appropriate procedure in the Saudi courts, that the obvious solution to that problem was not availed of at that time, being that it could have been agreed between the Foundation and TAM that appropriate proceedings would be commenced in the Saudi courts to determine the matter one way or the other. It might well have been, of course, that even if such a form of proceedings were available, same were unlikely to have been capable of being completed within the 60 day period provided for in the Cure Notice. It also needs to be said that, by the time the Cure Notice had been served, the Foundation had, to a large extent, committed itself to arrangements with TVTC. For whatever reason the Foundation did not suggest (either in the cure notice or, perhaps, more realistically and reasonably, when it received an at least credible basis for suggesting that the TVTC view as to its powers was wrong) that the matter could be resolved one way or the other in the Saudi Courts, and that the Foundation would hold its hand until such resolution had taken place. Likewise, it is not entirely clear to me as to why TAM did not seek to have the matter clarified in the Saudi courts. I am left, therefore, to do the best I can on the basis of sharply conflicting testimony as to the proper interpretation of TVTC's governing statute.

5.14 In approaching that question, I am also mindful of the fact that the interpretation of statutes and the like is something which can vary from jurisdiction to jurisdiction. Even within this jurisdiction, judges and lawyers now have to distinguish between the appropriate approach to the construction of domestic statutory documents and European ones. I have tried, therefore, to avoid approaching the TVTC statute with the eye of an Irish common lawyer.

5.15 Some things are, however, fairly clear about the statute. In Article 1, training units are defined as locations where TVTC actually provides training. They are, therefore, TVTC units.

5.16 Article 3.4 also makes clear that TVTC may undertake the licensing, overseeing and setting of technical standards for private sector training. Likewise, Article 5.5 allows the Board of TVTC to approve regulations for private sector training, particularly those related to technical standards.

5.17 At least at a general level it seems clear, therefore, that TVTC can provide its own training units and also has a licensing or regulatory role in relation to what is described as private sector training. I agree that the activity carried on by those actually using the programme on the ground in Saudi Arabia may well come within the definition of "training" as set out in the TVTC statute. However, TVTC is not given authority over all training. Rather, it is given authority in Articles 3.4 and Article 5.5 over private sector training.

5.18 That there may be a distinction between private sector training (which all seemed to agree was the provision of training by private bodies) and the operation of training programmes in the public sector seems consistent with the views expressed by the Ministry of Higher Education in the letter dated the 21st February, 2011, to which reference has earlier been made. That letter seems to suggest that, in the view of that Ministry, the fact that the ICDL programme was considered a preparatory part of university courses meant that it was, at least when provided in that university context, outside the scope of TVTC. If the evidence given both by TVTC and by the expert witnesses called on behalf of the Foundation is correct, then that letter must clearly be wrong.

5.19 The approach adopted in the letter is also consistent with the views expressed by the expert witnesses called on behalf of TAM which was to the effect that other areas of general training which came under the auspices of different government departments (the example was given of medical training), would be treated in a like way so that the provision of the ICDL programme as part of training within the medical context would, by a parity of reasoning, also be outside the scope of TVTC's control. The real question in the later case is as to who is providing the "training". TAM provides the syllabus, the cards and the test. TAM does not, as I understand it, provide the hands on training. In the case of the governmental sector who then provides the training? If TAM, then it might be that it could be characterised as private training as TAM is a private body. If it is the, for example, university which provides the training (using the syllabus, cards and test provided by TAM) then it might well be characterised as not being private training.

5.20 One issue relied on on behalf of the plaintiffs was a suggestion that TAM had operated in Saudi Arabia without objection, until the events in controversy in these proceedings intervened, in the absence of any apparent licence, permit or consent from TVTC. The response on behalf of the Foundation was to point to the evidence given by TVTC which suggested that the contract which existed between TAM and TVTC amounted to such a consent. There can be little doubt but that, in the legal regime which operates in this and other common law countries, it would be surprising indeed to find a necessary statutory licence or consent in a document which was otherwise a commercial arrangement between a state body and a private commercial entity. It is important, in the context of our legal system, that the exercise of statutory powers by statutory bodies be kept separate from the legitimate commercial arrangements which statutory bodies may enter into with commercial entities. In that context it would be surprising to find, in a single document, both a commercial contract and a form of statutory licence.

5.21 However, I am not convinced on the evidence that it is appropriate to necessarily look at the Saudi situation in that regard from the viewpoint of a common lawyer. There was, in my view, insufficient evidence to allow me to form any meaningful judgment as to whether it might be expected that a Saudi statutory corporation would be required, under Saudi law, to keep the same level of separation between documents exercising its statutory role on the one hand and making commercial arrangements on the other hand, as an Irish statutory body would undoubtedly be expected to do in the Irish legal context.

