Neutral Citation Number: [2016] EWHC 1243 (QB)

Claim No: LM 2015-000209

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
LONDON MERCANTILE COURT

Date: 27 May 2016

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

R + V VERSICHERUNG AG

Claimant

- and -

ROBERTSON AND CO. SA

Defendant

Charles Dougherty QC and Timothy Killen (instructed by Kennedys Law LLP, Solicitors) for the Claimant
Andrew Legg (instructed by Steptoe & Johnson, Solicitors) for the Defendant

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.

Hearing date: 16 May 2016

INTRODUCTION

1. In this application, the Defendant, Robertson and Co. SA, a Swiss company ("Robertson") seeks to set aside service upon it of proceedings brought by the Claimant, R+V Versicherung AG ("R&V"), a German company, for want of jurisdiction. R&V is a reinsurer which faced claims arising out of the earthquakes in New Zealand which occurred between September 2010 and June 2011. In early 2013 it engaged Robertson to provide loss-adjusting services in a joint instruction with another reinsurer, AIG Insurance New Zealand Ltd ("AIG") which was by then already instructing Robertson.

2. R&V contends that it contracted with Robertson on the basis of terms contained in a Master Agreement ("the Master Agreement") made between Robertson and another AIG company called AIG Europe (UK) Ltd ("AIG Europe"). The Master Agreement provided in Clause 15.4 thereof for English law and the exclusive jurisdiction of the English Courts.

3. Accordingly, when a dispute arose between R&V and Robertson in relation to the performance of its loss-adjusting services, R&V brought proceedings against Robertson here. Although it certified on the Claim Form, issued 30 December 2015, that permission was not needed because of the operation of Article 25 of the "Recast" Brussels Regulation, it is common ground that the governing provision is in fact Article 23 of the Lugano Convention, the operation of which is specifically retained for parties to that Convention by Article 73 of the Regulation. In the event, there was no objection to my permitting R&V to make reference to Article 23 (which is in materially the same terms as Article 25) by way of a formal amendment to the Claim Form, since there is no conceivable prejudice to Robertson in so doing and there is no other reason not to permit that amendment so as to cure the procedural irregularity.

4. Robertson denies that it contracted with R&V as alleged and thus denies its case on the jurisdiction of the English Court.

THE ISSUE

5. In fact, on 12 November 2015, and unbeknown to R&V at the time, Robertson had commenced proceedings against it in the Swiss court at the Cantonal Financial Division of Vaud, claiming unpaid fees ("the Swiss Claim") and on that basis, also alleged *lis alibi pendens* in respect of the claim made here. However, following the conclusion of submissions on the exclusive jurisdiction clause, Robertson sensibly dropped the *lis alibi* point on the basis that even if Robertson was successful here, the Swiss court would still have to decide the issue of exclusive jurisdiction and that being so, it was more convenient and proportionate to let this Court deal with that issue in any event. Accordingly, the only question before me is whether R&V has a good arguable case (in the sense that it has "the better of the argument") that Article 23 applies.

THE LAW

6. Article 23 (1) so far as material provides as follows:

> "If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or…"

7. There is a significant body of EC and domestic case-law on this particular provision from which I derive the following general principles:

(1) The sole purpose for requiring the agreement as to jurisdiction to be in, or evidenced in, writing is so that there is clear proof of that agreement; see paragraph 5 of the judgment of the ECJ in *Iveco v Van Hool* [1986] ECR 1851;

(2) The agreement, or consensus, itself must be "clearly and precisely" demonstrated - see paragraph 7 of the decision of the ECJ in *Salotti v Ruwa* [1976] ECR 1832;

(3) The existence or otherwise of such an agreement is to be regarded as an independent concept of EU law - see the decision of the ECJ in *Powell Duffryn v Petereit* [1992] ECJ 1-1745 at paragraphs 13-14, and paragraph 54 of the judgment of Aikens LJ in *Aeroflot v Berezovsky* [2013] EWCA 784;

(4) Accordingly, the fact that as a matter of domestic law, one or other parties argue that the agreement containing the jurisdiction clause is itself void or invalid is irrelevant, save perhaps where it could be said that as a result, the transaction was entered into by the other party in bad faith - see paragraphs 55-63 of the judgment of Aikens LJ in *Aeroflot*. Otherwise, a doctrine similar to that of "separability" in relation to arbitration agreements applies in this context also - see paragraph 24 of the judgment of Longmore LJ in *Deutsche Bank v Asia Pacific* [2008] 2 Lloyds Rep 619, referring back to the decision of the ECJ in *Benincasa v Dentalkit* [1997] ECR 1-3767 at paragraphs 23-32;

