Neutral Citation Number: [2012] EWHC 42 (Comm)

Case No: 2011 FOLIO NO. 1519

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
7 Rolls Building, London EC4A 1NL

Date: 19/01/2012

Before :

THE HON MR JUSTICE COOKE

- -

Between :

(1) SULAMÉRICA CIA. NACIONAL DE SEGUROS S.A.
(2) ALLIANZ SEGUROS S.A.
(3) COMPANHIA DE SEGUROS ALIANÇA DO BRASIL
(4) MAPFRE VERA CRUZ SEGURADORA S.A.
(5) ITAÚ-UNIBANCO SEGUROS CORPORATIVOS S.A. (formerly UNIBANCO SEGUROS S.A.)

and

(6) ZURICH BRASIL SEGUROS S.A.

Claimants/Applicants

and

(1) ENESA ENGENHARIA S.A. – ENESA
(2) ENERGIA SUSTENTÁVEL DO BRASIL – ESBR
and
(3) CONSTRUÇÕES E COMÉRCIO CAMARGO CORRÊA

Defendants/Respondents

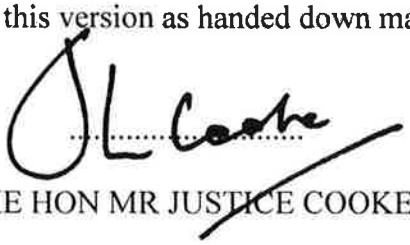
- -
- -

Stephen Houseman and Damien Walker (instructed by **Messrs Clyde & Co**) for the **Claimants**
Hilary Heilbron QC and Nehali Shah (instructed by **Messrs White & Case LLP**) for the **Defendants**

Hearing dates: 12 January 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



THE HON MR JUSTICE COOKE

The Hon. Mr Justice Cooke:

Introduction

1. The Claimant insurers (the Insurers) seek the continuation of an interim anti-suit injunction against the defendant insureds (the Insureds) by which the latter are restrained from pursuing proceedings instituted in Brazil, in which they in turn obtained an interim order restraining the claimants from proceeding against them in arbitration until the Brazilian Court determines whether or not the Insureds are bound to arbitrate the disputes which have arisen between them. The substantive issues arise in relation to two all risk insurance policies (referred to hereafter as the Policy, as there is no material distinction between them) covering the construction of one of the world's largest hydro electric facilities, known as Jirau, located in Brazil. The Insureds have made a claim under the Policy for physical damage and consequential losses as a result of incidents in March 2011. The Insurers deny liability under the Policy and, in arbitration proceedings commenced by them on 29 November 2011, seek a declaration of non-liability and a declaration that a *material alteration* has occurred within Condition 3 of the Policy.

2. There are issues between the parties in the context of the anti-suit injunction as to the validity of an arbitration agreement which is found in the Policy. The proper law of the Policy is expressly that of Brazil, the Insureds and Insurers are all Brazilian, the subject matter of the insurance is located in Brazil and the events in question took place in Brazil. The insurance was however reinsurance led, in the sense that the Insureds, through brokers JLT, sought to arrange the terms of the reinsurance cover before local insurers were put in place to "front" the covers. The reinsurances are led by Swiss Re, Allianz and Zurich Re. The programme was tailor-made for the Jirau project and was the subject of lengthy and detailed negotiation between the Insureds who are substantial enterprises and the reinsurers. The reinsurances are expressed in the English language and the Policy, although in the Portuguese language, contained essentially the same terms as the reinsurances, translated from the English. In determining the issues which arise, both parties proceeded on the basis of the Policy, translated into English as reflecting the reinsurance terms and conditions.

The Relevant Terms of the Policy

"3.1 Condition 7, entitled "Law and Jurisdiction", states:

> *It is agreed that this Policy will be governed exclusively by the laws of Brazil.*
>
> *Any disputes arising under, out of or in connection with this Policy shall be subject to the exclusive jurisdiction of the courts of Brazil".*

3.2 Condition 11, entitled "Mediation", states

> *"If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation.*
>
> *All rights of the parties in respect of the Dispute are and shall remain fully reserved and the entire mediation including all documents produced or to which reference is made, discussion and oral presentation shall be strictly confidential to the parties and shall be conducted on the same basis as*

without prejudice negotiations, privileged, inadmissible, not subject to disclosure in any other proceedings whatsoever and shall not constitute any waiver of privilege whether between the parties or between either of them and a third party.

The mediation may be terminated should any party so wish by written notice to the appointed mediator and to the other party to that effect. Notice to terminate may be served at any time after the first meeting or discussion has taken place in mediation.

It the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, of if either party serves written notice terminating the mediation under this clause, then either party may refer to the Dispute to arbitration.

Unless the parties otherwise agree, the fees and expenses of the mediator and all other costs of the mediation shall be borne equally by the parties and each party shall bear their own respective costs incurred in the mediation regardless of the outcome of the mediation".

3.3 Condition 12, entitled "Arbitration", states:

"In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules. The Arbitration Tribunal shall consist of three arbitrators, one to be appointed by the Insured, one to be appointed by the Insurer(s) and the third to be appointed by the two appointed arbitrators. The Tribunal shall be constituted upon the appointment of the third arbitrator.

The arbitrators, shall be persons (including those who have retired) with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.