5.22 It follows that I did not consider that this point weighed very heavily one way or the other.

5.23 There can be little doubt but that the absence of support from TVTC means that the ICDL programme could not expect to operate in TVTC training units. It also seems, on the evidence, to be unlikely, in practice, that the programme could operate in private training centres without TVTC's support. TVTC can set technical standards for private training centres and in the absence of TVTC approving the ICDL programme it seems, in practice, that private training centres would be unable to provide the ICDL programme.

5.24 However, on the balance of the evidence and with the reservations which I have already expressed, I have come to the view that Saudi law is as stated by the experts called on behalf of the Dubai Company and TAM. TAM does not provide training as such. The training is provided by the bodies, whether public or private, who deal directly with the students. Much training is, therefore, public and outside the scope of TVTC's control. It is not unlawful, therefore, to operate the ICDL programme in Saudi Arabia without TVTC consent per se. The absence of TVTC consent is, undoubtedly, as a matter of practicality, a significant matter, for the absence of that consent will mean that, in practice, the programme is highly unlikely to be able to operate in the private training sector and will not be able to operate at all in the training units under TVTC's direct control. However, for the reasons already analysed it does not seem to me that that type of difficulty is the sort of necessary licence, permit or consent which is spoken of in Clause 14.1. It follows that, on balance, I have come to the view that the Dubai Company was not in breach of the Licence. It follows that the basis for the Cure Notice was wrong in that the cure notice sought to have remedied a matter which did not require to be remedied. It follows, on that ground alone, that the termination of the Dubai Company's licence is invalid.

5.25 Lest I be wrong in that conclusion it is next necessary to turn to the other bases on which it was suggested that the Notice of Termination served by the Foundation was invalid.

6. The Requirement for a Second Notice of Termination

6.1 Along with the issue as to whether the Foundation was substantively correct in seeking to terminate the Licence, there is an issue as to whether the Foundation was procedurally correct in how it sought to determine the Licence. In other words, what form of notice of termination was necessary, and was such a notice served?

6.2 Clause 16 of the Licence, entitled "Termination" provides:-

> 16.1 ECDL-F may terminate this Contract forthwith, by giving written notice to the Licensee:
>
> 16.1.1 if the Licensee's performance in relation to the implementation of the ECDL Concept is in the reasonable opinion of ECDL-F substantially unsatisfactory relateive to the agreed Performance Criteria and, where such performance is, in the opinion of ECDL-F capable of remedy the Licensee fails to rectify its performance to the satisfaction of ECDL-F within ninety (90) days of written notice by ECDL-F;
>
> 16.1.2 if control of the Licensee passes from the present shareholders or owners or controllers to other persons or legal entities whom ECDL-F shall in its absolute discretion regard as unsuitable;
>
> 16.1.3 if the Licensee is in breach of any of its obligations under this Contract and, where such breach is capable of remedy, fails to rectify the breach to the satisfaction of ECDL-F within sixty (60) days of written notice by ECDL-F.

The remaining sub-clauses of clause 16 go on to provide for termination situations which are not relevant to this case.

6.3 The Dubai Company contends that the letter of the 23rd February, 2010, was merely a cure notice, in which the Foundation set out the grounds on which it was entitled to terminate if certain steps were not taken within the 60 day time period specified by the Licence. The Dubai Company further relies on four emails from Mr. O'Sullivan (dated the 30th March, 26th April, 5th July and 9th August, 2010) in which he alludes to the necessity to furnish a second letter of formal notice of termination. Finally, the Dubai Company points to certain English authority, including *Chitty on Contracts* (30th Ed. 2008) (pp.1476-7) and the House of Lords decisions in *Afovos Shipping Co. Ltd. v. Pagnam* [1983] 1 WLR 195 and *Mardorf Peach v. Atticus Sea Containers Corp.* [1977] AC 850 which provide authority for the contention that the validity of a notice depends on the precise observance of the specified conditions.

6.4 In contrast, the Foundation, while conceding that Mr. O'Sullivan may have laboured under the apprehension that a second notice was required, disagree that the terms of the clause 16, in fact, require that a second notice must be sent. The Foundation argues that their letter of the 23rd February states that the Licence "will terminate" unless certain remedial action is taken. This, it is said, implies that, in circumstances where no remedial action is taken, as in this case, the Licence automatically terminates on the expiry of the 60 days. In the alternative the Foundation contends that, if a second notice or communication is required, then the letter from its solicitors, dated 19th August, 2010, which states that "[a]s your client is fully aware, it failed to remedy its breach and the agreement has therefore terminated" should suffice.