(5) Moreover it is common ground that as with English law, the existence or otherwise of the requisite agreement must be decided objectively regardless of what either or both parties thought they were agreeing to;

(6) The writing which evidences the agreement may often be, but need not be, in a single document; so, for example, in *7E v Vertex* [2007] 1 WLR 2175, the Court of Appeal held that the writing consisted of the seller's quotation and the buyer's purchase order which was held to have accepted it. See in particular, paragraphs 34-36 of the judgment of Sir Anthony Clarke MR;

(7) Finally, the writing relied upon need not emanate from the party now sought to be bound by the jurisdiction clause; so if that party received from the other party a written confirmation of the oral agreement previously made, and failed to object to that confirmation within a reasonable time, this could be sufficient "evidence in writing" of the agreement in question: see *Berghoefer v ASA SA* [1985] ECR 2699 at paragraphs 14-16.

8. It might be thought from all of this that if at the time of the agreement, while there was an express reference to the relevant terms, the other party had not received a copy thereof, the required agreement evidenced in writing could not be made out. But in *Credit Suisse v Societe Generale d'Enterprises* 4th July 1996, the Court of Appeal held that actual provision of a copy of the terms was not required where the party concerned had clearly accepted them by reference – see pages 6 and 7 of the judgment.

9. Second, there is a question as to whether there is any rule of law, or presumption, to the effect that if the terms to be incorporated (which would include the jurisdiction clause) are something other than a set of standard terms used by the other party for the type of contract in question, mere incorporation by reference to those terms or to the contract as a whole, is insufficient. The logic behind such a distinction is that unless the jurisdiction clause relied upon is part of such a set of standard terms, it does not follow that all the terms of some other contract will necessarily be apposite for the contract in question; in particular, it would not follow that the jurisdiction clause was necessary or appropriate.

10. In *The Ethniki* [2000] 2 ALL ER 566, the question was whether a reinsurance contract which contained the express words "Conditions: wording as original" meant that the parties were agreeing to all of the terms of the underlying original contract of insurance, including the jurisdiction clause, or not. The Court of Appeal said that they did not because the purpose of the reference back to "original" was simply to define the risk insured, to which the jurisdiction clause was irrelevant and moreover the original policy included some terms which were wholly inappropriate to the dispute between a reinsurer and insurer: see the judgment of Evans LJ at paragraph 40. In this context, an analogy was made with cases where a bill of lading had purported to incorporate all of the clauses of a charter party which itself included an arbitration clause.

11. Moore-Bick J (as he then was) reached a similar view in *AIG Europe v QBE International* [2001] 2 Lloyds 268. This was another reinsurance case where the reinsurance contract stated "all terms clauses and conditions as original in all respects including settlements". Again, the point was that many terms of the original contract of insurance were simply not appropriate. He contrasted the case of "standard trading terms" where most if not all of them were likely to be directly relevant. But in making that observation, I do not believe that he was seeking to lay down a rule or presumption as to what types of collections of terms could or could not be the subject of an incorporation by reference into an agreement for the purposes of Article 23. Standard terms for the type of contract in question are obviously a paradigm example but they are not necessarily the only one. As Moore-Bick J himself put it at paragraph 26:

> "in each case the court must construe the language of the contract in the context of its commercial background and ask itself whether a consensus on the subject matter of the jurisdiction clauses is clearly and precisely demonstrated"

12. That, in my judgment, is clearly a matter of fact and analysis in each case.

13. In *AEL v Socofi SA* [2010] 2 Lloyds Rep. 181, Christopher Clarke J (as he then was) took what I believe to be the same approach. He said the following at paragraphs 30 and 31 of his judgment:

> 30. Where the terms of a wholly separate contract are incorporated, different considerations apply. A bill of lading which incorporates all the conditions of a specified charterparty will not usually incorporate a charterparty arbitration clause, in the absence of express wording to that effect. By analogy with the incorporation of arbitration clauses into bills of lading from charterparties, the law adopts "a fairly strict approach" — *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] Lloyd's Rep IR 127, page 141 at para 48 (Aikens J), affirmed [2006] 2 Lloyd's Rep 475 — to the incorporation of jurisdiction clauses from an insurance (or reinsurance) contract into another reinsurance contract. Only those terms directly germane to the parties' agreement are carried over. The presumption is that these usually exclude a jurisdiction clause. In that case a provision in the excess reinsurance slip that it was "to follow all terms and conditions of the primary