When a party fails to appoint an arbitrator within 14 days of being called upon to do so where the two party-appointed arbitrators fail to appoint a third within 28 days of their appointment, then upon application ARIAS (UK) will appoint an arbitrator to fill the vacancy. At any time prior to the appointment by ARIAS (UK) the party or arbitrators in default may make such appointment.

The Tribunal may at its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute. The tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.

The seat of the arbitration shall be London, England."

The Main Contentions of the Parties

4. The Insurers submit that, on 29 November 2011, they instituted arbitration in accordance with Condition 12 which, they submit, is a valid agreement to arbitrate governed by English law. They also contend that the Insureds refused or failed to enter into a mediation prior to the time when the arbitration was commenced. The Insureds maintain that the arbitration agreement is governed by the law of Brazil and is only operative under that law at the behest of the Insureds themselves, since it is part of a contract of adhesion upon which the Insurers are not entitled to rely. The Insureds also submit that the right to arbitrate only arises if the requirements to mediate in Condition 11 have been complied with. They say that satisfaction of those requirements is a condition precedent to the ability to refer to arbitration under Condition 12. They say that those requirements were not met here. Additionally, they say that the scope of the arbitration agreement is limited to arguments about quantum and does not cover the matters which insurers have referred to arbitration, namely a declaration of non-liability and a declaration that a "material alteration" has occurred within the meaning of the Policy.

The Proper Law of the Arbitration Agreement

5. It is common ground that, in ascertaining the putative proper law of an arbitration agreement, the English court must apply English conflict of law rules, and that the court's task at common law, which applies here, is to ascertain, in the absence of an express or implied choice of law, the law with which the arbitration agreement has its closest and most real connection.

6. The Insureds contend that, as the proper law of the Policy is expressly Brazilian law and "exclusively" so (reinforced by the exclusive jurisdiction provision in favour of the courts of Brazil), combined with the fact that the parties, the location of the risk and the events are all Brazilian, the law of the arbitration agreement must also be the law of Brazil. The Insurers, on the other hand, say that the law with which the arbitration agreement has its closest and most real connection is that of England because the arbitration clause provides that the seat of the arbitration is to be London, England.

7. As the House of Lords pointed out in Fiona Trust v Privalov [2008] 1LLR 254, by reference to section 7 of the Arbitration Act 1996 (see paragraphs 12 and 17), an arbitration agreement is to be treated as distinct from the substantive agreement in which it is enshrined for the purpose of assessment of its validity, existence, and effectiveness. It cannot of course be divorced from the commercial agreement in which it appears but it does have a distinct identity. It is perfectly possible (and a not infrequent occurrence) for the parties expressly to agree that different identified bodies of law should apply to the commercial agreement and to the arbitration agreement within it. This is not such a case and there is here a clear provision for the law and jurisdiction of Brazil to apply exclusively to the Policy which is defined as including the "Conditions and Exclusions", whilst the introduction to the Policy states that it comprises a number of items including the General Conditions. The General Conditions themselves, in Condition 1, state that the Policy and the Schedule, Exclusions, Extensions, Memoranda and Conditions shall be read together as one contract, though the following words suggest that the force of this relates to the meaning to be attached to any word or expression which is defined in any part of the Policy. The Insureds point out that the arbitration agreement "forms or was intended to form part of another agreement" and that Condition 7, as part of the General Conditions, is all embracing in saying that the Policy shall be governed exclusively by the laws of Brazil and that any disputes arising in relation to it are to be subject to the exclusive jurisdiction of the Brazilian courts.

8. I was taken, without objection by either party, to documents and evidence relating to the course of negotiation of the Policy terms. This exercise played a role in the context of any determination I might make as to whether or not the Policy was an adhesion contract within the meaning of Brazilian law. For the purposes of English law and conflict of laws rules, it cannot matter whether the provision for arbitration in London was introduced by the Insureds broker's, or whether the particular language of Condition 12, in its final form, was introduced by Swiss Re, as the parties, which are large commercial enterprises, negotiated these terms at arms length over a period of months and the Policy and reinsurances were tailor- made. I have to construe the Policy terms as they stand without regard to inadmissible evidence of the course of negotiation.

9. What is plain, however, is that Conditions 11 and 12 of the Policy have to be read together since Condition 11, dealing with mediation, refers to it in the context of a potential later arbitration, whilst Condition 12 begins with a reference to a failure by the

parties "to agree through mediation as above". The Insureds accept that it is theoretically possible for the arbitration agreement to have a different governing law from the balance of the Policy, but say that it is inconceivable that the parties intended there to be a different governing law for mediation under Condition 11 and arbitration under Condition 12. The force of that argument however depends upon an analysis of Condition 11 and whether or not it too, at least in part, forms part of the arbitration agreement, which is capable of having a different governing law from the rest of the Policy. Apart from the Insureds' submission that the Policy should be construed effectively "contra proferentem" against the Insurers under Brazilian law principles of construction of contracts (a point related to the adhesion contracts point), no other principles of construction of contract were relied on which differ in any way from English law principles. The inter-relationship of Conditions 7, 11 and 12 can, therefore, with this one qualification in mind, be viewed effectively through English eyes, without concern as to the putative proper law of the arbitration agreement.