6.5 In my view, a second notice was required. It is clear that clause 16 permits what can, I think, properly be described as a cure notice to be served. In other words, a party is given notice that it must remedy what is said to be a default. Obviously, the types of matters that might be asserted to be a default can vary enormously. The extent to which it might or might not be a matter of opinion as to whether a particular type of default had been remedied in a proper manner will, therefore, vary enormously from case to case. It is clear from the text of the clause that there will at least be some types of defaults where there could be a real debate as to whether the measures taken to seek to remedy the alleged default had, in fact, been taken, or had been taken to a sufficient degree so as to cure the default. It seems to me that the structure of the clause, therefore, requires the Foundation to take a second decision, when the cure period has expired, as to whether it is satisfied that there has been a remedy, and, even if not so satisfied, whether the Foundation actually wishes to bring the licence to an end. It is certainly possible to envisage circumstances where the Foundation might take the view that there was default, might serve a cure notice, might form the view that there had been some progress but that the default had not been fully cured, but might nonetheless take the view that termination was not appropriate in all the circumstances.

6.6 The particular type of default which arose in this case might suggest that it is the type of default which was black and white as to whether it had been remedied. However, the clause as a whole is not confined to that type of default only. It seems to me that the proper construction of the clause as whole is, therefore, that a second decision had to be taken by the Foundation as to whether the matter referred to in the Cure Notice had been "cured", and if not, whether the Foundation then wished to bring the licence to an end.

6.7 The second point relied on by the Foundation, as noted earlier, is to draw attention to the letter written by its solicitors on 19th August, 2010, which refers to the fact that the Dubai Company was said to have failed to remedy its breach and that the agreement "has therefore terminated". On the basis of the construction which I have placed on clause 16, it is not, of course, correct to say that the contract had terminated by that time. However, if the letter had said "is now terminated", rather than "has now terminated", there could be no doubt but that the letter would be effective to have terminated the Licence from that time. The question is as to whether a letter which purports to assert that something has happened is ineffective to make the same thing happen because of the use of language adopted. Put another way, is the mistaken assertion that something has already happened ineffective to make it then happen because the use of language is one which describes a previously occurring event rather than something that is to occur by virtue of the letter in question. There is certainly no substance to the point made by the Dubai Company under this heading. The plaintiffs were fully aware, from the receipt of that letter, that the Foundation were treating the licence as at an end. If something turned on events which occurred between the time when the original 60 day Cure Notice expired and the receipt of that letter, then difficult questions might arise. However, it seems to me that, in context, the proper construction to place on the letter in question is that it amounted to a notice of termination even if it mistakenly used language which implied that that termination had already taken place when it should have used language which suggested that the termination was to take place by the letter itself. On that basis, I am not satisfied that the Dubai Company's case under this heading is made out.

7. Partial Termination

7.1 A further issue raised by the Dubai Company as to the manner in which the Licence was sought to be terminated is the question as to whether the Foundation was entitled to partially terminate. In the circumstances, the Foundation sought to preclude the Dubai Company from operating the Programme in Saudi Arabia and as such there was no suggestion that it sought to interfere with the ability of the Dubai Company to continue to operate the Programme in the other designated territories.

7.2 The Foundation contends that this step was taken in ease of the Dubai Company. They point to the fact that the Dubai Company has been able to continue to offer the Programme outside Saudi Arabia as proof that the severance of one territory from the Licence is workable in practise and they also point to clauses 26.2 and 26.3 of the Licence, which provide:-

> "The failure by either party to exercise or enforce any rights under this Contract shall not be deemed to be a waiver of any such rights, nor shall any single or partial exercise of any right, power or privilege, or further exercise thereof, operate so as to bar the exercise or enforcement thereof at any later time.
>
> The waiver by either party of any breach of any of the terms of this Contract by the other shall not be deemed to be a waiver of any such rights, nor shall any single or partial exercise of any right, power or privilege, or further exercise thereof, operate so as to bar the exercise or enforcement thereof at any later time."

7.3 The Dubai Company asserts that the partial termination of the contract, where the largest economic unit in the region is severed, makes the Licence unworkable and spells a terminal event for the Dubai Company's business. It is argued that it was never within the commercial intention of the parties to sever the Licence, a fact which is illustrated by the performance requirements set out in the Licence which are to be evaluated on the basis of the GCC region as a whole and not on a country by country basis. Furthermore the Dubai Company points to academic writing which suggests that partial termination is the exception rather than the rule and will usually only take place as an exercise of an express right, for which, in this case, the Licence does not provide. The article by Carter on *Partial Termination of Contracts* (2008) 24 Journal of Contact Law 1 was cited as a case in point.

7.4 In the article, the author also identified three particular categories of exception to the above rule, namely: the termination of

unperformed obligations; the termination of a severable part of a severable contract; and the termination of the "application" of one or more terms of a contract. The Dubai Company argued that the circumstances of the case did not lend themselves to the application of any of these exceptions. The Foundation, however, argued that the second exception, the Common Law ground to terminate a severable part of a severable contract, could indeed be applied to the facts. Counsel pointed to Clauses 26.2 and 26.3 of the Licence and also highlighted the fact that the licensed territories could be changed during the life of the agreement as illustrative of the exception's applicability.

