Neutral Citation Number: [2025] EWHC 77 (Comm)

Case No: CL-2023-000760

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

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

Date: 21 January 2025

Before :

Nigel Cooper KC sitting as a High Court Judge

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Between :

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

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TIMOTHY KILLEN and **JAMES PARTRIDGE** (instructed by **Reed Smith LLP**) for the **Claimant**
PETER MACDONALD EGGERS KC and **TIM JENNS** (instructed by **RPC**) for the **Defendant**

Hearing dates: 18 July 2024

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Approved Judgment

This judgment was handed down remotely at 10:30am on 21st January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Nigel Cooper KC :

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

2. On 23 October 2023, the Claimant applied without notice for an interim anti-suit injunction (or more accurately anti-arbitration injunction), which was granted by Foxton J. on the same day. The Defendant subsequently applied by an application notice dated 30 October 2023 to set aside the interim anti-suit injunction ("the Set Aside Application"). The Claimant applied by an application notice dated 17 November 2023 to make the interim anti-suit relief final (or in the alternative, to continue the interim anti-suit injunction pending the result of any jurisdiction challenge that might be brought by the Defendant) ("the ASI Application"). The two applications came before Mr. Christopher Hancock KC sitting as a High Court Judge on 06 December 2023 for a one day hearing. For reasons set out in a reserved judgment dated 07 February 2024, Mr. Hancock KC continued the interim anti-suit injunction pending any application to be made by GIC challenging the jurisdiction of the English court, including any application made under s.9 of the Arbitration Act 1996 ("the AA 1996"). He also set a timetable for the submission of any further evidence by the parties.

3. By an application notice dated 06 March 2024 ("the Stay Application"), GIC applied pursuant to CPR Rule 11 and/or Rule 62.8 and/or section 9 of the AA 1996 for the court:

    i) To determine that it has no jurisdiction to try TICL's claim and/or that the court should not exercise its jurisdiction;

    ii) To set aside the Claim Form dated 20 October 2023;

    iii) To stay the proceedings pursuant to s.9 of the Arbitration Act 1996;

    iv) To make consequential orders.

4. By an application notice dated 21 May 2024 ("the Final ASI Application"), TICL applied for permanent (alternatively continued) anti-suit relief and related orders.

5. I will refer to the Stay Application and the Final ASI Application collectively as "the Applications".

Evidence

6. For the purposes of the Applications, I had witness evidence before me as follows:

    i) The Fourth Witness Statement of Ms. Victoria Sherratt, a partner in RPC, dated 06 March 2024 served on behalf of GIC together with the exhibit thereto;

    ii) The Fourth Witness Statement of Mr. Leslie Pring, a partner in Reed Smith LLP, dated 21 May 2024 served on behalf of TCIL together with the exhibit thereto; and

    iii) The First Witness Statement of Ms. Rebecca Carrera, of Counsel with RPC, dated 14 June 2024 together with the exhibit thereto.

7. Neither party sought to cross-examine the witnesses of fact.

8. I had expert evidence on market practice from:

   i) Mr. Richard Cook on behalf of GIC, whose evidence was set out in a report dated 06 March 2024 and a supplementary report dated 14 June 2024.

   ii) Ms. Susan Taylor on behalf of TICL, whose evidence was found in a report dated 21 May 2024.

9. Neither party sought to cross-examine the other party's expert.

10. I deal further with the relevance and effect of the expert evidence in paragraphs 71 to 74 below. However, while I am grateful to both experts for the work they have done, neither party placed any significant reliance on expert evidence in their submissions before me and I consider that they were correct not to do so.

Relevant Background

11. The account of the facts below is principally taken from paragraphs 3 to 23 of the judgment of Mr. Hancock KC updated to take account of the additional evidence put before me and events since the hearing before him.

The Parties

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

13. TICL is the captive insurer of Tyson Foods. TICL is incorporated and registered in Bermuda. Tyson Foods owns a large property portfolio and insured its property risks with TICL pursuant to a policy of insurance ("the Captive Policy"). The insurance provided by TICL was against *"all risks of direct physical loss or damage to property"* situated in the US or Puerto Rico for the period 01 July 2021 to 01 July 2022. The Captive Policy was governed by Arkansas law and was subject to a US service of suit clause.

14. TICL in turn reinsured the property risks on a facultative basis with various reinsurers.

15. GIC is a subscribing reinsurer to two layers of TICL's property insurance for Tyson Foods, including for the period 01 July 2021 to 01 July 2022. GIC had also been a subscribing reinsurer with TICL the previous policy year (01 July 2020 to 01 July 2021).

16. GIC is a limited company registered in England and Wales with company no. 07792458. GIC operates (and for the 2021 and 2022 years of account did operate) as the sole corporate member for Lloyd's of London Syndicate 1947 and carries (and carried) on business including as an underwriter of reinsurance.

The policies of reinsurance

17. GIC issued two "All Risks of Direct Physical Loss or Damage" reinsurance policies to TICL with policy numbers PRPNA2104091 and PRPNA104667 for the period 01 July 2021 to 01 July 2022 (together "the Reinsurance"). GIC underwrote 10% on each of two different layers of reinsurance; one being for US$25 million excess of US$175 million and the other being for US$75 million excess of US$225 million.

18. GIC claims but TICL denies that on the renewal of the Reinsurance for 2021/2022, TICL misrepresented the values of the Hanceville Facility to GIC by the submission of a significantly understated statement of value, upon which the GIC reinsurance premium was based. GIC claims that by a letter dated 03 November 2022, it rescinded and avoided the Reinsurance *ab initio* on the basis of that misrepresentation. It is this dispute which will be determined either before this court under English law or by arbitration seated in New York subject to New York law. I am, of course, not concerned with the merits of this underlying dispute when it comes to deciding the Applications.

19. Policy documents PRPNA2104091 and PRPNA2104667 were both signed by GIC on 30 June 2021. During the hearing, the documents which were signed by GIC on 30 June 2021 were referred to as 'slips' or as 'MRC'(s) (standing for "Market Reform Contracts"). I shall refer to the documents hereafter as 'MRC'(s) principally because I think this expression most accurately reflects the form of the documents in question.

20. Both MRCs contained identical choice of law and jurisdiction provisions ("the Jurisdiction Clause") in the following terms:

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

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

> *"Wherever practicable, between the broker and each (re)insurer which have at any time the ability to send and receive ACORD messages:*
>
> *1. the broker agrees that any proposed contract change will be requested via an 'ACORD' message or using an ACORD enabled electronic trading platform;*
>
> *2. whilst the parties may negotiate and agree any contract change in any legally effective manner, each relevant (re)insurer agrees to respond via an appropriate 'ACORD message' or using an ACORD enabled electronic trading platform;*
>
> *…"*

22. Under the Conditions section, the MRCs incorporate the Beazley Policy Wording, defined as policy number PRPNA2103094 (see further paragraph 37 below). The effect

of incorporating the Beazley Policy was also to incorporate the Captive Policy as amended by an endorsement known as the General Change Endorsement (an endorsement, which inter alia, amended the cancellation provisions in the Captive Policy as incorporated into the Beazley Policy).

23. The MRCs included (i) a Property Cyber and Data Endorsement excluding cover for certain cyber and data risks, (ii) a Sanctions Limitation and Exclusion Clause protecting reinsurers from certain sanctions risks and (iii) a Communicable Disease Endorsement excluding cover for certain risks associated with communicable diseases.

24. It was further a condition of the MRCs that premium due at inception had to be paid and received by reinsurers on or before midnight on 28 September 2021.

25. Subsequently, after GIC had signed the two MRCs, a document called a Facultative Certificate was issued in respect of each policy. The Facultative Certificates were accepted by GIC on 09 July 2021 and are on a US standard form known as 'MURA' or 'Market Uniform Reinsurance Agreement' as amended by the parties. MURA is a standard or common form of agreement used in the United States insurance market. Again a number of different expressions have been used to describe the two policy documents in submissions but, as already indicated, I shall refer to them as 'the Facultative Certificates'.

26. The Facultative Certificates include the same agreement numbers as the MRCs. They also provided as follows:

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

    ii) Page 1 under the Declarations includes a provision (inserted at GIC's request): *"Reinsurers have made the following amendments to this Reinsurance Certificate:*

        1) Excluding ex gratia, without prejudice payments and follow the fortunes/settlement (if applicable)

        2) RI slip to take precedence over reinsurance certificate in case of confusion[1]

        3) Cancellation/Termination – Subject to no losses"

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

        "2. Reinsurance Agreement

        In consideration of the payment of the premium and subject to the terms, conditions and limits of liability set forth in this Agreement, in the Declarations

[1] It was common ground before me that "RI slip" in this clause is a reference to the MRC and that the reference to the "reinsurance certificate" is to the Facultative Certificate.

and any endorsements made a part of this Agreement, the Reinsurer does hereby reinsure the Company [TICL] …

iv) Clause 4 of the Terms and Conditions headed "*Books and Records*", gave TICL and GIC the right to inspect each other's books and records insofar as they concern the reinsurance.