10. I was referred to a significant number of authorities where the court has had to determine the proper law of an arbitration agreement in the context of arguments that it did or did not differ from the proper law of the parent contract, but the parties agreed that each case necessarily turned upon its own facts and the particular forms of words used. The key issue here depends upon the weight to be given to the provision in Condition 12 that "the seat of the arbitration shall be London, England".

11. It was accepted by the Insureds that this necessarily carried with it the English court's supervisory jurisdiction over the arbitration process. This follows from the express terms of the Arbitration Act of 1996 and, in particular, the provisions of section 2 which provide that Part 1 of the Act applies where the seat of the Arbitration is in England and Wales or Northern Ireland. This immediately establishes a strong connection between the arbitration agreement itself and the law of England. It is for this reason that recent authorities have laid stress upon the location of the seat of the arbitration as an important factor in determining the proper law of the arbitration agreement. I explored the effect of this in C v D [2007] 2 LLR 367, as did the Court of Appeal, in the same case at [2008] 1LLR 239. The matter is further discussed, following the decision of the Court of Appeal, in my decision in Shashoua v Sharma [2009] 2LLR 376. Reference can be made to these decisions for a discussion of the previous authorities.

12. I held, in both decisions, that, in accordance with previous authority, agreement as to the seat of arbitration was akin to agreement to an exclusive jurisdiction clause in relation to the supervisory jurisdiction of the courts of that country. In C v D, I decided (obiter) that the proper law of the Arbitration Agreement/Agreement to Refer in that case coincided with the proper law of the contract for the conduct of the arbitration (the curial law), which in itself was determined by the parties' express agreement that the seat of the arbitration was to be in England. At paragraph 43, I said that the authorities revealed different emphases as to the likelihood of the coincidence of the governing law for the Arbitration Agreement/Agreement to Refer with the law of the substantive parent agreement, on the one hand, and the curial law, on the other. The decisions to which I referred in that paragraph tally to a significant extent with those to which I was referred on this occasion. There, I concluded that the broad thrust of the more recent authorities appeared to suggest that, where the law of the substantive contract differed from the curial law, there was an increased likelihood that the law of the arbitration agreement and the law of the contract of reference would tally with that of the curial law. In that case

too, the defendants relied upon dicta in other cases and passages in a number of textbooks which suggested that it was more likely that the proper law of the agreement to arbitrate would be the same as the proper law of the substantive parent contract.

13. In the Court of Appeal, Longmore LJ, with whom the other two Lord Justices agreed, decided (again obiter) that, where there was no express choice of law for the arbitration agreement, the law with which that agreement had its closest and most real connection was more likely to be the law of the seat of arbitration than the law of the underlying contract. He referred to Mustill J (as he then was) in Black Clawsen International Limited v Papierwerke Waldhof-Aschaffenburg AG [1981] 2LLR 446 as saying that it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place or seat of the arbitration. Longmore LJ also referred to the speech of Lord Mustill (as he had then become) in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1LLR 291 and concluded that the Law Lord was saying that, although it was exceptional for the proper law of the underlying contract to be different from the proper law of the arbitration agreement, it was less exceptional (or more common) for the proper law of that underlying contract to be different from the curial law, the law of the seat of the arbitration. He was not expressing any view on the frequency or otherwise of the law of the arbitration agreement differing from the law of the seat of the arbitration. Longmore LJ agreed with Mustill J's earlier dictum that it would be rare for the law of the separable arbitration agreement to be different from the law of the seat of the arbitration. The reason was "that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate, than with the place of the law of the underlying contract, in cases where the parties have deliberately chosen to arbitrate, in one place, disputes which have arisen under a contract governed by the law of another place".

14. Whilst the relevant part of the decision in C v D in the Court of Appeal is obiter, it nonetheless carries great weight and coincides with the view which I had taken at first instance. It does not matter that, in the present case, there is no express reference in the arbitration clause to the English Arbitration Act, because it is accepted that the choice of the seat of arbitration determines the curial law and the supervisory jurisdiction of the English courts under the Act and the applicability of its provisions, save where such provisions are non-mandatory and the parties have expressly agreed otherwise. The Insurers say that this is reinforced by the reference to arbitration under ARIAS Arbitration Rules where the rules themselves refer to the objectives set out in section 1 of the 1996 Arbitration Act as the basis upon which the rules have been drafted. This however appears to me to be a weak point (though the rules are produced by a UK arbitration society) since the rules may be used in any venue throughout the world in the arbitration of disputes arising out of insurance and reinsurance contracts. There is room under the rules for the seat of arbitration to be elsewhere than England. It is right however, that many of the rules reflect the provisions of the 1996 Act.

15. In these circumstances, it is clear to me that the law with which the agreement to arbitrate has its closest and most real connection is the law of the seat of arbitration, namely the law of England. I see no difficulty in that by virtue of the mediation clause and its references to arbitration because, insofar as Condition 11 is part of the agreement to arbitrate, it must be governed by the self-same law. Moreover the Condition refers to "without prejudice negotiations" and this reinforces the position because the evidence shows that the concept of "without prejudice" is unknown under the law of Brazil. Whilst

the agreement to mediate, such as it is, might be governed by the law of Brazil, in accordance with the agreed proper law of the contract, the agreement to arbitrate, including any provisions of Condition 11 which are part of that agreement, is subject to the law of the seat of arbitration. If, of course, the mediation condition as a whole is to be read as part of the agreement to arbitrate, then no problem arises at all, but, if that is not the case, I see no problem in separating out the agreement to arbitrate, insofar as there are provisions in Condition 11 relating to it, from the agreement to mediate.