> policy together with riders and amendments thereto covering the identical subject matter and risk" was held to be inapt to incorporate a Mauritian jurisdiction clause in the primary reinsurance.
>
> 31. It is, however, necessary, always to remember that the ultimate issue is what objectively did the parties intend: see *Dornoch* at first instance, para 48. In the Court of Appeal in that case Tuckey LJ said this [2006] 2 Lloyd's Rep 475, page 481:
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> > 27. There are many cases in which the courts have to decide whether terms from one contract have been incorporated in another. A number of these cases concern the incorporation of terms from a direct insurance into a reinsurance. But no hard and fast rules emerge from these cases as one would expect. The question in each case is one of construction: did the parties to the contract in which the general words of incorporation appear intend that their contract should include the particular term from the other contract referred to? It may be.. that the courts will answer this question in favour of incorporation more readily in some categories of cases than in others, but that is no more than saying that the contractual context and the words used are all important."

14. Once more, the Court in *AEL* was not seeking to lay down a rule or presumption. While Christopher Clarke J did refer to a presumption this was in the particular context of the underlying charterparty or contract of insurance, regarded as "wholly different contracts" to those embodied in a bill of lading or reinsurance contracts. For reasons that will appear below it cannot possibly be said that the Master Agreement here was a "wholly different contract".

THE EVIDENCE

15. For the purpose of this application, there were witness statements from the following on behalf of Robertson: Struan Robertson a director of and shareholder in that company, Euan Robertson, a loss adjuster employed by it, John Sabalis, a claims manager employed by AIG and Mark Handy, a Global Knowledge and Technical Officer for Property and Energy Claims for AIG Claims Inc. For R&V there were witness statements from Thomas Ullrich, head of the Legal and Claims Support unit of its reinsurance division, Christian Blöcher, a manager at that unit, and Michael Baier, a partner in Aurigon Advisors AG, an insurance and reinsurance consultancy firm which was assisting R&V at the time.

16. This case is more complicated than some, because most of the relevant cases were where the agreement or incorporation by reference clearly embodied a set of terms, and the only question was whether such agreement extended to all those terms, including the jurisdiction clause, or not. Here, the parties are in serious dispute as to whether there was an agreement to be bound by the Master Agreement at all. Indeed, Robertson's position in early solicitors' correspondence and to some extent still in its witness statements, was that it had no agreement with R&V of any kind and the only agreement made by R&V was with AIG. That was clearly unsustainable. Indeed, the Conciliation Petition issued by Robertson in the Swiss Claim on the question of Applicable Law states that there was a "mandate contract" between Robertson and R&V whereby the latter benefited from the former's loss adjustment services, in return for agreeing to pay for those services and that the parties were "clearly bound by an agency contract". In the course of the hearing Robertson did not seriously contend that it had no agreement with R&V and I proceed on the basis that it did.

17. Equally, Robertson's evidence (including that from AIG) suggests now that at the material time, the contract which AIG undeniably had with Robertson was not based on the Master Agreement either. I deal with this suggestion below but I would accept that if there is no good arguable case that in truth Robertson and AIG were proceeding on the basis of the

Master Agreement in respect of this instruction, it would be much more difficult for R&V to show that it did so, nonetheless.

18. Where the witness statements set out what the parties say was or was not agreed orally at the relevant meeting (see below), that evidence is of course admissible although their assertions can and should be tested by reference to what they said about these matters in the contemporaneous documents. But their evidence as to what they thought they were agreeing to cannot be taken into account, nor should the passages on both side's witness statements which in reality are not more than argument.

19. While this case therefore has these complications, it does not mean that it is impossible to establish a good arguable case that Article 23 applies.

THE BACKGROUND FACTS

20. It is not in dispute that Robertson acted as a loss-adjuster for various AIG companies for many years. The Master Agreement was in fact a written agreement made between Robertson and AIG Europe only, and for the period 30 May 2007 to 30 May 2010. It consisted of AIG's standard terms, or at least a set of terms proffered by AIG, as opposed to Robertson's standard terms and indeed on the evidence, it seems that Robertson did not necessarily operate with a set of standard terms at all.