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

> *"13. Arbitration*
> *a. As a condition precedent to any right of action hereunder, any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall be submitted for decision to a panel of three arbitrators. …*
>
> *f. … Unless the panel agrees otherwise, arbitration shall take place in New York, but the venue may be changed when deemed by the panel to be in the best interest of the arbitration proceeding. Insofar as the arbitration panel looks to substantive law, it shall follow the law of New York in accordance with the dictates of the Governing Law Clause. …"*

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

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

vii) Clause 19 is headed "*Service of Suit*". The preamble to that clause states that it applies to a Reinsurer not domiciled or authorised in the United States. GIC falls within that description. Clause 19 sets out a mutual non-exclusive jurisdiction clause in favour of any court of competent jurisdiction within the United States and provides that service of suit of United States proceedings may be made on the New York law firm "*Mendes & Mount*".[2] Clause 19 concludes as follows: "*The foregoing is not intended to conflict with or override the obligation of the Parties hereto to arbitrate their disputes as provided in the Arbitration Clause*".

viii) Clause 26 of the Terms and Conditions contains an entire agreement clause, which provides:

> *"26. Entire Agreement*

[2] This was a change from the 2020/21 placement in which in the declarations to the Reinsurance Agreement the Service of Suit stated "*Not Applicable*" and provided no address for service.

> *This Agreement, including any duly executed written amendments and endorsements thereto, and appendices, schedules or other attachments made part thereof or expressly incorporated by reference, and the Policy and any written endorsements, modifications, alterations and cancellations thereto, and waivers and interpretations thereto but only with respect to the claim in dispute, all as permitted under Reinsurance Agreement Clause 2 and Reinsurance Accepted Clause 3, shall constitute the entire agreement between the Parties and shall supersede all contemporaneous or prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter hereof provided, however, that this Clause 26 shall not override or take precedence over Clause 3 hereof."*

ix) The Facultative Certificates also amended the time for payment of premium as provided for by the MRCs. In the case of the Facultative Certificates, premium was due to be paid by 01 September 2021. This amended the date of 28 September 2021 under the MRCs. The date was brought forward by Lockton, when it proposed the Facultative Certificates because it wanted to pay the premium to all the reinsurers at the same time.

27. As noted above, the Facultative Certificates incorporate by way of amendment a clause dealing with the effect of 'confusion'. That clause has been variously described as 'a Confusion Clause' or as a 'Hierarchy Clause'[3]. During the hearing before me, the clause was referred to as the 'Confusion Clause' and that is the phrase I shall use in this judgment on the basis that it is a neutral description without giving rise to any inference as to the meaning of the clause, which is the central issue before me.

28. Formally, the Facultative Certificates took effect as a GUA amendment or endorsement of the MRCs. The Facultative Certificates were submitted by Lockton through the "PPL" online placing platform as an endorsement requiring GIC's agreement, which was given at 09:38 on 09 July 2021.

29. The Facultative Certificates do not incorporate the Beazley Policy wording. Rather, by the generic wording of clauses 2 and 3 of the Facultative Certificates they only incorporate the wording of the Captive Policy (which is not amended by the General Change Endorsement). TICL submitted that the effect of this change if the Facultative Certificates supersede the MRCs is that many of the negotiated terms of cover including the endorsements and exclusions contained within the General Change Endorsement and specifically listed within the MRCs' Risk Details would no longer apply to the Reinsurance.

The Placement of the Reinsurances

30. TICL entered into reinsurances with a number of reinsurers including GIC. It was not disputed that each layer of reinsurance was placed independently with individual reinsurers writing only for their respective shares. GIC was not aware of or involved in the negotiations or placements with other reinsurers.

[3] Mr. Hancock KC used the definition 'Hierarchy Clause' but for the reasons outlined in paragraph 27, I prefer the description 'Confusion Clause'.

31. So far as those other reinsurances were concerned, the evidence before me was that some reinsurers wrote on terms which included a hierarchy clause, while others did not. There was no uniform practice nor common form of hierarchy clause. This difference in approach among the reinsurers and the acceptance of that different approach by TICL speaks against there being any uniform approach among London market reinsurers to the relationship between MRCs and facultative certificates.

32. The Applications are concerned with the policy period from 01 July 2021 to 01 July 2022 ("the 2021/22 policy year") which was the second year of cover provided by GIC to TICL under the TICL reinsurance programme.

33. The negotiations for the 2021/22 placement commenced on 12 May 2021 when Lockton e-mailed to GIC various documents and property values, identifying various changes to the programme structure from expiring policies including an increase in deductible to US$55 million per occurrence. The e-mail stated that *'we will provide reinsurance certificates and the updated policy form in due course'*. In other words, the parties anticipated that the MRCs would be followed by facultative certificates. On 03 June 2021, Lockton e-mailed GIC further renewal documents for a new risk location in Humbolt, Tennessee. That e-mail repeated the statement *'we will provide reinsurance certificates and the updated policy form in due course'.*

34. Lockton subsequently forwarded the MRCs to GIC which Mr. Scott Goozee of GIC signed and stamped on 30 June 2021 as evidenced on the MRCs and on PPL, thereby allowing Lockton to evidence to Tyson Foods that coverage was in place for the 2021/22 policy period.

35. Lockton then prepared and sent draft facultative reinsurance certificates on 06 July 2021. On 07 July 2021, Mr. Sameer Gupta (an underwriter at GIC who had been instructed to process the documentation because Mr. Goozee was on holiday) as directed by Mr. Ian Haslam (GIC's Head of Property – Director, Direct and Facultative), confirmed that he was happy to accept the draft subject to three amendments now stated on page 1 of the Facultative Certificates (including the "Confusion" Clause). Lockton incorporated those amendments and recirculated the certificates for approval on 08 July 2021. GIC confirmed to Lockton its acceptance of their terms and endorsement agreements to the MRCs on 09 July 2021.

The Captive Policy

36. The Captive Policy contained at clause 33 the following clause ("the Certificates Clause") entitled 'Certificates of Insurance':

> *"Any certificate of insurance issued in connection with this policy shall be issued solely as a matter of convenience or information for the address(s) [sic.] or holders of said certificate of insurance, except where any Additional Insured(s) or Loss Payee(s) are named pursuant to the Special Provisions of said certificate of insurance. In the event any Additional Insured(s) or Loss Payee(s) are so named, this policy shall be deemed to have been endorsed accordingly, subject to all other terms, conditions and exclusions stated herein".*

The Beazley Reinsurance

37. The primary reinsurance layer for the 2021/2022 Policy Period was placed with Beazley Syndicates AFB ("the Beazley Reinsurance") under policy no. PRPNA2103094 through TICL's broker, Lockton Companies LLP ("Lockton"). As noted above, the Beazley Reinsurance incorporated the wording of the Captive Policy as amended by the endorsement entitled "General Change Endorsement Reference 001" (the "Beazley Policy Wording").

The Loss and Notice of Rescission

38. On 30 July 2021, there was a fire at a poultry rendering plant owned by Tyson Foods at Hanceville, Alabama, USA. TICL accepted coverage under the Captive Policy for the losses incurred by Tyson Foods. TICL provided notice of the loss to GIC on or shortly after 30 July 2021. GIC has failed to confirm an indemnity to TICL under the terms of the Reinsurance. Rather, as noted above, GIC purported by a notice dated 03 November 2022 to rescind the Reinsurance.

Placement with GIC in the prior policy year

39. The evidence of Mr. Pring was that cover for the prior policy year, 01 July 2020 to 01 July 2021 was placed with GIC in a similar manner as for the policy year 2021/2022. Cover was bound with the agreement and execution of the MRC for that policy year via PPL.