16. The consequence of my finding that English law is the proper law of the agreement to arbitrate means that no issue arises as to its validity, since it was not contended by the Insureds (who at all times made submissions, without prejudice to their stance that the English court had no jurisdiction) that, as a matter of English conflict of laws rules, any provisions of Brazilian law which might render it ineffective (such as Article 4(2) of the Brazilian Arbitration Act and Article 44 of SUSEP Circular no 256) could have extra-territorial effect or have any application so far as the English court is concerned. Such provisions are irrelevant to my decision, in accordance with English law and its conflicts of laws principles, whether or not the Brazilian court might regard such provisions as mandatorily applicable. I do not therefore have to decide whether they do apply to the Policy or what their effect might be under the law of Brazil.

The requirements of Condition 11

17. The Insureds submit that the right to arbitrate in Condition 12 of the policies is conditional upon compliance with the requirements of Condition 11, whether the agreement to arbitrate is governed by English or Brazilian law. As I have already explained, apart from the equivalent of the "contra proferentem" rule in Brazilian law, there are no relevant tenets of construction under that law which differ from those applicable under English law when considering the inter-relationship between the various Conditions of the policies.

18. The fundamental difference between the parties in relation to Condition 11 is that the Insureds submit that Condition 11 contains not only an enforceable obligation to mediate, but a condition precedent to arbitration under Condition 12. They say that the two conditions form part of a multi-tiered dispute resolution procedure and it is necessary to comply with Condition 11 before proceeding to arbitrate under Condition 12. In these circumstances, if the provisions of Condition 11 are not satisfied, there is no right to refer to arbitration and the arbitrators have no jurisdiction to determine the matters referred.

19. Furthermore, it is said that the process envisaged by Condition 11 is a formal process of mediation involving a notice which initiated it, the appointment of a mediator and meetings in the course of it. There are provisions dealing with termination and payment of expenses as well as the effect of exchanges between the parties and the mediator within such a formal process. It is said that there are clear words which demonstrate the mandatory nature of the provisions and the need for a notice initiating mediation which must comply with the requirements described by Lord Steyn in Mannai Investment Co Ltd v Eagle Star Life Insurance Co Ltd [1997] AC 749 at 767-778. The notice must be "sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt… that the right …. [to mediate] is being exercised".

20. The Insurers say that Condition 11 does not give rise to an enforceable obligation, let alone a condition precedent and that, in any event, to "seek to have the Dispute resolved

amicably by mediation" does not involve a requirement to serve a formal notice initiating mediation.

21. It is noteworthy that Condition 11 is, like Condition 7 of the Policy, all- embracing in relation to disputes and differences arising in relation to the Policy. For the purpose of the clause, such disputes and differences are then referred to as a "Dispute" (with a capital "D"). The first sub-paragraph of Condition 11 then provides that "the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation". No reference is here made to mediation being required prior to commencing proceedings in Brazil. On the face of it, the mediation clause contemplates subsequent arbitration rather than litigation, if mediation does not result in agreement. The Insureds submit that the parties have the option either of mediating, followed by arbitration or alternatively of going to the courts of Brazil instead of that two- staged process, but that an initiated mediation is a pre-requisite to reference to arbitration.

22. In Cable & Wireless plc v IBM United Kingdom Ltd, [2002] EWHC 2059 (Comm), Colman J held that an ADR Clause had binding effect and adjourned the court proceedings pending ADR. The clause in question provided that "if the matter is not resolved through negotiation, the parties shall attempt in good faith to resolve the dispute or claim through an alternative dispute resolution [ADR] procedure as recommended to the party by the Centre for Dispute Resolution (CEDR)". The question arose as to whether the reference to ADR was in substance nothing more than an agreement to negotiate and therefore incapable of enforcement in English law in consequence, as decided by the Court of Appeal in Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd [1975] 1WLR 297. The judge placed reliance upon the fact that the parties had not simply agreed to attempt in good faith to negotiate a settlement, but had identified a particular procedure, namely that recommended to the parties by CEDR. CEDR by the time of the contract had published the 6th Edition of its Model Mediation Procedure and Agreement which set out the terms upon which the parties might proceed with the reference to mediation, identified the functions of the mediator, the duties of the participants and the manner in which the mediation would take place, including provisions about confidentiality and costs. The mediator was to be nominated by CEDR, subject to the agreement of the parties or any court order.

23. An undertaking to negotiate, or an agreement to strive to settle a dispute amicably, is too uncertain to be enforced, because the court has insufficient objective criteria to decide whether one or both parties have complied with or breached such a provision. The judge held that the parties in Cable & Wireless had agreed to participate in a procedure to be recommended by CEDR and that their agreement to resort to that body and its recommended procedures involved engagements of sufficient certainty for a court readily to ascertain whether or not there had been compliance. If one party failed to co-operate in the appointment of a mediator in accordance with CEDR's model procedure, there would clearly be an ascertainable breach of the agreement to refer to ADR. The judge recognised that this might appear a somewhat slender basis for distinguishing the type of reference from a mere promise to negotiate but there was a public policy in favour of ADR rather than litigation.