21. When R&V sought to join AIG's instruction of Robertson, that engagement was already underway. The relevant insurer of Christchurch City Council, in respect of the losses sustained in the earthquakes, was New Zealand's Local Government Corporation Limited ("Civic") and AIG was a lead quota share reinsurer of 32.5%. R&V had a 40% interest in the balance of 67.5% which remained of the reinsurance. AIG had instructed Robertson on this particular engagement pursuant to an email from Mr Sabalis dated 1 October 2012.

22. It made commercial sense for R&V to join in the instruction of Robertson by AIG, because although their individual contractual responsibilities to Civic differed in some respects, they made fundamentally common cause in terms of investigating the losses claimed which would extend to the instruction, through Robertson, of a variety of experts and subcontractors. It would follow, from an objective commercial point of view, that if AIG and Robertson contracted according to a particular set of terms, if R&V was now to participate in that instruction, it would make sense for it to do so according to the same terms to avoid any conflicts which might otherwise arise, unless of course there were good reasons not to do so. Mr Ullrich's evidence was that R&V would need terms set out in a document and while it could in theory have done its own, there was no point here when the instruction was already proceeding according to its intended partner's terms.

23. There is something of a dispute as to whether R&V needed at this point to join up with AIG because it had less rights of access to the insured assets and to documents but in my judgment the motivation for joining AIG is not important. What is important is the fact of that "joinder".

24. Although the Master Agreement was (a) made with AIG Europe and not AIG, and (b) it had, strictly, expired in 2010, none of that is relevant because all of the contemporaneous evidence shows that Robertson and AIG regarded themselves as working to the terms of that

agreement in respect of this instruction. If it were otherwise neither Robertson, nor AIG through Mr Sabalis, would have referred to that agreement as governing the engagement of Robertson by AIG, which the documents show they manifestly did. Indeed, at the time of the meeting referred to below, R&V was not even aware of the expired term of the Master Agreement or that it was not in fact with AIG but AIG Europe. I reach that view despite the assertions by Mr Sabalis and Mr Handy in their witness statements that this is not so. For present purposes there is at least a good arguable case that they are wrong as will be seen from the documents.

25. By early January 2013 R&V, assisted by Mr Baier, had approached Robertson to see if they could join in AIG's loss-adjustment instruction to it. This led to a meeting being arranged on 4th and 5 March 2013 in Singapore. The agenda for that meeting, prepared by Mr Struan Robertson, did not refer to any particular terms of engagement as such but it did mention the sharing of fees and expenses and the budget for the work.

WHAT WAS AGREED AT THE MEETING?

26. I have before me 3 separate notes of the meetings. One was prepared by Mr Euan Robertson, the second by Mr Blöcher and the third by Mr Baier. There is a degree of common ground in the witness statements to the extent that on any view, Mr Ullrich wanted to check that disbursements passed over to R&V by Robertson would not be excessive or unnecessary and otherwise to see Robertson's charging structure. Exhibit 3 to the Master Agreement, not produced at the meeting but made available later, set out the service to be provided which was loss adjusting services, and then set out in a box the hourly charge-out rate although this was in fact out of date, and finally stated that Robertson would not charge for more than 12 hours work per day unless otherwise agreed and that Robertson could invoice the customer for "all reasonably and properly incurred disbursements".

27. Robertson's essential case is that R&V at the meeting wanted some reassurance that excessive costs could not be claimed and to this end Mr Struan Robertson offered to send Mr Ullrich a copy of the Master Agreement and also said that any costs charged would have to be reasonable, but that the Master Agreement was referred to and later tendered, for no other purpose. It was certainly not agreed that it would form the basis of Robertson's engagement as far as R&V was concerned. By way of contrast R&V's evidence in the witness statements is that this is exactly what it was, and that it was necessary to have something like this document for Mr Ullrich to be able to show his superiors prior to the commencement of the engagement which would involve substantial cost. Mr Ullrich accepted that the question of costs and the reasonableness thereof, was of particular concern to him but that did not explain entirely the reason why the Master Agreement was referred to and later produced.