40. On 31 July 2020, Mr. Whitcombe, a vice-president of Lockton sent GIC the facultative certificate together with an endorsement request. The facultative certificate for 2020/21 and the endorsement were agreed on the same day. The endorsement was in effect a hierarchy clause (the "2020/21 Hierarchy Clause") and provided:

> *"The Agreement of Facultative Reinsurance … Between Reinsured Tyson International Company Ltd and Reinsurer Lloyd's Syndicate 1947 GIC is agreed subject to the terms and conditions of contract PRPNA 2004091 [the 2020/21 MRC]."*

Placements with other insurers

41. Mr. Pring gives evidence in his statement that for the 2020/21 policy year, Lockton placed 16 reinsurance policies for TICL with 14 reinsurers in the London market. His evidence is that all 14 reinsurers agreed an endorsement in materially equivalent terms to the 2020/21 Hierarchy Clause. In addition two of the reinsurers included language on the face of the applicable facultative certificates which made clear that each relevant MRC took precedence over the related facultative certificate.

42. For the 2021/22 policy year, there were 16 reinsurance policies agreed with 15 reinsurers within the London market but the reinsurers adopted varying approaches. Three reinsurers, including GIC, required wording on the face of the facultative certificates, which Mr. Pring considered amounted to hierarchy clauses. The other 11 policies placed on behalf of TICL for the 2021/22 policy year were silent on the issue of hierarchy.

43. Again, this evidence suggests that there is no uniform market practice among London reinsurers as to the contractual status of MRCs and facultative certificates.

Procedural History

44. On 19 October 2023, TICL became aware through a press enquiry of an *ex parte* motion made by GIC in the Southern District of New York. TICL obtained a copy of the motion (with Docket Number 1:23-cv-09175, Doc. Nos. 1 – 5) ("the Motion") on 20 October 2023. The Motion sought an order restraining TICL from commencing proceedings in England *"concerning any and all claims subjects [sic] to Article 13".* The reference to Article 13 was understood to be a reference to clause 13 of the Facultative Certificates providing for arbitration as a condition precedent to any right of action.

45. TICL issued a claim in the Commercial Court (CL-2023-000769) on 20 October 2023 seeking (i) a declaration that GIC is obliged to indemnify TICL under the Reinsurance contracts, (ii) payment of an indemnity from GIC and (iii) damages for breach of contract. The Claim Form was subsequently amended on 16 May 2024 to include a claim for a permanent anti-suit or anti-arbitration injunction. This amendment was made as a consequence of an argument made by GIC before Mr. Hancock KC that TICL could not seek a final injunction before him because there was no claim for such in the Claim Form.

46. On 23 October 2023, Foxton J. heard TICL's without notice application for an interim anti-suit injunction. The judge granted interim anti-suit relief on the terms of an order of the same date ("the Order"). The Order required at clause 4 that GIC withdraw or discontinue the Motion.

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

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

49. On 20 October 2023, the working day before TICL's application for interim relief, GIC had posted a Demand for Arbitration via the United States Postal Service to: Tyson International Company Ltd at its address in Hamilton, Bermuda. TICL was, it says, not aware that a Demand for Arbitration had been posted. That Demand for Arbitration was apparently not received by TICL at the Bermuda address until 07 November 2023.

50. In the Demand for Arbitration dated 20 October 2023, GIC appointed an arbitrator, a Mr. Mark Gurevitz. Among the relief sought by TICL in its draft order is an order that GIC revoke the appointment of its party arbitrator.

51. On 30 October 2023, GIC issued the Set-Aside Application and on 17 November 2023, TICL issued the ASI Application. On the same date, GIC had filed its Acknowledgment of Service indicating an intention to contest jurisdiction. As noted above, those applications were heard by Mr. Hancock KC on 06 December 2023.

52. On 15 December 2023, Mr. Stephen Houseman KC, sitting as a deputy High Court Judge, handed down judgment in Tyson International Company Ltd v Partner Reinsurance Europe SE [2023] EWHC 3243 (Comm), a case between TICL and Partner

Re., another excess reinsurer subscribing with GIC to the same risk, involving the same underlying subject matter. As was the case with the GIC placement, TICL and Partner Re. first entered into an MRC on 30 June 2021 which contained an English law and jurisdiction clause. Then, on 08 July 2021, they entered into a facultative certificate based on the MURA form, which provided for New York law and arbitration. Partner Re. issued an application under s.9 of the AA 1996 for a stay of the English proceedings on the grounds that they had been brought in breach of the arbitration agreement in the facultative certificate. TICL issued an application for a permanent anti-suit injunction to restrain Partner Re. from pursuing the arbitration in New York. The court granted a stay and dismissed the injunction application. The court accepted Partner Re.'s submission that the parties had, by concluding the facultative certificate, agreed to replace the English jurisdiction clause in the MRC with the arbitration agreement in the later agreement. I note that the principal relevant issue in the Partner Re. case was the contractual status of the facultative certificate in relation to the MRC. There was no confusion or hierarchy clause in the facultative certificate under consideration and, therefore, Mr. Houseman KC was not required to determine any issue as to the effect of such a clause.

53. In the present case, Mr. Hancock KC issued a reserved judgment remotely by e-mail to the parties on 07 February 2024 ([2024] EWHC 236 (Comm)). Mr. Hancock KC reached an interim (not to be regarded as final) conclusion that the English law and jurisdiction provisions in the MRC took precedence over the New York arbitration clause in the Facultative Certificate concluded 9 days later due to the effect of the Confusion Clause. Before issuing his reserved judgment, Mr. Hancock KC had invited and received written submissions from the parties on the effect of the Partner Re. judgment.

54. By an order dated 22 February 2024 ("the Second Order"), Mr. Hancock KC (i) dismissed the Set Aside Application, (ii) refused permanent anti-suit relief (iii) continued the Interim ASI 'until the determination of any challenge by the Defendant ('GIC') to the jurisdiction of the English Court and/or any application for a stay pursuant to s.9 of the Arbitration Act 1996', (iv) set down a timetable for such application, and (v) reserved costs to the judge hearing the application.

55. Subsequently, by a judgment issued on 15 April 2024 in Tyson International Company Limited v Partner Reinsurance Europe SE [2024] EWCA Civ 363, the Court of Appeal upheld the judgment of Mr. Houseman KC and concluded that the MRC between TICL and Partner Re. dated 30 June 2021, which provided for English law and jurisdiction was superseded by the facultative certificate dated 08 July 2021 which provided for New York law and arbitration.

The Issues

56. For the purposes of the Applications, the issues I have to decide are:

    i) What is the contractual relationship between the MRCs and the Facultative Certificates?

    ii) What is the effect of the Confusion Clause, when properly construed?

iii) If the effect of the Confusion Clause is to give effect to the choice of English law and jurisdiction in the MRCs:

a) Does clause 13(a) (the New York arbitration clause) in the Facultative Certificates operate as a *Scott v Avery* clause so that New York arbitration is a condition precedent to any action before the English courts?

b) Are clause 13(a) and the Jurisdiction Clause to be read together such that the English courts provide only a supervisory jurisdiction for any proceedings brought by way of New York arbitration.

The Law

The relevant test for anti-suit relief?

57. TICL's application for anti-suit relief is made pursuant to s.37(1) of the Senior Courts Act 1981.

58. Like Mr. Hancock KC, I am guided by the principles recently summarised by Cockerill J. in Times Trading Corporation v National Bank of Fujairah (Dubai Branch) 2020 EWHC 1078 (Comm) at [38].

"i) The Court has the power to grant an interim injunction "in all cases in which it appears to the court to be just and convenient to do so": section 37(1) of the Senior Courts Act 1981 ("SCA 1981"). "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just": section 37(2).

ii) The touchstone is what the ends of justice require: Emmott v Michael Wilson & Partners Ltd [2018] 1 Lloyd's Rep 299 at [36] per Sir Terence Etherton MR.

iii) The Court has jurisdiction under section 37(1) of the Senior Courts Act 1981 to restrain foreign proceedings when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration: Ust-Kamenogorsk Hydropower Plant JSC v AES Kamenogorsk Hydropower Plant LLP [2013] 1 WLR 1889 (SC).

iv) The jurisdiction to grant an anti-suit injunction must be exercised with caution: Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] UKPC 12, [1987] AC 871, 892E per Lord Goff.

v) As to the meaning of "caution" in this context, it has been described thus in The "Angelic Grace" [1995] 1 Lloyd's Rep 87 at 92:1 per Leggatt LJ: " The exercise of caution does not involve that the Court refrains from taking the action sought, but merely that it does not do so except with circumspection. *"*

vi) The Claimant must therefore demonstrate such a negative right not to be sued. The standard of proof is " a high degree of probability that there is an arbitration agreement which governs the dispute in question *": Emmott at [39].The test of high degree of probability is one of long standing and boasts an impeccable pedigree going back to Colman J in Bankers Trust Co v PT Mayora Indah (unreported) 20 January 1999 and American International Specialty Lines Insurance Co v Abbott Laboratories*

[2003] 1 Lloyd's Rep 267 and has been recently affirmed on the high authority of Christopher Clarke LJ in Ecobank v Tanoh [2016] 1 WLR 2231 at 2250.

vii) The Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause unless the Defendant can show strong reasons to refuse the relief: The Angelic Grace [1995] 1 Lloyd's Rep 87; The Jay Bola [1997] 2 Lloyd's Rep 279 (CA) at page 286 per Hobhouse LJ.

viii) The Defendant bears the burden of proving that there are strong reasons to refuse the relief: Donohue v Armco Inc [2002] 1 All ER 749 at [24]-[25] per Lord Bingham."