24. At paragraph 32 the judge added that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration, he said, would be whether the obligation to mediate was expressed in unqualified mandatory terms or

whether, as was the case with the standard form of ADR orders in court at that time, the duty to mediate was expressed in qualified terms such as *"shall take such serious steps as they may be advised"*. He said that the wording of each reference had to be examined with those considerations in mind, but where there was an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.

25. In Holloway v Chancery Mead [2007] EWHC 2495, Ramsey J was faced with a clause which made "a determination by an NHBC investigator … a condition precedent to any right to refer the matter to arbitration". Although he decided that the provision was inapplicable to the claim with which he had to deal, he went on, obiter, to determine whether a binding obligation to obtain such a determination existed, if the clause applied. He referred to the decision of Einstein J in the Supreme Court of New South Wales in Aiton Australia Pty Ltd v Transfield Pty Ltd [1999] NSWSC996 where that judge held that an obligation to negotiate in good faith could be sufficiently certain to give rise to a binding obligation if (inter alia) the parties undertook to subject themselves to a process of negotiation or mediation which was sufficiently precisely defined by the agreement to be certain and enforceable. An ADR clause would be sufficiently certain if it was in Scott v Avery form, and completion of a mediation could be a condition precedent to court proceedings, if the process established by the clause was certain. There had, however, to be no stage in the process where agreement was needed on some course of action before the process could proceed, as this would amount to an agreement to agree. Additionally, the administrative processes for selecting a mediator and determining the mediator's remuneration had to be included in the clause and in the event that the parties could not agree, a mechanism for selecting a mediator by a third party had to be included. The clause had to set out in detail all the process or at least the model of mediation to be followed.

26. Ramsey J derived three requirements for an ADR clause to be binding. First, that the process had to be sufficiently certain, in that there should not be the need for an agreement at any stage before matters could proceed. Second, the administrative processes for selecting a party to resolve the dispute and to pay that person had to be defined. Third, the process or at least a sufficient model of the process should be set out so that the detail of the process is sufficiently certain.

27. I am content to follow the principles set out by Colman J and Ramsey J in these two decisions. In my judgment, there are three major difficulties which stand in the way of the submission that Condition 11 is an enforceable obligation. First, there is no unequivocal commitment to engage in mediation let alone a particular procedure, albeit that various provisions are made about a mediation. The parties agree that "they will seek to have the Dispute resolved amicably by mediation" but do not bind themselves to do so in clear terms. They only agree in general terms to attempt to resolve differences in mediation. Second, there is no agreement to enter into any clear mediation process, whether based on a model put in place by an ADR organisation or otherwise. Third, there is no provision in Condition 11 for selection of the mediator. There are therefore stages in the process where agreement is needed on a course of action before a mediation can proceed. The parties would need to agree upon the identity of the mediator, the location of the mediation and the process in which the parties had to engage. In this connection it is noteworthy that, when insurers suggested mediation on 7th October, they enclosed a draft mediation agreement and a document setting out an explanation as to how the

process might work in Brazil. Implicit within that suggestion was the recognition that Condition 11 was not enough to establish what the parties had to do and that there was a need for a further agreement.

28. In these circumstances, I consider that Condition 11 does not give rise to a binding obligation to mediate and the court would not be able to determine whether or not a party had complied with the "obligations" allegedly imposed. If, for example, the parties were unable to reach agreement on a mediator or on the form of mediation and it was suggested by one party that the other had not sought to have the Dispute resolved by mediation or had failed to agree with the other on the identity of a suitable mediator, how would the court determine which party was in breach? If there is no binding obligation, there cannot be a condition precedent to arbitration that the parties should enter into a mediation.

29. The element of uncertainty about the mediation is actually illustrated by the facts of this case which are in dispute, as revealed by the statements of Mr Carstens, Mr Carelli, Mr Tzirulnik and Mr Hirst. The incidents giving rise to the claim took place in March 2011 and, following notification that month, the Insurers appointed loss adjustors to investigate the cause and extent of the loss. Prior to 28th September, the Insurers had not taken a formal position in relation to coverage or quantum. At a meeting on 28th September in Rio, attended by representatives of the Insurers, reinsurers, brokers and the second defendants, the parties, on the evidence of both sides, achieved little. In an informal conversation that evening over a drink, representatives of the Insurers/reinsurers raised the subject of mediation with representatives of the major shareholder of the second defendant. The Insurers' evidence is that there was extensive explanation and discussion of mediation on that occasion and that Mr Carstens said he would take the suggestion of mediation back to his employer and the Insureds. On his evidence, he simply said that he would pass the offer of mediation on to the Insureds, which he did.

30. On 29th September, the Insurers/reinsurers sent Mr Carstens an email referring to the meeting and saying that there was a shared desire to resolve the outstanding issues between the parties and that "*mediation appears to be the best vehicle to reach a satisfactory conclusion for all involved*". The email went on to say that "*you expressed an interest but were clear that you would obviously have to check with all the parties involved*". The email concluded by saying that a response was awaited but that the Insurers were happy to send a paper on the mechanics of mediation and a draft mediation agreement for review. The evidence of Mr Carstens and Mr Carelli (of the second defendant) is that the suggestion of mediation was passed on to the latter.