7.5 I do not believe that Clause 26.2 and 26.3 avail the Foundation in the way it contends for. Those clauses are designed to preserve the rights of either party to enforce the contract even though the party concerned may earlier have either failed to enforce the relevant provision or have engaged in only a partial exercise of its entitlements under a relevant provision. Likewise, the clauses are intended to preserve the rights of the parties to further enforce the contract even where there has been an earlier waiver of breach or only partial exercise of an entitlement arising on a breach.

7.6 Thus, the whole tenure of the two clauses is simply to ensure that previous inaction or partial action does not prejudice future action. Those clauses do not, it seems to me, confer an express or an implied entitlement to partially terminate the Licence itself. The clauses deal with a situation where there has been a legitimate partial enforcement (and where further enforcement is preserved). The clauses do not deal with an entitlement to partial action where it is not otherwise authorised. The clauses do not seem to me, therefore, to alter the default position which is that the partial termination of a contract is not valid.

7.7 Nor does it seem to me that the contract is really severable in the way in which the Foundation suggests. In particular, the performance criteria, to which reference has already been made, are specified, as a matter of contract, across the entire licensed region. While there were, it would appear, targets for each country within the licensed region, the fact remains that the parties' contractual entitlements were specified by reference to a single target across the whole region. In those circumstances it is difficult to see how the contract could be severable.

7.8 In those circumstances it seems to me that the Foundation, if it did have an entitlement to terminate, was required to terminate the entire licence. Even if, therefore, I am wrong in the view which I have expressed concerning the legal basis for the Foundation's purported termination, I am of the view that an attempt to partially terminate the Licence (even if it was, as the Foundation suggests, in the Dubai Company's interests) was not permitted and was, therefore, unlawful.

7.9 Having found, therefore, that the termination is unlawful on two grounds it is next necessary to turn to the question of the Limitation Clause.

8. The Damages Limitation Clause – Gross Negligence/Wilful Act Exception

8.1 Clause 25 of the Licence, headed "Limitation of Liability", is in the following terms:-

> 25.1 "The Licensee's exclusive remedy and the total liability of ECDL-F in respect of any cause of action relating to or arising out of this Contract will, to the extent that it is not caused by a wilful act or gross negligence by ECDL-F, not exceed 10 per cent of the total amounts paid to ECDL-F by the Licensee or €50,000.00, whichever is the lesser amount.
>
> 25.2 In no event will either party be liable for incidental, indirect or consequential damages, including but not limited to loss of profits. This limitation shall not apply to claims due to damage caused by the use or copying of the ECDL Concept or the transfer of assignment of the Licence in violation of the terms and conditions of this Contract."

8.2 Therefore, where there is any finding of liability against the Foundation, this clause serves to limit that liability to a maximum of €50,000.00 except in cases where the Foundation has, through either a wilful act or gross negligence, caused injury. Accordingly, the question of what constitutes a "wilful act or gross negligence" is one which must now be subjected to some scrutiny.

8.3 Before turning to the applicable law, it is useful to take this question out of the abstract and to look to the matters relied on which the plaintiffs contend amount to wilful acts or acts of gross negligence on the part of the Foundation. The following 14 instances were highlighted:

> i. The decision to intervene in the negotiations in Saudi Arabia by interposing between TAM and TVTC when it is said the Foundation was unqualified and unskilled to so do;
>
> ii. The failure to get legal advice on the powers claimed by TVTC and the acceptance of the TVTC representation as to their powers without analysis or expert assistance, notwithstanding: (a) the fact that Dr. Saleh is not a lawyer; (b) that TVTC had a clear interest and as such a conflict of interest in the matter; and (c) that the plaintiffs had explicitly warned of the aggressive position that TVTC were taking with them;
>
> iii. The failure to revisit the legal issue when the Foundation's request for an indemnity from TVTC was ignored;
>
> iv. The failure to revisit the issue when it transpired that TVTC relied in Saudi Arabia on the purported termination by the Foundation rather than on any alleged absence of a licence on the part of TAM.
>
> v. The decision to go to meet Dr. Saleh alone despite the clear warnings that had been given by Mr. Al Bawardi.
>
> vi. The act of offering the Licence to TVTC when there was still a year to run on the original agreement with the Dubai Company. This act was also said to serve to remove any possibility of rectification as between the parties.
>
> vii. The agreement to meet alone at Dr. Saleh's request.
>
> viii. Proposing, on foot of representations by TVTC following an eight hour meeting, a tripartite agreement which involved the Dubai Company losing the Licence.
>
> ix. The alleged breach of the confidentiality clause in the Licence through communicating the substance of the Cure Notice of the 23rd February to Dr. Saleh a short time after sending it to the Dubai Company.
>
> x. Agreeing to TVTC's ultimatum to produce a road map within 24 hours dealing with the future plan for ICDL in Saudi Arabia.

xi. The actual service of the cure notice on the 23rd February combined with the requirement directing the plaintiffs to stop all operations at once.

xii. The asserted destruction of any ability under the Agreement to avail of the 60 day period in which to fix the problem by the communication of the Cure Notice (to TVTC).

xiii. The facilitation of the negative campaign by TVTC through the communication of both the cure notice and the purported termination.

xiv. The failure to pass on the third party inquiries as required under the Licence.