59. The Times Trading Corporation case concerned anti-suit relief sought in support of an arbitration agreement. Subsequently, Jacobs J. in Catlin Syndicate Limited v. AMEC Foster Wheeler USA Corporation [2020] EWHC 2530 (Comm) at [33] considered that Cockerill J's summary of the principles was equally applicable to relief sought in support of an exclusive jurisdiction clause.

60. The essential principles, including as to the standard of proof, are the same whether the Court is granting interim or final relief; see Aon UK Limited v Lamia Corporation SRL [2022] EWHC 3325 (Comm) at [95] and RSM Production Corporation v Gaz Du Cameroun SA [2023] EWHC 2820 (Comm) at [21] and [51]; both referred to by Mr. Hancock KC at paragraph [29] and footnote 1 of his judgment.

The relevant test for a stay under s.9 AA 1996

61. So far as GIC's application for a stay under s.9 of the AA 1996 is concerned, the court has to determine whether it can decide on the basis of the written materials before it if there was a concluded arbitration agreement. If the court believes it can so decide then it is for GIC to establish on the balance of probabilities that there was a concluded arbitration agreement and that it covers the disputes which are the subject of the court proceedings; see Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors [2013] EWCA Civ 784 at [73]. If the court were to determine that it could not decide whether or not there was a concluded arbitration agreement on basis of the written evidence before it, then either it can direct an issue to be tried pursuant to CPR Pt. 62.8(3) or it can stay the proceedings so that the putative arbitral panel can decide the existence of the arbitration agreement pursuant to s.30 of the AA 1996.

62. In the present case, I am satisfied that I can determine whether or not there was a concluded arbitration agreement on the basis of the written materials before me. Indeed, GIC invited me to do so. The issues before me principally turn on the construction of the MRCs and the Facultative Certificates. There is some limited additional factual evidence relating to the circumstances in which cover was placed but the relevant evidence was largely undisputed. Neither party identified any missing specific evidence which was likely to be relevant to the issue of whether there was a concluded arbitration agreement and would become available by way of disclosure. Equally, neither party submitted with any degree of enthusiasm that there was market practice evidence which was likely to materially affect my decision. Further, although both parties served witness statements of fact and expert reports (dealing with the issue of market practice), neither party sought the opportunity to cross-examine either the other party's witness(es) or the other party's expert. In these circumstances, I do not consider that

this is a case where I should either direct an issue to be tried or stay the proceedings to allow the issue to be determined by an arbitration tribunal in New York.

63. It follows that, if I am to grant a stay, I have to be satisfied on the balance of probabilities that, in accordance with the provisions found in clause 13 of the Facultative Certificates, TICL and GIC had agreed to arbitrate the coverage dispute which is presently before this Court.

The principles of contractual construction - generally

64. As before Mr. Hancock KC, there was no dispute as to the relevant principles. They are those summarised by Mr. John Kimbell KC (sitting as a Deputy Judge of the High Court) in Witz Company LLC v Edmund Truell [2023] EWHC 2877 (Comm) at [25] and [26]:

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

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

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

a. If there are two possible constructions, the court is entitled to prefer the construction which is more consistent with business common sense and to reject the other – see BNP at [100] citing Lord Clarke in Rainy Sky SA v Kookmin Bank [2011] UKSC 50 and Adaptive Spectrum and Signal Alignment Inc v British Telecommunications Plc [2023] EWCA Civ 451 (26 April 2023) at [19] per Birss LJ and at [50] per Nugee LJ.

b. Commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party see BNP at [101] citing Lord Neuberger in Arnold v Britton [2015] UKSC 36.

c. There is no class or type of contract for which commercial common sense is irrelevant. Evidence of commercial context and commercial consequences are both part of the iterative process of interpretation under English law: "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements" per Lord Hodge in Wood v Capita [2017] UKSC 24 at [13].”

The principles of contractual construction where there are competing jurisdiction and arbitration clauses

65. As a starting point, the general principle is that arbitration clauses should be broadly construed; see Fiona Trust & Holding Corp. v Privalov [2007] UKHL 40 and ACE Capital Ltd v CMS Energy Corporation [2009] Lloyd’s Rep. IR 414 at [83].

66. So far as the approach where there are competing jurisdiction and arbitration clauses, the principles are helpfully set out in the judgment of Mr. Alexander Nissen QC (sitting as a High Court Judge) in Surrey CC v Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015 (TCC) at [77]. The case concerned an application for a stay under s.9 of the AA 1996 or pursuant to the Court’s inherent jurisdiction in relation to proceedings relating to a waste disposal project agreement and three deeds of variation thereto. The four agreements had conflicting dispute resolution provisions but no hierarchy or confusion clause. Nevertheless, the judge considered the relevant authorities at paragraphs [49] to [76], which he described as revolving around four themes: (i) agreements with two superficially inconsistent dispute resolution provisions within the same contract, (ii) the Court’s high regard for the arbitral process and the need to avoid having disputes heard in different fora, if say, the arbitration clause was limited in scope, (iii) situations where there is more than one agreement between the parties, each of which has a different provision for dispute resolution and (iv) the approach to be adopted when parties have included a hierarchy or precedence clause within their agreement. Having reviewed the authorities for each theme, the judge summarised the principles as follows:

“(a) Whilst the exercise is ultimately one of routine construction, where possible the Court should strive to give effect to an arbitration clause in the presence of a competing jurisdiction clause. It has latitude to do so where there is infelicitous drafting

but cannot do so where the clauses are in direct conflict with each other and wholly irreconcilable so that no sense whatsoever can be given to the intention of the parties.

(b) Unless they expressly and clearly say otherwise, there is a strong presumption that parties are assumed to have agreed on a single tribunal for the determination of all their disputes, at least when there is only one agreement between them. Dispute resolution clauses require certainty so parties know where they should go when a dispute arises.

(c) Where there are two agreements each containing different provisions for dispute resolution, the outcome may depend on the nature of the second agreement and its relationship to the first. A second agreement which varies the first one will probably be regarded differently from a second agreement which makes a clean break from the first one. The desire for one-stop shopping means that, where possible, the clauses should be regarded as mutually exclusive in their scope of application rather than overlapping. However some degree of fragmentation may be inherent in what has been agreed, in which case the centre of gravity of a given dispute will be relevant.

(d) Where a contract contains a hierarchy or conflicts clause, there should be no predisposition to find or not find a conflict between two clauses. The ordinary rules of construction should first be deployed and only if those result in a conclusion that the two provisions are irreconcilable is recourse to the conflicts clause required. …"

67. The four principles summarised above set out neatly the approach I should take when considering the proper construction of the MRCs with their Jurisdiction Clauses and the Facultative Certificates with their Arbitration Agreements.

68. The final case, I need to mention is Sul America CIA Nacional de Seguros SA & Ors v. Enesa Engenharia SA & Ors., a decision of Cooke J. at [2012] EWHC 42 (Comm) affirmed by the Court of Appeal at [2012] 1 Lloyd's Rep. 671. The case concerned two all-risk insurance policies covering the construction of a hydroelectric facility in Brazil. The policies contained a condition providing for the policies to be governed exclusively by the laws of Brazil and for any dispute to be subject to the exclusive jurisdiction of the courts of Brazil and conditions providing for disputes under the policies to be referred to arbitration with the seat of the arbitration being London. The insureds claimed under the policies and the insurers denied liability as well as commencing arbitration in London for a declaration of non-liability and other declarations. The insurers also sought and obtained an interim anti-suit injunction. At first instance, Cooke J continued the anti-suit injunction holding that the arbitration agreement was governed by English law and was valid. He also held that the arbitration clause prevailed over the Brazilian jurisdiction clause (see the judgment at [47] to [51]). On appeal, the Court upheld the judge's decision that the proper law of the arbitration agreement was English law. They also upheld his conclusion that the arbitration clause prevailed over the Brazilian jurisdiction clause even though that left very little in practice for the exclusive jurisdiction of the Brazilian courts such as founding jurisdiction for the purposes of declaring the arbitral nature of the dispute, to compel arbitration, to declare the validity of the award, to enforce the award or to confirm the jurisdiction of the Brazilian courts on the merits in the event that the parties agree to dispense with arbitration (see the judgment of Moore-Bick LJ at [44]).