31. According to the Insureds' evidence, they did not consider that there was a dispute to mediate until the Insurers had explained their position as to liability and quantum in response to the Insureds' claims. On 7 October the second defendant sent a letter enclosing a Schedule of Loss and stating that the thirty day period provided under Brazilian law for the Insurers to respond ran from that date. Also on 7th October the Reinsurers emailed Mr Carstens, again expressing their understanding that they had to obtain agreement from the other parties in relation to the mediation proposal discussed on 28th September and enclosing the draft mediation agreement and the explanation as to how mediation worked in Brazil (to which I have already referred earlier in this judgment).

32. On 13th October, Mr Carstens responded to the emails of the 29th and 7th October stating that the Insureds were awaiting the response to their letter of claim of 7th October and that it might be better to talk about mediation a little later in the process.

33. At some time in October there was a telephone call between the brokers and the Insurers/Reinsurers in which the brokers were asking whether the suggested mediation would relate to liability as well as quantum, from which it appeared that the Insureds were more reluctant to accept any mediation if it was intended to encompass the question of liability as opposed to quantum only. The Insurers maintained on 20th October that the thirty day period could not yet begin to run because they had not received adequate supporting documentation in relation to the loss claimed.

34. According to the evidence of the Insureds, around this time, Mr Carelli told Mr Carstens to get the brokers to ask for a written proposal of mediation from the Insurers, as borne out by an email to the brokers dated the 27th October. The Insureds were expressing frustration at the lack of responsiveness on reinsurers' part in relation to coverage and said that if they wanted mediation they would have to ask for it in writing, following which they would analyse the position. Furthermore, the Insureds were now stating that the loss adjusters had earlier admitted liability under the policy on behalf of the Insurers, which the Insurers denied. By a letter dated 17th November, Insurers denied liability under the policy.

35. On 22nd November, a meeting took place which is the subject of disputed evidence from both sides. The Insurers maintain that Mr Tzirulnik, who was the lawyer for the third defendant at the time, but not, on his evidence, either of the other two defendants, following a telephone conversation with his clients in relation to the question of mediation, said that they would not be prepared to mediate the claim until such time as the Insurers had put forward their position on coverage (the letter of 17th November denying cover was not, it is said, received until 29th November). The Insurers concluded that, in the absence of an admission of liability there would be no prospect of any mediation taking place. Mr Tzirulnik denies that he told Insurers that mediation would not be an acceptable means of dispute resolution unless the Insurers admitted liability. On his evidence, he said that he needed to take instructions but that he would be surprised if his clients were prepared to agree to mediation on the basis of a threat not to accept liability, though his clients might be willing to agree to a mediation or a structured negotiation of some sort as to the amount which the Insurers should pay in respect of his clients' losses. His understanding was that Insurers had been asked to set out their position in relation to the Insureds' claims in writing but had not yet received any statement of the Insurers' position.

36. On 29th November the Insurers gave notice of arbitration. This was, according to the Insureds, the same day that they received the notice of denial of cover from the Insurers.

37. It was the Insurers' case that the Insureds (all three defendants) had "failed or refused to participate in the mediation" within the meaning of the fourth subparagraph of Condition 11 of the policy and that there had been a failure "to agree as to the amount to be paid under this policy through mediation", within the meaning of Condition 12. The Insureds maintain that they were willing to mediate and had sought clarification of the Insurers' proposals by asking for a request in writing. They said that they wished to know what Insurers' position was in regard to liability before taking part in any such mediation. In such circumstances it would be exceedingly difficult to say that the Insureds had refused

to participate in a mediation and I do not find that they did. Nonetheless, the uncertainty surrounding the parties' "obligations" and their "fulfilment", in the context of mediation, is well illustrated by the difficulty in evaluating the stance taken by the parties in relation to the Insurers' suggestion.

The Inter-relationship of Conditions 11 and 12.

38. If Condition 12 is read in isolation, the Insureds and the Insurers had, as at the 29 November, not agreed on any amount to be paid under the policy through mediation, but the terms of Conditions 11 and 12 have to be read together as part of a multi-tiered dispute resolution procedure. The Insureds submitted that there could be no failure within the meaning of Condition 11 or 12 unless a mediation had actually been commenced, which undoubtedly had not happened here. Whilst I have found that Condition 11 does not give rise to enforceable obligations and do not find that the Insureds failed or refused to participate in a mediation, the question remains as to how Conditions 7, 11 and 12 of the policy inter-relate.

39. Condition 11 plainly envisages that, prior to a reference to arbitration, the parties would attempt mediation. That much is plain from the first sub paragraph of Condition 11, even though it gives rise to no enforceable obligation. A formal process was envisaged with an appointed mediator and the possibility of termination of the process, for any reason, after the first meeting or discussion had taken place in the mediation, with written notice given to the appointed mediator and the other party, as provided by the third sub-clause of Condition 11.

40. The fourth subparagraph of Condition 11 provided that in the circumstances there set out, either party "may refer the Dispute to arbitration". This is a permissive right, not an obligation to refer. The circumstances in which that right could be exercised are said to be a failure to resolve the Dispute within ninety days of service of the notice initiating mediation, a failure or refusal by either party to participate in the mediation, or the termination of the mediation under the third subparagraph of the Condition. What appears to be envisaged is a mediation which has begun, at least in the sense of one party initiating or "requiring" it, which then comes to an end, before arbitration is commenced. As the Insureds say, it is significant that the reference is to "the mediation" in the fourth subparagraph and not to "a mediation", in the context of failing or refusing to participate. But, although a suggestion of mediation or an offer of mediation does not initiate a mediation for this purpose, a "notice initiating mediation" or a notice requiring a party to mediate (which must be what is meant) could not, for the reasons I have already given impose upon the other party an obligation to mediate, because of the uncertainty about what the obligation might involve. Condition 12 then falls to be read in that light, however infelicitous the wording may be in that context.