28. I now turn to the documents. I quote the relevant extracts, and then discuss them below.

(1) Mr Euan Robertson's note included the following:

"TU-relative proportions… 45/55… Start date… 1st of March 2013

JS issue invoices once a quarter

TU… Would like copy of AIG contract to R&V and will join instruction…

Set up of fee fund for subcontractors… Invoices quarterly from R & Co. .. Each quarter will need budget for quarter w/ plan of hours.. As bills will have to go to management for approval.. TU will email JS confirming participation w/ AIG on same terms w/ AIG's master agreement… E.g. want to avoid problems w/ "car-rental allowances"

SR: expenses at cost but reasonable"

(2) Mr Blöcher appears to have taken two sets of notes.

(a) His notes beginning at p196 of the bundle include the following:

"RS… Quarterly is okay. But question is disbursements for subcontractors.
TU do you have an agreement in place between AIG and Robertson
RS yes it's a big doc
TU if we could have that then we can agree that R&V participated in the costs 45/55 by email exchange
SR: okay;

(b) His notes beginning at page 215 include the following:

"TU: SR please send me the AIG Robertson agreement-I will state per email that R&V will co-join this agreement on a 45/55 basis. I will send you a confirmation… I would like you to send me a "plan/budget" for the quarterly accounts. Stating what R & Co. will precisely bill and what the subcontractors will bill. I need this to show it to the board for approval and so we can make the fund payment.

SR: yes I will send that in a letter…

SR: In the AIG-Robertson agreement there is a confidentiality clause. But since AIG is sitting here I guess they will be okay with the passing it on to you

JS: yes we are."

I should add that Mr Struan Robertson in his evidence tried to make something of the fact that shortly after this section there appear in the notes the words "For Us..The Master Agreement" crossed out, suggesting that it was specifically decided that the Master Agreement would not govern. I do not accept this – the words might have been crossed out for any number of reasons and indeed the Master Agreement had already been referred to as being joined by R&V;

(3) Mr Baier's typed notes of the meeting includes the following:

"RATES AND FEES OF SUBCONTRACTORS:

… SR to send master contract with AIG and updated fees table to R&V. This together with budget for Rob fees and subcontractor fees, budget for subcontractors on quarterly basis, Rob will send letter to this effect, TU needs something as basis for making substantial upfront payment into escrow account.

SR: expenses are at cost, should be reasonable.…

WRAP UP TO Dos:

-short message to re-High points of agreement AIG/R&V. Exchange of emails sufficient… Finalisation of agreement early next week…"

29. On 7 March 2013 Mr Sabalis emailed Mr Ullrich, copied to Robertson, what he said were "the terms of our agreement on a joint plan to manage this loss:" this referred to the joint employment of the services of Robertson to represent the two companies' interests in this matter. The share of all costs would be on a 55%/45% basis with AIG bearing 55%. The effective date of the arrangement would be 1 March 2013. There would be a fee fund account opened by Robertson specifically to facilitate the payment of the various experts. On 15

March, Mr Ullrich replied thanking Mr Sabalis for his note and adding the following clauses to the summary of the agreement:

> "… Robertson.. Will provide detailed quarterly accounts of amounts due to consultants plus bank statements documenting that the amounts due have been settled from the fee fund account. Robertson… Will also provide a quarterly budget plan for the estimated costs of consultants work to be carried out in the following quarter; AIG and R&V will make according contributions to the fee fund account
>
> 6. Robertson… Will provide detailed quarterly accounts (plus detailed timesheets) on the work carried out by Robertson… Which will be settled by AIG and R&V in accordance to their respective proportion… Robertson will provide a quarterly budget plan for the estimated costs of the work to be carried out by Robertson…
>
> 7. The details of the dealings between Robertson… And AIG are governed by their contract dated 2005 (approx.). AIG will provide a copy of this contract to R&V. Confidentiality restrictions… Have been lifted by mutual agreement of AIG, Robertson… And R&V at the meeting."

30. This email with the additional clauses was not itself copied by Mr Ullrich to Robertson, but the whole chain was copied to Robertson by Mr Sabalis on 16 March. A point was taken as to whether the fact that it was not initially forwarded to Robertson showed that the email was not really about any agreement between R&V and Robertson at all, but I do not think there is anything in this. After all, even if one puts the Master Agreement to one side, this summary clearly sets out the obligations of Robertson in relation to quarterly budgets etc so it must have been intended for Robertson at some point.