69. Returning for a moment to the judgment of Cooke J., two passages in his judgment highlight the approach of the English courts when faced with an exclusive jurisdiction clause and an arbitration agreement:

> *"48. The English courts, when faced with an exclusive jurisdiction clause and an arbitration agreement, look to the strong legal policy in favour of arbitration and the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal. Unless expressly provided otherwise, the parties must be taken to have agreed on a single tribunal for the resolution of all disputes. A liberal approach to the words chosen by the parties in their arbitration clause must now be accepted as part of our law. I follow in this regard the words of Christopher Clarke J. [a reference to paragraphs 68 to 86 of the judgment in Ace Limited v CMS Energy Corporation [2009] ILRIR 414].*
>
> *…*
>
> *50. The effect is, of course, to give priority to the arbitration clause over the exclusive jurisdiction clause but there is no other way of reconciling the two. To give full width to the exclusive jurisdiction clause would be to exclude the right to arbitrate altogether. The only other option would be to allow both the right to litigate in Brazil and the right to arbitrate to run in tandem with the potential for a race to judgment between the two. That, for reasons already given, is a most unlikely construction of the parties' intentions, as all the authorities indicate."*

70. The agreements under consideration in the Sul America case were separate two policies of insurance, neither of which had a hierarchy or confusion clause but both of which contained the Brazilian jurisdiction clause and the London arbitration provisions.

Market Practice and the Placement of the Reinsurances

71. The principal purpose of the market practice expert evidence was to address the question of whether there was a market practice which affected the relative contractual status of an MRC and a facultative certificate as viewed by the London Reinsurance Market. Both parties were rightly agreed that the expert evidence did not assist when it came to the proper construction of the Confusion Clause.

72. Ms. Taylor gave evidence on behalf of TICL that there was a general standard market practice for the placement of North American property risks in the London Reinsurance Market pursuant to which an MRC was seen as setting out the binding terms and conditions of the (re)insurance and would normally be seen as the operative document for the duration of the policy terms. It is a bespoke document unique to the particular insured and records the negotiated terms and conditions of the (re)insurance cover specific to the particular placement. In contrast, facultative certificates are generic, short form documents based on MURA, which concentrate on administrative aspects rather than the details of the cover.

73. Mr. Cook's evidence is that in the London reinsurance market it is understood that (i) the facultative certificate is not a generic or mere administrative document, rather it is the equivalent of and an alternative to a policy wording and (ii) the MRC is the operative

contract when it is issued but once the facultative certificate is issued it supersedes and becomes the controlling and binding contract.

74. Both parties realistically recognised that the market practice evidence was of little, if any, assistance in determining the contractual status of the MRC and the facultative certificates. The parties were in my view correct in their approach to the expert evidence for a number of reasons.

i) Neither expert's evidence went far enough in my view to establish a market practice as to the status of facultative certificates or the use of hierarchy clauses which was sufficiently notorious that I could properly conclude that the parties would have been negotiating cover on the basis of a shared understanding of that market practice. Indeed, the conflict between them rather highlighted that there was no uniform market practice.

ii) It was apparent from the limited evidence before me that the reinsurers negotiating with TICL to provide cover each took an individual approach to the question of whether they wanted a facultative certificate and, if so, whether or not that was to be on the basis of a confusion or hierarchy clause making clear that the MRC was to take precedence.

iii) To the extent that it was TICL's case that there was a market practice that facultative certificates were to be treated as administrative documents only, this is inconsistent with the language of the Facultative Certificates, which is clearly contractual in nature.

a) The certificates have an agreement number.

b) The certificates are described as being an agreement of facultative reinsurance.

c) The MURA terms and conditions, which are standard terms save to the extent varied by the parties, are obviously contractual in nature.

iv) To the extent that it is necessary to understand the role of an MRC in the London Reinsurance Market, that role is adequately described in the textbooks such as Colinvaux's Law of Insurance, 13th ed in section 4, "London Market Procedure" (and see the discussion at [32] to [34] of Mr. Hancock KC's judgment). The origins of the MRC are also described by Jacobs J. in AIG Europe SA v John Wood Group plc [2021] EWHC 2567 (Comm) at [49] to [51].

49. Each of the 4 policies began with a number of pages which started with the heading "Risk Details". The background to the form of these policies is described in Merkin: Colinvaux's Law of Insurance *12th Edition paragraphs 1-082 – 1-094. In summary, the position is that prior to reforms resulting from steps taken between 2004-2007, the typical procedure in Lloyd's and the London market was for the broker to prepare a "slip" which contained brief details of the risk and its terms. Formal policy wording would be prepared at a later stage. On occasion, and particularly at the reinsurance level, the parties might agree that no formal policy was to be issued, in which case the slip was referred to as a "slip policy". However, in many cases there was no policy wording in*

> *existence at the time when the contract came into effect (ie when the slip was signed), which* Merkin *describes as one of the "weaknesses in the system".*
>
> *50. Following intermediate reforms, the insurance regulator (the FSA) challenged the London market to find a solution to the problem of inadequate documentation. This resulted in the formation of two working groups in the London market. This included the Subscription Market Reform Group, whose work is relevant to policies such as those in the present case. Codes of Practice were later issued. This work resulted in the "Market Reform Contract", which is now the standardised form of agreement used in the London market. There is no longer any reference to the "slip". Instead, as Merkin describes:*
>
> *"... when a risk is presented by the broker to the market, the presentation consists of an introductory section setting out the most important details of the risk (which more or less corresponds to the old slip) but attached to this document is a "schedule" which sets out the terms of the policy. The effect therefore is that all of the documents are prepared up-front, and when the underwriters scratch the documents the contract is in its entire form."*
>
> *51. A Market Reform Contract must contain the details set out in the published guidance. It consists of a series of sections, including Risk details. The Risk details include, for example, the unique market reference, the type of policy, the interest insured, the monetary limits and the choice of law and jurisdiction.*

v) I pause to note that the choice of law and jurisdiction in an MRC is a matter of choice for the parties. The example MRCs within the copy of the Market Reform Contract (Open Market) Implementation Guide dated 31 March 2021 exhibited to the witness statement of Mr. Pring include for the US example a choice of the Revised Code of Washington and any competent court within the United States and for the global example an English choice of law and jurisdiction clause.

vi) In any event, I consider that I am bound by and, in any event, agree with the analysis of the relationship between an MRC and a facultative certificate found in the judgment of the Court of Appeal in Partner Re.; see further paragraphs 78 to 87 below. The Court of Appeal held in Partner Re. that the facultative certificate was a contractual document, which was intended to supersede the contract found in the MRC.

The status of the judgment of Mr. Hancock KC

75. Unsurprisingly, Mr. Killen on behalf of TICL urged on me that I should not depart from the construction of the Confusion Clause adopted by Mr. Hancock KC. He submitted that while I was not strictly bound by the decision of Mr. Hancock KC, I should follow Mr. Hancock KC unless there were powerful reasons for not doing so. He submitted that this would be consistent with a conventional approach to *stare decisis*; see Willers v Joyce [2016] UKSC 44 per Lord Neuberger at [9].

76. Clearly, in reaching my decision on the proper construction of the Confusion Clause, I have considered carefully the reasons given by Mr. Hancock KC for concluding that the effect of the Confusion Clause was that the Jurisdiction Clause in the MRCs took precedence over the Arbitration Agreement. But it was common ground before me that

I was considering the proper construction of the Confusion Clause afresh and not merely reviewing the reasons given by Mr. Hancock KC for his preferred construction of the Confusion Clause. Further:

i) Mr. Hancock's decision was made in circumstances where he granted an interim injunction but refused a final injunction. He expressly stated in his judgment at [111] that he wished to be clear that his conclusions on construction were not to be treated as final.

ii) There was no application from GIC before Mr. Hancock KC for a stay pursuant to s.9 of the Arbitration Act 1996.

77. I do not, therefore, consider that the convention described by Lord Neuberger in Willers v Joyce constrains me to follow the judgment of Mr. Hancock KC were I to disagree with his construction of the Confusion Clause.

The judgments in Partner Re.