8.4 Looking at the concepts of "wilful act" and "gross negligence" in turn. In respect of the former, the plaintiffs sought to relay on a number of English authorities. The following passages were thus submitted to the court as indicative of the meaning of "wilful act". In the case of *Re Young and Hartson* 31 Ch D 168 at 174-175, Bowen L.J. stated:

> "The other word which it is sought to define is 'wilful.' That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

This statement was later cited with approval by Talbot L.J. in the case of *Wheeler v. New Merton Board Mills, Limited* [1933] 2 K.B. 669, at 677, who prefaced his approval with the following statement:

> "'Wilful act' is plain English, and I can entertain no doubt that the installing of this machine without guard or fence for use in the factory was a wilful act by some one. It was an act, and it was intentional. It is true that though 'wilful' and 'intentional' are synonymous […], 'wilful' is more commonly used in modern speech of bad conduct or actions than of good, though it does not necessarily connote blame […]".

In the latter, and relatively brief, decision of *Lomas v. Peek* [1947] 2 All E.R. 574, at 575, Lord Goddard C.J. appeared to implicitly approve the above statements when he said the following:

> "If a man permits a thing to be done, it means that he gives permission for it to be done, and if a man gives permission for a thing to be done, he knows what is to be done or is being done, and, if he knows that, it follows that it is wilful."

In response to these cases, the Foundation contends that this interpretation is overbroad and is not in line with the intention of the clause. Instead, it was the Foundation's case that an "act" must mean an unlawful act, either a breach of contract or a tort, as to understand it otherwise would be to extend rather than to limit liability. Second, "wilful" must mean that when the (unlawful) act occurred, it must have been carried out in full knowledge that it was unlawful.

8.5 Turning to the second term. The plaintiffs argued that there was little distinction between negligence and gross negligence. They pointed to a number of authorities to ground this contention. In the case of *Austin v. Manchester, Sheffield and Lincolnshire Railway Company* (1852) 10 CB 454, at 474-475, the Court cited with approval the following statement of Lord Denman in *Hilton v. Dibber* (1842) 2 Q.B. 646:-

> "It may well be doubted whether between gross negligence, and negligence merely, any intelligible distinction exists."

In the case of *Beal v. South Devon Railway* [1861-73] All ER Rep 972, at 975, the following passage was also relied on:-

> "The authorities are numerous, and the reasonings of the judgments various, but for all practical purposes the rule may be Stated thus: That the failure to exercise reasonable care, skill and diligence is gross negligence."

The case of *Grill v. General Iron Screw Collier Company* (1866) L.R. 1 C.P. 600 at 612, was also relied on. Here Willes J., approving the statement in *Beal*, made the following remarks:-

> "I quite agree with the dictum of Lord Cranworth in *Wilson v. Brett* 11 M. & W. 113., that gross negligence is ordinary negligence with a vituperative epithet […]. Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. Gross, therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression gross negligence, instead of the equivalent, a want of due care and skill […]."

Against this, the Foundation relied on the more recent case of *Red Sea Tankers Limited v. Papachristidis* (The Hellespont Ardent) [1997] 2 Lloyd's Reports 547 in which Mance J. made a number of comments, albeit *obiter dicta*, on the meaning of "gross negligence". Although he was ultimately obliged to make a finding on the basis of the law of New York, Mance J. did indicate that if he were to decide the matter according to English law then in his view "gross negligence" is clearly intended to represent something more fundamental than a failure to exercise proper skill or care constituting negligence.

8.6 It must be remembered that the limitation clause is contained in a commercial contract. It does not seem to me, therefore, that whether the term "gross negligence" is a term of art in any particular area of the law is of itself a matter of any great importance. I have already addressed the principles applicable to the construction of commercial contracts earlier in the course of this judgment and it is unnecessary to repeat them here. Terms must be construed by reference to their text but in their context. In the ordinary way, one would expect persons to mean something different by the use of the term "gross" negligence rather than the simple use of the term "negligence". Why else would the word "gross" be used? Obviously negligence implies a breach of a duty of care. However, anyone involved with negligence litigation would be more than familiar with cases where the margin by which someone has failed to meet the duty of care imposed on them is large. It seems to me that that is the ordinary meaning of the term "gross negligence". It is a degree of negligence where whatever duty of care may be involved has not been met by a significant margin.