41. Condition 12 then, although it has to be read in the light of Condition 11, which envisages a prior mediation taking place, can be read as giving rise to an agreement to arbitrate under ARIAS arbitration rules whenever there has been a failure to settle disputes in mediation (subject to the argument about the scope of matters susceptible to arbitration, with which I deal later in this judgment). By 29th November, there had been suggestions and offers of mediation by the Insurers but no take-up by the Insureds for what seemed to them perfectly sensible reasons. There had been no mediation and there had been no agreement as to the amount to be paid through mediation and as Condition 11 of the

policy did not give rise to a binding obligation nor a condition precedent, Condition 12 gave rise to the right to arbitrate.

The Scope of the Arbitration

42. The Insureds submit that the current arbitration proceedings, initiated by the Insurers, fall outside the scope of the arbitration clause, since Condition 12 is limited to disputes about quantum and does not extend to proceedings for a declaration of non-liability or for a declaration that a "material alteration" has occurred within the meaning of Condition 3 of the policy. In these circumstances no tribunal appointed would have jurisdiction to hear the arbitration claim.

43. The Insureds draw attention to the reference in Condition 12 to a failure to agree "as to the amount to be paid under this policy" and the succeeding reference to "such dispute" then being referred to arbitration under the ARIAS rules. Attention is drawn then to the different and wider wording used in Condition 7 making "any disputes arising out of or in connection with this policy" subject to the exclusive jurisdiction of the Brazilian courts, and to the terms of Condition 11, which provide for mediation of "any dispute or difference of whatsoever nature arising out of or in connection with the policy". It is submitted that the words "such dispute" (with a small "d") in Condition 12 are to be distinguished from the defined term "Dispute" in Condition 11. Moreover reference is made to the recommended ARIAS arbitration clause which provides that "all disputes and differences arising under or in connection with this contract" should be referred to arbitration. The words "amount to be paid" in Condition 12 must, it is said, be given meaning and weight because they were inserted for a purpose. Moreover there may be good commercial reasons why the parties wished for liability issues to be decided in the Brazilian courts but for quantum issues to be susceptible of decision in arbitration.

44. There is however one insuperable difficulty about these arguments which is that, if the circumstances referred to in the fourth subparagraph of Condition 11 apply, on its express terms, a party is entitled to refer a "Dispute" to arbitration and any such "Dispute" includes, by virtue of the first subparagraph of Condition 11, "any dispute or difference of whatsoever nature" arising out of or in connection with the policy, including questions relating to its existence, validity or termination. If a party is entitled to refer any of these matters to arbitration under the fourth subparagraph, in the circumstances there referred to, it would be nonsensical for a more limited type of dispute only to be referable to arbitration in the circumstances referred to in Condition 12. As a matter of language, a failure to agree "as to the amount to be paid under this policy" includes a dispute about whether any sum is due under the policy at all, and thus includes matters of liability and coverage.

45. Additionally, although it is possible for parties to agree that quantum should be dealt with in one jurisdiction and liability in another, the two are not always clearly distinguishable and all the authorities reveal a reluctance on the part of any court to decide that certain types of dispute are to be dealt with in one forum and others in another, because the parties are most unlikely to have intended that, since it would be a recipe for confusion. Moreover, the qualifications required of the arbitrators in the second subparagraph of Condition 12 suggest that they are peculiarly suited to deal with questions of coverage and liability rather than quantum only.

46. I therefore conclude that there has been a failure to agree as to the amount to be paid under the policy through mediation and that the words "such dispute" in Condition 12 refer to any "Dispute" of the kind set out in Condition 11, without restriction, however infelicitous the wording used. On that basis, there is no difficulty in Insurers seeking a declaration of non-liability in the arbitration, nor referring an issue about "material alteration" to arbitration, assuming that there are matters that the arbitrators can decide in relation to that, as a matter of Brazilian law. Even on a narrow view of the words "such dispute", a declaration of non-liability would amount to a dispute "as to the amount to be paid under the policy" since the Insurers are saying that none is due at all.

Reconciliation of Condition 7 with Conditions 11 and 12.

47. I was referred to ACE Ltd v CMS Energy Corporation [2009] 1LRIR 414 and in particular to paragraphs 68-86 where Christopher Clarke J discussed mandatory arbitration and exclusive English jurisdiction clauses and the difficulty in reconciling the two and giving meaning to both. Whereas Condition 11 of the policy appears permissive in allowing a party to refer a dispute to arbitration in the circumstances referred to, Condition 12 provides that such disputes "shall" be referred to arbitration. Whilst the Insurers argued that the contract gives rise to a permissive right to refer to arbitration, and that the only mandatory element requires that, if that permissive right is exercised, the arbitration must take place under ARIAS rules, for the purposes of this argument, I treat the arbitration clause as being mandatory. The question arises as to whether there is such inconsistency between the exclusive Brazilian jurisdiction clause on the one hand, and the arbitration clause on the other, that they cannot be reconciled. The courts have struggled with such matters in cases such as Paul Smith v H & S International Holding Inc., [1991] 2LLR 127 and SIPC Ltd v Coral Oil Co. Ltd, [1999] 1LLR 72, as well as the ACE decision. The cases illustrate the principle that the contract must be read as a whole and that every effort should be made to give effect to all of its clauses. A clause should not be rejected unless it is manifestly inconsistent with, or repugnant to, the rest of the agreement. It is only if such limited reconciliation cannot successfully be done that the court will treat a clause that has been specifically agreed as prevailing over an incorporated standard term.