31. Then, by an email dated 12 April 2013 Mr Struan Robertson sent a copy of the Master Agreement to Mr Baier, copied to Mr Ullrich in the following terms:

> "Dear Michael,
> I have attached our service agreement with AIG with their consent but in confidence.
> The original signed document dated 30 May 2007 is not in electronic form so if you need this we would have to scan it for you.
> The only changes during the last 6 years are to Exhibit 3 where our current charge out rates per hour are:
>
> | | |
> |---|---|
> | S. Robertson | CHF 595.00 |
> | E. Robertson | CHF 295.00 |
> | W. Klein | CHF 320.00 |
>
> The main change has been to Euan's charge out rate as he completed his 10 years of experience training in 2009.
> I hope this is sufficient for your purposes."

32. On the same day Mr Baier emailed Mr Ullrich, having also received a copy of the Master Agreement, saying that in the absence of explicit instructions from Mr Ullrich he would not do anything in relation to it. He also thought that 45% of Mr Struan Robertson's hourly rates seemed adequate. In his witness statement he suggested that what he otherwise would have done would have been to review the Master Agreement but it was not in fact necessary.

33. Finally, at about the same time, Mr Blöcher prepared a draft note of the arrangements between R&V and Robertson for the purpose of being submitted to R&V's board. This stated as follows, among other things:

> "2. An ongoing business relationship exists between AIG and Robertson… Which is regulated by a framework agreement dating from the year 2005 (not yet confirmed). This framework agreement is being made available to R&V. The provisions of the framework agreement will apply by default to

the relationship between R&V and Robertson and co-unless individual variations to the contrary have been agreed."

34. Before analysing those documents individually, I should say that if one reads all of them together it seems to me to be clear that there is at least a good arguable case for two propositions:

(1) First, despite what the witnesses now say, AIG and Robertson were proceeding on the basis of the Master Agreement which was indeed "in place";

(2) Second, that R&V, AIG and Robertson agreed to proceed with each other on the basis that Robertson's own charges were as per the hourly rates set out in the email of 12 April 2013, there would be the quarterly budgets referred to in paragraphs 6 and 7 of the revised notes of the agreement completed on 15 March 2013, the contributions being in the ratio 55/45, and otherwise in accordance with the terms of the Master Agreement.

35. As to the individual documents:

(1) Euan Robertson's note shows that at the same time as agreeing to join AIG's instruction, Mr Ullrich wanted a copy of the relevant agreement. It is a reasonable assumption that he did so because R&V would "join" that agreement as part of joining the "instruction"; that is backed up by the later words that "TU will email JS confirming participation with AIG on same terms [as] AIG's master agreement"; it is right that the example given of that was to avoid excessive expenditure and have reasonable costs, but there is no limitation in this note of what was said at the meeting being simply as to the terms of the Master Agreement which dealt with costs;

(2) Mr Blöcher's note also refers to the Master Agreement and although Mr Sabalis said that it was a "big document" Mr Ullrich asked for it and "then we can agree that R&V participates in the costs 45/55 basis". On its face that is an intention to proceed according to the same terms as AIG; if its only relevance was costs there would be no need to saddle Mr Ullrich with the whole of this large document; the second note recorded that R&V would "co-join" the Master Agreement;

(3) Mr Baier's typed note is also at least consistent with R&V proceeding upon the basis of the Master Agreement;

(4) It seems to me that all of the meeting notes show that R&V was interested in the Master Agreement more than simply because of its provisions on costs and having discovered that there was an agreement which was treated as governing the position between AIG and Robertson Mr Ullrich wanted any instruction to be on the same basis so that it was truly "joint"; this would then satisfy his superiors;

(5) It also seems a fair inference from the revised summary of the agreement prepared by Mr Ullrich that, although not stated explicitly, R&V would be instructing Robertson on the same basis as AIG, which was the Master Agreement. It is not as if Robertson (or AIG) came back afterwards and objected to this part of the summary;

(6) Equally Mr Struan Robertson's email to Mr Ullrich and Mr Baier on 12 April suggests that the Master Agreement would now form the basis of the agreement with

R&V; otherwise it is not clear why Mr Robertson should go to the trouble of not only updating the charge out rates but pointing out that these were "the only changes" to the Master Agreement in the last 6 years; I agree that in theory he could have been providing the Master Agreement simply on the basis that Mr Ullrich wanted to show the board what sort of agreement AIG had with Robertson but if so, it is difficult to see why R&V's position would be that its agreement with Robertson was something different; that makes little commercial sense;

(7) Mr Baier's email of 12 April 2013 does not take matters much further;

(8) One is then left with the undated draft note for the board. That, of course, is R&V's internal document only and no board minutes have been produced, but taken at face value, it is certainly stating that absent any particular alterations, R&V would also be operating according to the Master Agreement.