8.7 However, there is another difficulty with the clause. In the main, the claim made in these proceedings is not one in negligence but one in breach of contract. In other words, the principal basis of the claim made is that the Foundation was not entitled to terminate the Licence because the circumstances which would have entitled the Foundation to so terminate the Licence did not arise. That is an allegation of a breach of contract. It is said there was a purported termination of a contract in circumstances were no entitlement to terminate existed. In what way does the concept of negligence or gross negligence fit into such allegation?

8.8 Where a contract itself requires a duty of care (such as, for example, a contract by a professional person to provide professional services where there is likely to be a co-extensive contractual obligation and an obligation as to a duty of care), the breach of which could give rise to both a tort and a breach of contract, no great difficulty may arise. A professional who fails, by a significant margin, to meet the relevant duty of care may be said to be guilty of gross negligence and any relevant breach of the contract of engagement of the professional concerned likewise easily fits into the box of gross negligence. Where, however, as here, the contractual obligation in issue is simply one which precludes the termination of the contract except in certain circumstances which are said not to arise, then it is somewhat harder to fit such a contention into a frame of reference where gross negligence arises. In that type of case one is either in breach or not in breach of contract. Negligence of any sort is not a necessary ingredient of the wrong.

8.9 However, it seems to me that business efficacy must be given to the clause. Where a breach of the type asserted in this case is relied on then it may be said to be as a result of gross negligence if, by analogy with the concept of a duty of care, the circumstances in which the breach took place are such that the relevant defendant was not merely in breach but was significantly careless as to its obligations. If I were not to construe the clause in that way then it is hard to see how the term "gross negligence" could have any real application save in the limited type of contract where the obligation on one of the contracting parties was to act without negligence. In a contract such as that with which I am currently concerned, the clause would have little or no application. It must be assumed that the parties intended the clause to have meaning and, indeed, a meaning which would have business efficacy. It seems to me, therefore, that in order for the exclusion clause to be ineffective, it is necessary that I be satisfied that any breach of contract established resulted from a significant degree of carelessness by the Foundation leading to the breach of contract concerned.

8.10 I can understand the difficult position in which the Foundation found itself. It had a legitimate interest in doing what it could to maintain the Programme's position in Saudi Arabia. While understanding the criticism made of Mr. O'Sullivan for his trip to Saudi Arabia, I do not believe that the headings of alleged gross negligence referred to above which stem from his decision to go to Saudi Arabia could come close to gross negligence. There was a problem. It was a matter of judgment as to how best to deal with the problem. Whether one agrees or disagrees with Mr. O'Sullivan's decision to travel, it does not seem to me that it could be said, by any manner of means, to have been grossly negligent for him so to do.

8.11 What happened next is, however, potentially in a different category. In effect, a deal was done with TVTC at a time when the legal relationship between the Foundation and the Dubai Company remained in full force (the Cure Notice had not even been served). TVTC was kept very fully aware of the steps being taken by the Foundation. That action by the Foundation removed any possibility, in practise, of matters being resolved between TAM and TVTC. It seems to me that those actions also need to seen in the context of the fact that the Foundation was well aware, at the relevant time, that there was in substance a commercial dispute between the plaintiffs and TVTC in which TVTC was attempting to leverage additional payments arising out of the ICDL programme in Saudi Arabia. This latter point is also relevant to the situation which pertained when at least a credible basis was presented to the Foundation for the view that TVTC's assertion as to the scope of its licensing entitlement was incorrect. The Foundation simply had an assertion by an interested party (albeit a governmental body) which that party was unwilling to back up by appropriate warranties or the like (despite being asked), placed against an at least credible view of Saudi law from an independent and reputable law firm.

8.12 Taking all of those latter factors together I am satisfied that they do demonstrate that the breach of contract which I have identified (and in particular the primary breach which stemmed from what I have found to be an incorrect view of Saudi law) resulted from a significant degree of carelessness so as to meet the test set out above. In those circumstances it does not seem to me that the Damages Limitation Clause applies on the facts of this case. It follows first that the Dubai Company is entitled to whatever damages properly arise from the breach of contract which I have identified. However, TAM has no direct contractual relations with the Foundation and so its claim can only succeed in tort. I, therefore, turn to the question of tortious liability.

9. The Tortious Claims and the Question of the Applicable Law

9.1 Both plaintiffs seek damages and/or compensation under the laws of Saudi Arabia, in particular the general principles of the Islamic law "*Shari'ah*" which is in force in that country. This aspect of the claim concerns an issue of conflicts of law and in particular Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11th July, 2007, on the law applicable to non-contractual obligations (Rome II) ("Rome II Regulation" or simply the "Regulation") which entered into force on the 11th January, 2009.