78. Tyson International Company Limited v Partner Reinsurance Europe SE [2023] EWHC 3243 (Comm) is a case on very similar facts to this case but concerns a different layer of cover with Partner Re. as the reinsurer. Cover was placed in a similar way to cover in the present case with the parties agreeing cover on the terms of an MRC on 30 June 2021 and subsequently agreeing the terms of a facultative certificate for the same cover on 08 July 2021. The MRCs contained an exclusive jurisdiction clause in favour of the English courts and the facultative certificates contained New York law and arbitration provisions on the same terms as the Facultative Certificates. The difference between the present case and the Palmer Re. case is that there was no hierarchy or confusion clause in the facultative certificate. TICL sought a final anti-suit injunction and Partner Re. sought a stay in favour of arbitration pursuant to s.9 of the AA 1996.

79. Mr. Stephen Houseman KC (sitting as a judge of the High Court) granted Partner Re. a stay pursuant to s.9 of the AA 1996. He held that despite extensive witness evidence directed to market practice, he was not persuaded that the evidence ultimately mattered when ascertaining the common intention of the parties as a matter of English law. The essential inquiry is what the parties agreed as their mandatory forum selection clause: exclusive English jurisdiction or New York arbitration. He went on:

i) To hold that the initial MRC evidenced or contained a legally binding and full contract of reinsurance.

ii) To hold that the facultative certificate viewed in isolation would also be a binding contract of reinsurance governed by New York law with a New York arbitration agreement.

iii) To reject an argument advanced by TICL that the facultative certificate was an administrative document only.

iv) To hold that it was the intention of the parties to swap out the fundamental terms of the contract found in the MRC with the terms of another contract found in the facultative certificate.

80. Accordingly, he granted Partner Re. the stay pursuant to s.9 of the AA 1996, which it sought. He did not therefore consider Partner Re.'s alternative argument that the exclusive jurisdiction clause and the arbitration provisions in the two contracts could be read together but described the argument as an 'extremely challenging submission' given the language of each of the forum selection clauses; see the judgment at paragraph [58].

81. The Court of Appeal rejected TICL's appeal against the judgment of Mr. Houseman KC; see [2024] EWCA Civ 363. They agreed with the Judge that the MRC and the facultative certificate each evidenced a separate contract of reinsurance and that the terms of the contract found in the facultative certificate superseded the terms of the contract found in the MRC.

82. Before the Court of Appeal, there was some discussion of the terms of cover for the preceding 2020/21 policy year. In contrast to the position for the 2021/22 year, the parties had agreed a general endorsement which stated:

"The Agreement of Facultative Reinsurance (The "Agreement") between Reinsured Tyson International Company Limited and Reinsurer Partner Reinsurance Europe SE-Zurich Branch is agreed subject to the terms and conditions of contract PRPNA 2003490. All other terms and conditions remain unchanged."

83. The Court held at [15] the effect of this endorsement for the 2020/21 policy year was to ensure that the MRC and not the facultative certificate remained the governing contractual document such that the choice of English law and jurisdiction prevailed. In other words, the Court accepted that an appropriately worded hierarchy clause could override the effect of the entire agreement clause in the facultative certificate.

84. The Court rejected TICL's argument that the facultative certificate was merely an administrative document. They held on a number of grounds that the facultative certificate was intended to be a final contract of reinsurance for the policy year 2021/22, which provided for New York law and arbitration in place of English law and the exclusive jurisdiction of the English courts. Those grounds were:

    i) That the parties contemplated in their negotiations for the 2021/22 policy year that the facultative certificate would be provided.

    ii) The parties were or must be taken to have been familiar with the terms of the facultative certificate, a widely used form of reinsurance contract in the US market which, on the face of it, makes it abundantly clear what the document is for.

    iii) There was no indication that the issue of the MURA was merely part of some administrative process.

    iv) Partner Re. duly signed and stamped the facultative certificate on every page and returned it to Lockton giving rise to the obvious inference that Partner Re. agreed the terms of the document and accepted it as a contract of reinsurance.

    v) The entire agreement clause in the facultative certificate, with which the parties were to be taken to be familiar, stated expressly that the certificate was to

supersede all contemporaneous or prior agreements and understandings, both written and oral, between the parties with respect to the subject matter of the certificate.

vi) In contrast to the previous year, there was no endorsement making clear that the facultative certificate was subject to the MRC. There were deliberate changes to the facultative certificate including the completion of the service of suit clause to provide for service on a New York law firm and the moving forward of the premium payable date from 28 September 2021 in the MRC to 01 September 2021 in the facultative certificate.

85. As Lord Justice Males put it at [51]:

"All this suggests that the 2021 MURA [facultative certificate] was intended to be a final contract of reinsurance for the 2021 policy year. Certainly, it looks like a contract and contains everything needed to be a valid and binding contract of reinsurance. It resembles the proverbial duck."

86. GIC did not sign and stamp the Facultative Certificates on each page or at all. The Facultative Certificates in the present case contain the Confusion Clause. Otherwise, the points set out in sub-paragraph 79(i) to (iii) and (v) above apply with equal force to the facts of this case.

87. The Court of Appeal rejected an argument by TICL that clause 33 of the Captive Policy as incorporated into the Beazley policy had the effect of rendering the facultative certificate no more than an administrative document. It found, at [57], that clause 33 was not incorporated into the MRC and, in any event, could not negate the true intentions of the facultative certificate which stated on its face that it was a contract of reinsurance. They further rejected an argument that the facultative certificate could not have contractual force because, unlike in the present case, the procedure set out in the GUA had not been followed. At [59] to [63], Males LJ pointed out that the purpose of the procedure in the GUA was to address how a following market, where there is one, is to be notified and bound by such changes. However, there was no following market and the subscription page in the MRC was therefore redundant. There was nothing in the MRC to prevent the parties agreeing either expressly or by necessary implication that the MRC should be superseded by a later contract on different terms.

Did the contracts of reinsurance evidenced by or contained in the Facultative Certificates supersede the contracts of reinsurance evidenced by or contained in the MRCs?

88. In the end, the arguments before me principally turned on the proper construction of the Confusion Clause and its effect. Nevertheless, TICL maintained a case that the Facultative Certificates were administrative in nature only having regard in particular to the effect of the Certificates Clause.

89. In relation to the Certificates Clause, TICL recognised that this was an argument which the Court of Appeal had rejected in Partner Re. but submitted that the Court of Appeal's reasoning was obiter and that there were in any event features of the contractual arrangements in this case which were sufficiently different as to distinguish this case from Partner Re.. In summary, TICL submitted that construed objectively, the parties'

clear intention was for the Beazley Policy Wording to serve as the foundation of the Reassurances with its warranties terms and conditions applying (insofar as possible) in full save for two categories of exception which do not affect the Certificates Clause. Accordingly, TICL submitted that the Certificates Clause was incorporated into the MRCs along with the Beazley Policy Wording. TICL submitted that the criteria for incorporation considered in HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co. Ltd [2001] EWCA Civ 735 support its position because:

i) The Certificates Clause works sensibly without undue manipulation and is apposite for inclusion.

ii) The Certificates Clause is germane to the reinsurance, not least as it governs the means by which coverage terms can be amended (in particular, how an additional reinsured may be added).

iii) In the present case, GIC were aware of the terms of the Captive Policy prior to the inception of the Reassurances and (ii) the Facultative Certificates are described as reinsurance certificates on their face.

90. TICL went on to submit in the alternative that, even if the Certificates Clause was not strictly binding, then at its lowest the clause forms a relevant background fact against which the status of the Facultative Certificate is to be viewed.

91. Subject to the effect of the Confusion Clause (considered below), I find that the Facultative Certificates are contracts of reinsurance which superseded the contracts of reinsurance contained in or evidenced by the MRCs. I reach this conclusion for the reasons set out below.

92. First, I consider that I am bound by the decision of the Court of Appeal in Partner Re. that:

i) Facultative certificates on the MURA form are ordinarily intended to have contractual effect; and

ii) That parties who have agreed MRCs with an English law and jurisdiction clause but then agree facultative certificates on the MURA form covering the same risk are to be taken as having agreed that the terms of the facultative certificate would supersede or replace the terms of the MRCs subject to any contractual terms providing that the terms of the MRCs were to have primacy.