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 comments of Christopher Clarke J.

49. In the present case, on the construction that I have held, all disputes or differences can be and must be referred to arbitration under the terms of Condition 12, but if that is so, what is left of the exclusive jurisdiction of the courts of Brazil under Condition 7? The answer is very little in practice - much the same as found by Christopher Clarke J in paragraph 82 of the ACE decision. It enables the parties to found jurisdiction in a court in Brazil to declare the arbitrable 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. It specifically operates to prevent the parties proceeding in another court on the merits. Use of the

Condition 7 rights for these purposes does not detract from the arbitration clause but gives them meaning. Furthermore, enforcement in Brazil against Brazilian parties is self-evidently a realistic possibility.

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 the reasons already given, is a most unlikely construction of the parties' intentions, as all the authorities indicate.

51. Of course if the arbitration clause is permissive only, giving a party the option of referring the matter to arbitration, reconciliation of that with the exclusive jurisdiction clause is easier but, once one of the parties has elected to refer the dispute to arbitration, the other party is contractually bound to accept the reference to the exclusion of any other form of dispute resolution, as a run of authorities including the Amazona [1989] 2 LLR 130 at 135-136 (CA) show.

Standard and Onus of Proof

52. I was addressed by the Insureds on the need to proceed on the basis that it was for the Insurers to show the existence of the arbitration agreement to "a high degree of probability" to justify an interim injunction. I am aware too of the need for caution in an area where a decision of this kind affects the jurisdiction of a foreign court. I do not think that here it makes any difference what the burden is, but I am satisfied that the Insurers have discharged the burden of proof, not only for an interim injunction, but for final resolution of the matter for the purposes of a permanent injunction.

53. Once the existence of the arbitration agreement is shown, the burden is then on the Insureds to show strong reason why the arbitration agreement should not be upheld or the parties kept to their bargain – see the Angelic Grace [1995] 1LLR 87 (CA) and the succeeding cases dealing with anti-suit injunctions upholding arbitration agreements.

54. The only reasons put forward by the Insureds for not continuing the anti-suit injunction were the existence of the decision of a single judge in the Appeal Court in Brazil that the defendants were not necessarily bound by the arbitration agreement, a conclusion based upon Brazilian law, not English law. As set out below, the Brazilian judge made an interim order only until such time as the matter could be fully considered by the Brazilian court. It is said that it would be an affront to comity for this decision not to be respected but since that decision was reached on 16th December following an ex parte refusal by a first instance judge on 12th December 2011 and the Insurers obtained an interim anti-suit injunction from Stadlen J on 13th December, I cannot see that comity requires this court to refrain from continuing an injunction which was in existence before the Brazilian court made its decision, which must be treated by this court as incorrect as a matter of English law and English conflicts of law principles, if I am right in this judgment.

55. Additionally, there is said to be a risk that the appeal decision by the single judge, although subject to confirmation by a full court at some stage and potentially the subject of an application by the Insurers for reconsideration and an appeal against any full court judgment at a later stage, would be considered a "preparatory proceeding of the court"

which would require the Insureds to commence their substantive claim in Brazil within thirty days of the single judge's decision on appeal. Any thirty day period may not expire as soon as 13th January because of a number of days which do not count over Christmas. The parties were prepared to reach agreement in any event so that no party's position was prejudiced by any delay by me in giving judgment.

56. There is therefore in my judgment no strong reason against the continuation of an anti-suit injunction and, for reasons I have already given, this court should take steps to uphold the arbitration agreement between the parties. There is no argument about the statutory jurisdiction under section 44(2)(e) of the 1996 Arbitration Act and section 37 of the Senior Courts Act 1981. The case is one of urgency within the meaning of section 44(3) of the 1996 Act and the requirements of section 44(5) are satisfied because the arbitration tribunal was and is presently unable to act as it has not yet been fully constituted.

Conclusion

57. Whilst I am therefore very conscious of the decision of the single judge of the Court of Appeal in Brazil, who on 16th December granted an interim order to the Insureds to stop the Insurers establishing or resorting to arbitration proceedings in London (at least on the Insured's view of the effect of the order), until the Insureds' right to refuse to accede to that kind of dispute resolution was considered by the court, I cannot allow such considerations to prevent the Insurers from enforcing their right to arbitrate in accordance with English law and its own conflict of laws principles.

58. The anti-suit injunction will therefore continue without, as it seems to me, any qualifications as to its scope, though I will listen to any further submissions which the parties wish to make about the exact form of it. If the parties can agree as to its form, so much the better.

59. Equally, in the absence of any special features of which I have not been informed, about which the parties can address me, costs should follow the event.