9.2 This claim arises out of the purported termination of the Licence Agreement by the Foundation. Its relevance is manifest given that no contractual relationship exists between TAM and the Foundation. Having found the Dubai Company to be entitled to damages for breach of contract, these issues are undoubtedly particularly important to TAM's claim.

9.3 It is trite law that any interpretation of an EU regulation must take into account the context of the provision and the purpose of the legislation in question. Accordingly the first point of departure in any consideration of the Rome II Regulation is the recitals, and in particular those which touch on the issues of the case as they go to demonstrate the purpose which the regulation was designed to serve. In relevant part, they are:-

> "(12)The law applicable should also govern the question of the capacity to incur liability in tort/delict.
>
> […]
>
> (14)The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.
>
> (15)The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all

the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

(16)Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17)The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18)The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country."

9.4 Turning now to the relevant provisions of the Regulation, they are as follows:-

"Article 1 – Scope

(1) This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

(2) The following shall be excluded from the scope of this Regulation:

(a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;

(b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;

(f) non-contractual obligations arising out of nuclear damage;

(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

(3) This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

(4) For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

Article 2 – Non-contractual obligations

(1) For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.

(2) This Regulation shall apply also to non-contractual obligations that are likely to arise.

(3) Any reference in this Regulation to:

(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and

(b) damage shall include damage that is likely to occur.

Article 3 – Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Article 4 – General rule

(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of

a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

(2) However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

(3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 15 – Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."

9.5 The plaintiffs contend that, in accordance with Article 4(1) the country in which the damage occurred is Saudi Arabia. This damage arose, it is said, as a result of the Foundation's termination of the Licence, or rather the partial termination of those parts of the Licence which granted the plaintiffs the right to operate the Programme in Saudi Arabia. So far as it goes, in so far as TAM is concerned, there appears little doubt that any damage which it has suffered occurred in Saudi Arabia.

9.6 Although less important (because of my finding that it is entitled to damages for breach of contract) the position regarding the Dubai Company is perhaps less clear cut. It is a UAE based company, whose connected company, TAM, operates in Saudi Arabia. There was no suggestion that the Dubai Company has any commercial interests, concerning the Licence and the operation of the Programme which were damaged, bar those which are conducted through TAM. Thus in view of the principles of separate legal personality which are common throughout many if not most jurisdictions, it is difficult to see how the Dubai Company suffered any damage in Saudi Arabia, save to the extent to which its return has been reduced by the damage caused to TAM. If the Dubai Company were, therefore, to have suffered any non-contractual damage as a result of the Foundation's termination then it would appear that, at least at the level of principle, such damage might be said to have occurred in the UAE.

9.7 However, where the court was to make such a finding the natural consequence would be to require the separate plaintiffs' claims to be decided under the laws of the UAE and Saudi Arabia respectively. Such a situation, involving the splitting of the applicable law, is known as *dépeçage.* The Rome II Regulation does not provide for the application of this principle. Academic commentators on the subject of the post-Rome II relevance of *dépeçage* have concluded that, in light of the wording of Article 4 in particular and in the absence of any jurisprudence from the ECJ to the contrary, it not now available to the courts. See in particular the comments of Andrew Dickinson in his text *The Rome II Regulation – The Law Applicable to Non-contractual Obligations* (OUP 2008) at para. 4.79 where he states:-

"The current position is clear: neither Art 4(2) or Art 4(3) permits *dépeçage,* which occurs under the Regulation only to the extent that it is mandated or permitted under Chapter V or as a result of the exclusion of matters of evidence and procedure. Under Art 15, the law applicable to non-contractual obligations under the Regulation applies to all of the matters set out. It is not possible for the court to divide those matters, with one law applying to some of them and another law applying to the others."

9.8 This position would appear to be consistent with the requirements for legal certainty and the need to do justice in individual cases which the Regulation seeks to achieve. Given the finding that the Dubai Company is entitled to damages for breach of contract it is, perhaps, not of the greatest importance to determine the law by reference to which any liability of the Foundation to the Dubai Company in tort or delict is to be determined. Given my findings in respect of the non-application of the Damages Limitation Clause in the Licence, it does not seem that there is any likely basis on which the damages for breach of contract to which the Dubai Company may be entitled would differ (or at least be greater) if it could also establish a claim in tort or delict. However, and to the extent that it may be necessary, I am satisfied that the proper basis for considering the potential liability of the Foundation to both the Dubai Company and TAM in tort or delict is the law of Saudi Arabia. I did not understand counsel for the Foundation to vigorously dispute that proposition. For the reasons already outlined the place of damage in respect of TAM is clearly Saudi Arabia. Splitting the law by reference to which tortious entitlement to damages of two parties so closely connected and arising out of the same set of circumstances, would be inappropriate.