93. Second, even absent the decision of the Court of Appeal in Partner Re. (or the decision of Mr. Houseman KC at first instance). I consider that it is obvious that the Facultative Certificates were intended to have contractual effect and (subject to the effect of the Confusion Clause) to supersede any contract contained in or evidenced by the MRCs. In this respect, I accept GIC's submissions:

i) The reference on the final page of the Facultative Certificates to the GUA A and the statement that both parties had agreed the terms at 09:38 on 09 July 2021 indicated that the parties intended the Facultative Certificates to take effect as an amendment to the earlier contract terms found in the MRCs.

ii) The Facultative Certificates cover the same subject matter as the MRCs. It is plain from the terms of the Facultative Certificates and the manner of their agreement and execution that they were intended to have contractual force. They expressly incorporated the Captive Policy wording (see clauses 1, 2 and 3 of the Facultative Certificates). Further, the contracts found in the Facultative Certificates are capable of being self-standing and self-sufficient contracts if viewed in isolation from the MRCs.

iii) The parties contracted on the basis that Lockton were going to be providing facultative certificates.

iv) Both parties and Lockton were familiar with the nature and terms of the MURA.

v) Subject to TICL's argument about the effect of clause 33, there was no indication that the issue of the Facultative Certificates was intended to be part of some administrative process. Lockton sent the Facultative Certificates to GIC for agreement.

vi) GIC confirmed their agreement to the Facultative Certificates by their unconditional acceptance of the endorsement via PPL.

vii) The entire agreement clause in the Facultative Certificates stated in terms that all prior agreements were superseded and that would include the MRCs (subject to the effect of the Confusion Clause).

viii) The parties contemplated that premium would not be administered until after the Facultative Certificates were executed and in a deliberate change, the Facultative Certificates brought forward the payment of premium from 28 September 2021 to 01 September 2021.

94. My conclusion set out in paragraph 93 above is not altered by the Certificates Clause. Whether I am formally bound by the view of the Court of Appeal in Partner Re. or not, I agree with their conclusion that this clause, if incorporated into the MRCs, does not override the contractual nature of the Facultative Certificates.

i) The Certificates Clause is on the face of it dealing with certificates which evidence the existence of the policy of insurance (i.e. the Captive Policy). It is a clause which is intended to deal with the situation where a party to the contract of insurance needs to be able to prove that they are insured and to that end requires a certificate of insurance. Clause 33 makes clear, that save in respect of the naming of Additional Insureds or Loss Payees, any such certificates are not intended to vary the terms of the policy, they are evidencing.

ii) However, clause 33 is not intended to prevent the parties agreeing that the terms of their original contract of insurance may be varied by a subsequent contract even if that subsequent contract is to be found in a document headed 'certificate'. In this regard, there is nothing in the language of the clause which suggests that the clause is intended to limit or exclude the parties' right to amend or replace their original contract by later terms.

95. In view of my conclusions on the effect of clause 33 within the Captive Policy, I do not need to finally decide the question of whether the language of the clause can be manipulated so that it applies as between TICL and GIC.

96. It follows that subject to the effect of the Confusion Clause, I find that the contracts of reinsurance contained in or evidenced by the Facultative Certificates did replace or supersede the contracts of reinsurance contained in or evidenced by the MRCs.

The proper construction of the Confusion Clause and its effect

97. GIC submitted that the Confusion Clause did not have the effect of giving precedence to the English choice of law and jurisdiction in the MRCs over the arbitration agreement in the Facultative Certificates for the following reasons:

    i) The reference to 'confusion' in the clause does not mean inconsistency or conflict rather it means indistinct, obscure or uncertain; cf. the definition in the current edition of the Oxford English Dictionary.

    ii) Consistent with point i) above, the clause is not intended to address the situation where there is a conflict or potential conflict between the terms of the Facultative Certificates and the terms of the MRCs. Rather it is intended to address the situation where there is uncertainty as to the meaning of the terms of the Facultative Certificates so as to allow the parties to look at the terms of the MRCs to resolve the uncertainty.

    iii) There is no uncertainty as to the meaning and effect of the arbitration agreement in the Facultative Certificates. Accordingly, there is no basis on which to give effect to the Jurisdiction Clause in the MRCs.

98. In turn, TICL submitted that on the proper construction of the Confusion Clause, the Jurisdiction Clause takes precedence over the Arbitration Agreement because:

    i) It gives effect to the ordinary meaning for the words used. The phrase 'takes precedence' necessarily imports the concept of two documents being read together and the imposition of a hierarchy.

    ii) "Confusion" is confusion arising between the terms of the MRCs and the Facultative Certificates.

    iii) GIC's construction turns the Confusion Clause on its head by giving precedence to the Facultative Certificate and reads the word "confusion" in isolation.

    iv) If GIC's construction were correct, it is unclear how it would sensibly operate given that (a) importing terms from an English law contract into a contract governed by New York law will likely cause more confusion than it resolves and (b) it is unclear how there will be the relevant lack of clarity or certainty if the Facultative Certificate is to be read independently as the complete and final contract of reinsurance.

The meaning of 'confusion'

99. So far as the meaning of the word 'confusion' is concerned, it is not a common word to find in clauses which provide for one contract to prevail over the other in the event of inconsistency between them. However, I do not agree with GIC that its meaning is limited to situations where something is indistinct, uncertain or obscure and does not refer to situations where there is inconsistency or conflict between contractual terms. I consider that this gives too narrow a definition to the word 'confusion' even if GIC were otherwise correct that the intention of the clause is to address only confusion arising from the terms of the Facultative Certificates. Confusion can arise where there are two clauses within a contract which are inconsistent such that it is unclear or uncertain which clause is to prevail or there is confusion as to the intention of the parties as to their respective rights and obligations under the contracts because there is inconsistency between the provisions. Similarly, confusion can arise where there are terms in two separate contracts which are inconsistent such that it is unclear or uncertain which term is to prevail or what the parties intended would be their respective rights and obligations.

100. In any event, I accept Mr. Killen's submission that GIC's argument focuses on the word 'confusion' without regard for the language of the clause as a whole. When one looks at that language 'RI slip to take precedence over reinsurance certificate in case of confusion', two conclusions follow in my judgment:

i) The confusion being referred to is confusion arising as between the terms of the MRC (it being common ground that the reference to RI slip is a reference to the MRC) and the terms of the Facultative Certificate.

ii) The intention of the clause is that where there is such confusion, it is the terms of the MRC which are to prevail.

101. In support of their case that one should look only to the Facultative Certificate to determine whether there is confusion, GIC relied on the guidance from Rix LJ found in the HIH case at [83]:

"…The difficulty of course is that where the later contract is intended to supersede the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any assistance. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance."

102. GIC submitted that consistent with this passage, there are limits on the utility of using an antecedent contract or document as an aid to construction of a later contract. They further submitted that the effect of TICL's construction would be to deprive GIC of a valuable right to rely on a later agreement, namely the Arbitration Agreement as found in the Facultative Certificates, and that accordingly any clause which seeks to undo that legal result would have to be clear. The word 'confusion' is not a clear indication of the clause operating in cases of inconsistency. In support of these submissions, GIC relied

on Mur Shipping BV v RTI Ltd [2024] UKSC 18 at [45] and on the principle in Modern Engineering (Bristol) Ltd v. Gilbert-Ash (Northern) Ltd [1974] AC 689.

103. I do not consider that the HIH case or the principle laid down in Gilbert-Ash or Mur Shipping materially assist in resolving the proper construction to the Confusion Clause. In the HIH case, Rix J. expressed the need for a cautious and sceptical approach to finding any assistance from the earlier contract but held that (i) it was not necessary to decide whether the policy document superseded the slip policy in that case and (ii) if it had been, he would not have concluded that the slip policy was superseded. There was no hierarchy clause in that case. So far as Mur Shipping and Gilbert-Ash are concerned, both the MRCs and the Facultative Certificates confer valuable rights on the parties. In particular, while I accept that the rights under the Arbitration Agreement are valuable rights so too are the rights under the Jurisdiction Clause. The principle does not therefore assist in determining whether the terms of the MRCs are to prevail over the Facultative Certificates in the event of confusion or whether the Facultative Certificates prevail over the MRCs. In the end, it seems to me that the best guidance in terms of construing the Confusion Clause is to be found in the summary of principles found in the Surrey CC case (see paragraph 67 above).

104. GIC further submitted that if TICL's construction of the Confusion Clause were correct, this would undo (i) the bringing forward of the premium payable date from 28 September 2021 to 01 September 2021 and (ii) the amendment to the cancellation provisions which made termination/cancellation subject to there being no losses.

105. I am not persuaded that this argument is correct in circumstances where both the premium payable date and the amendment to the cancellation clauses were specific amendments to the terms of the Facultative Certificates individually negotiated by the parties. The change to the premium payable date was an amendment sought by TICL. The amendment to the cancellation provisions was one of the three amendments to the Facultative Certificates introduced by GIC together with the Confusion Clause and accepted by TICL. It does, therefore, seem to me that it would be difficult for either party to successfully argue that the Confusion Clause had the effect of undoing these specific amendments. There would be no confusion as to the parties' intentions.