9.9 In those circumstances it is necessary to refer to the Saudi principles of tortious liability and the application of those principles to the facts of this case.

10. The Saudi Principles of Tortious Liability

10.1 The plaintiffs' expert witness, Dr. Hammad, gave evidence of the relevant provisions of Islamic law in relation to tortious liability. His witness statement provided the following account:

> "25. There is no codified law that specifically contains the rules for determining liability in Saudi Arabia. Accordingly, the liabilities are governed by the general principles of the Islamic Shari'ah as enforced in Saudi Arabia.
>
> 26. Since the law of a liability in Saudi Arabia is not codified, the provisions in the Holy Quran are the guidelines for deciding on any matter in relation to determining the liability. It is my analogy that the concept of liability in Islam i.e., under the Islamic Shari'ah and therefore the law in Saudi Arabia, has more or less a similar meaning as recognized in contemporary civilian jurisprudence and is substantially similar to the rules applicable under other legal systems.
>
> 27. Therefore, in the context of a liability, as the liability of a specific person for breach of a general obligation, i.e., the obligation not to hurt others there are many Quranic verses as well as sayings of the Prophet to implement such general rule relating to the tortious liability. For example, in the Sunnah, Prophet Mohammed (PBUH) ""let there be no injuring and no injury."
>
> 28. In view of the Hadith, it is my understanding that harming others is not permitted under Shari'ah. Furthermore, in their wider interpretation wilful or negligent acts fall under the definition of harmful acts. I feel that in terms of prohibition there is no distinction made between an "intentional" and/or "negligent" act in Shari'ah and both are prohibited. It is my understanding that three (3) ingredients must be present to prove liability:
>
> a) an act or omission (whether wilful or negligent);
>
> b) injury/damage;
>
> c) relation between the act and damage
>
> 29. It is to be noted that it is one of the principles under Shari'ah that there is no liability unless a prohibited act has been committed intentionally however, as stated above there is no distinctions drawn between wilful and negligent act and the liability of a person is strictly associated with his harmful act or prohibited act whether committed wilful or negligently. Moreover, there is no joint and several liabilities for tort in Saudi Arabia and the liability must be apportioned among the parties. This means that there is no vicarious liability and a party is only responsible for the damages that he causes. That could also mean that under Saudi law, where a party is blameless in fact it may not be found liable in law. Moreover, the courts in Saudi Arabia will not impose liability on a party when that party is not at fault and in order to establish the liability it is very important to proof that there is a fault on the part of the defaulting party."

10.2 The Foundation's expert witnesses were broadly in agreement with the principles of Saudi law set out above.

10.3 It, therefore, appears that the Saudi principles on tortious liability are very similar to Irish principles, namely the requirement that there be a duty of care, breach, causation and damage. However, it should be noted that only the broad principles can be relied on and not the case law or interpretation which is available from Irish sources, *i.e.* textbooks and case law. Therefore, any similarity between Saudi and Irish law can only be seen as superficial at best and a worst there is a danger of conflating the two.

10.4 Given the general nature of the descriptions of Saudi law in this area, it is again with some diffidence that I approach the task of applying it to the facts of this case. However, having found that the problems of both the Dubai Company and TAM stemmed from a breach of contract on the part of the Foundation which arose out of circumstances of a significant degree of carelessness, it seems to me that I must conclude that the first part of the three ingredient test set out at para. 28 of the written statement of Dr. Hammad is met. There was an act or omission based at least on negligence. In those circumstances it seems to me that TAM is, at the level of principle, entitled to recover damages for the Saudi equivalent of a tort. The question of the extent of those damages and the relation between the wrongful act and those damages (what would be called causation in this jurisdiction) are matters properly to be dealt with at the damages module of these proceedings.

11. Conclusion

11.1 In summary, therefore, I have come to the view that the Foundation was in breach of contract in terminating the Licence both on the principal basis of its assertion (which I have found to be incorrect) that TAM was operating in Saudi Arabia without a necessary licence, permit or consent and on the basis of a purported partial termination of the Licence. The Dubai Company is, therefore, entitled to damages for breach of contract which are to be assessed.

11.2 I also find that TAM is, at the level of principle, entitled to succeed on liability (as it would be described in this jurisdiction) under the law of Saudi Arabia in an action in tort or delict. Damages under this heading are also to be assessed.

11.3 Furthermore, for the reasons already set out, I am satisfied that the Limitation of Damages Clause does not apply.

11.4 It follows that a second module of this hearing is required to assess the damages which properly arise in those circumstances. I will hear counsel further as to the steps that need to put in place to arrange for a timely hearing of that second module. I will further hear counsel as to the precise form of the order which should be made as a result of this judgment.