106. In any event, even if I am wrong about this, it does not seem to me that this would be a reason not to construe the Confusion Clause as giving precedence to the terms of the MRCs. As already indicated, I consider that the language of the Confusion Clause is clear that the parties intended the terms of the MRC to prevail if there is confusion between the terms of the two contracts.

107. Both parties submitted that their construction was consistent with commercial common sense and that the construction of the other party was commercially absurd.

    i) GIC submitted that it would be commercially absurd for the parties to have chosen to contract on the terms of the Facultative Certificates thereby incorporating the Arbitration Agreement only to override that agreement by the Confusion Clause especially when the parties agreed the Facultative Certificates only eight days after agreeing the MRCs.

ii) TICL submitted that it would be bizarre for the parties to have agreed the Jurisdiction Clause in the MRCs to only then switch to New York law and arbitration nine days after the inception of the Reinsurances.

108. So far as arguments of commercial common sense and absurdity are concerned, they provide only limited assistance in deciding how to construe the Confusion Clause. However, it seems to me that if one asks whether experienced insurance professionals are more likely to include in the later insurance contract (i) a provision which provides a mechanism to resolve a potential conflict between the terms of that contract and the earlier contract or (ii) a provision, which provides that the earlier contract is to be used to resolve uncertainty as to the meaning of terms in the later contract, then the answer favours the first of the two alternatives.

109. Accordingly, I find that the Confusion Clause is to be construed as a clause which gives precedence to the terms of the MRC in the event that there is confusion or inconsistency between the terms of the MRCs and the terms of the Facultative Certificates.

Is there confusion?

110. The next question therefore is whether there is any confusion between the Jurisdiction Clause and the Arbitration Agreement. On the face of it, given that the Jurisdiction Clause provides for a choice of English law and the exclusive jurisdiction of the English courts, while the Arbitration Agreement provides for New York arbitration and New York law, there would seem to be an obvious confusion as to which dispute resolution provisions are to apply such that the Confusion Clause would give precedence to the Jurisdiction Clause.

111. However, GIC say that the two sets of dispute resolution provisions can be reconciled either because clause 13 of the Facultative Certificates is to be read as a *Scott v Avery* clause or because the Jurisdiction Clause can be read as giving the English courts a supervisory jurisdiction in relation to the New York arbitration.

112. I accept that in accordance with the principles summarised in the Surrey CC case at [77]:

i) There should be no predisposition to find or not find a conflict between two clauses.

ii) I should where possible strive to give effect to an arbitration clause in the presence of a competing jurisdiction clause even if by doing so the jurisdiction clause is deprived of virtually all purpose in practice.

113. But:

i) The exercise I have to carry out is ultimately one of routine construction applying the ordinary principles of contractual construction including avoiding re-writing the parties' agreement.

ii) The parties are to be assumed to have agreed on a single tribunal for the determination of all their disputes.

iii) If I reach the conclusion that two provisions are irreconcilable then I should give effect to the prevailing clause, in this case the Jurisdiction Clause.

114. When one considers the Jurisdiction Clause and the Arbitration Agreement I consider that one has to come to the conclusion that the two sets of provisions are irreconcilable.

i) The Jurisdiction Clause provides for the proper law of the contract to be English law and for the courts of England & Wales to have exclusive jurisdiction over the parties for all matters relating to the reinsurance.

ii) In contrast, the Arbitration Agreement provides for arbitration in New York as a condition precedent to any right of action hereunder in respect of any dispute arising out of the interpretation, performance or breach of the agreement in the Facultative Certificates (clause 13). Further the arbitrators are to apply the law of New York as the proper law of the contract (clauses 13 and 17). To the extent that disputes are not resolved by arbitration, the Facultative Certificates provide for the jurisdiction of the courts of the United States.

iii) On the face of it therefore, the terms of the Jurisdiction Clause and the terms of the Arbitration Agreement inevitably conflict.

iv) In particular, the requirement in the Facultative Certificates that New York arbitration should be a condition precedent to any right of action inevitably conflicts with the requirement in the Confusion Clause that precedence should be given to the terms of the MRCs. In other words, the Jurisdiction Clause should take precedence over the Arbitration Agreement.

v) More fundamentally, GIC's submissions that the Jurisdiction Clause and the Arbitration Agreement can be read together either on the basis that the Arbitration Agreement is a *Scott v Avery* clause or on the basis that the courts of England & Wales have a supervisory jurisdiction ignores the fact that the parties' intention was that the terms of the Facultative Certificates should replace or supersede the terms of the MRCs unless there is confusion. If there is confusion, then the parties' intention was that the terms of the MRCs should prevail not that one should endeavour to read the two agreements together.

vi) If one were to construe the provisions of the Jurisdiction Clause and the provisions of the Arbitration Agreement on either of the bases suggested by GIC, then one would be setting up a situation which departs dramatically from the notion that the parties are deemed wherever possible to have intended that their disputes should be resolved before a single tribunal or forum.

vii) To construe the Jurisdiction Clause and the Arbitration Agreement together would not merely deprive the Jurisdiction Clause of virtually any purpose, it would deprive the Jurisdiction Clause of any sensible purpose in circumstances where any arbitration was to take place in New York subject to New York law and the parties had also made provision for the jurisdiction of the courts of the United States.

115. In relation to the final two points made in the previous paragraph, one can anticipate experienced insurance professionals such as the individuals working for GIC and TICL

entering reinsurance contracts which provide either for dispute resolution under English law before the courts of England & Wales or dispute resolution under the law of New York before a New York arbitration tribunal with the New York courts having supervisory jurisdiction. What seems to me extremely unlikely is that such insurance professionals would agree that their disputes should be resolved by arbitration in New York with the courts of England & Wales exercising a supervisory jurisdiction and the courts of the United States also having a residual jurisdiction.

Consequences of my findings

116. For all the reasons given above, I am satisfied on the balance of probabilities that GIC's application for a stay under s.9 of the Arbitration Act 1996 should fail.

117. I am further satisfied that TICL's application for an anti-suit injunction, including provision for GIC to revoke the appointment of its party arbitrator, Mr. Gurevitz, should succeed.

Form of ASI relief

118. An issue arose before me as to whether any anti-suit relief I grant should be on a final basis or continue on an interim basis pending trial. GIC submitted that the injunction should continue on an interim basis as there has not yet been witness evidence or disclosure. However, GIC did not identify any further documentary evidence which might become available and so far as witness and expert evidence is concerned, the parties had the opportunity, which they took, to put before the court any witness or expert evidence on which they wished to rely. The intention behind the timetable put in place by Mr. Hancock KC was clearly that TICL's application should be finally determined at the hearing fixed in accordance with that timetable, namely the hearing before me.

119. Further, in circumstances where I have determined on the balance of probabilities that GIC's application for a stay fails because the Jurisdiction Clause in the MRCs prevails over the Arbitration Agreement, this is a situation where can I properly conclude that not only does TICL's application for an anti-suit injunction have a high probability of success but also that it succeeds on the balance of probabilities; there having been no delay in bringing the application and no other reason to refuse the relief.

120. Finally, there is no other reason to hold over determination of TICL's application until trial. The trial will be concerned with the underlying dispute as to whether GIC is entitled to rescind cover and refuse to pay TICL's claim.

121. I therefore grant TICL's application for anti-suit relief on a final basis. This leaves open the question whether the order I make should include an express liberty to apply. I am persuaded that the order should include an express liberty to apply but on the basis that this is not intended to enable a rearguing of the merits of the Applications or to permit an application based on matters which were foreseeable at the date of my order but is intended to deal with the same matters as would otherwise entitle a party to apply to discharge or vary a final injunction namely a material unforeseen change in circumstances, the court having been misled, abuse of process or a material change in the law.

Conclusion

122. For the reasons set out above:

i) I refuse GIC's application for a stay pursuant to s.9 of the AA 1996 or to set aside the Claim Form for want of jurisdiction.

ii) I grant TICL's application for final anti-suit relief with an express liberty to apply.

123. I would ask the parties to agree if possible a form of order reflecting my judgment for my approval. To the extent that it is not possible for the parties to agree, I will deal with any consequential matters arising either on paper or at a further hearing as may be appropriate.

124. I am very grateful to counsel and their instructing solicitors for all their work in the preparation and presentation of their respective cases.