36. I now make some other general points:-

(1) I accept that there are various clauses in the Master Agreement which might not be particularly necessary for R&V for example in relation to third-party recipients of Robertson's services, but that does not mean that the Master Agreement did not work or was inapposite from R&V's point of view; I agree also that there is a limitation of liability in clause 11.2 to £1m and there might be a question as to whether that would have been suitable for R&V. On the other hand, I think the likelihood is that had this been addressed specifically, R&V would have fallen into line with AIG. It is not, after all, such an unusual provision;

(2) In addition, if the Master Agreement was not incorporated entirely, there is a question whether, for example, clause 2.2 of Exhibit 3 was included or not. It does not deal with the quantum of payments so on that footing, on Robertson's case, it would not be included. On the other hand, it gives an important contractual right to the customer to suspend payment of any sums due where Robertson was in breach of duty of any of its obligations to the customer until the breach was rectified. In a joint instruction situation where, for example, Robertson was in breach of duty in respect of its performance where both parties were sharing the costs, it would seem to me to be very odd, objectively, to have a situation where only one party could suspend payment and the other party could not. In that regard, one could make a similar point about jurisdiction, namely that it would be odd if one of the jointly instructing parties had a clause in favour of England whereas for the other party, jurisdiction was at large. It also means that it cannot be said that Robertson would have had some objection in principle to an English jurisdiction clause, had it been asked to consider that matter because (as all the documents suggest), it already accepted that it was contracting with AIG on the basis of the Master Agreement, notwithstanding Robertson's assertions now that the Master Agreement had expired and did not govern AIG anyway;

(3) While the Master Agreement is not Robertson's standard terms, it is nonetheless a set of terms dealing with precisely the subject matter of the dealings between R&V and Robertson, namely the latter's instruction of it as a loss adjuster. The set of terms may have been as between Robertson and a third party but (a) the third party was here working alongside R & V to instruct Robertson and (b) the Master Agreement

cannot be seen as an agreement essentially about something else; compare the charterparty as against the bill of lading or the original contract of insurance as against the contract of reinsurance;

(4) The very fact of a joint instruction commercially supports the notion of instructions on the same terms. I quite accept that when a third reinsurer, Axis, came later to join in the instruction to Robertson (although it did not stay very long) there is no evidence that the Master Agreement was mentioned. But the fact that Axis seems to have taken a very informal approach does not in my judgment affect the commercial points made above;

(5) It follows for all those reasons that the facts of this case are materially different from those in, say *AEL*. There, the agreement sought to be incorporated as whole and not merely as to its payment conditions, was different to the main agreement because it was a freight forwarding agreement and not a slot charter and a number of its provisions simply could not be carried over. Moreover the documents taken as a whole showed that the reference to that agreement was only referred to in relation to its payment conditions. While in that case one could then conclude (as the Court did) that any incorporation of the terms should be limited and not general, the starting point in this case is crucially different: it is that the whole set of terms in question were already operative as between Robertson and AIG, the party whose instruction R&V was now to join.

37. Therefore I take the view first that there is a good arguable case that R&V and Robertson and indeed AIG agreed that they would all proceed upon the basis of the Master Agreement varied only as to chargeable hours and the production of quarterly budgets and that this was agreed by 12 April 2013 at the latest.

38. However, I also need to be satisfied that there is a good arguable case that such an agreement is clearly and precisely evidenced in writing. In my judgment, there is. The relevant writings consists of Mr Euan Robertson's note of the meeting, the revised summary of the agreement as forwarded to Robertson and Mr Struan Robertson's email of 12 April 2013 containing the Master Agreement. Since those documents were either sent or made by Robertson or received by it without objection, they all "count" for present purposes. Strictly, Mr Blöcher's note of the meeting and the draft note prepared for the board cannot "count" but simply act as corroboration.

39. Of course, the actual issue of incorporation of the Master Agreement, insofar as it remains relevant, will be a matter for determination by the court hereafter and it may come to a different view.

40. But at this stage, and for the purposes of Article 23, I am quite sure that R&V has the better of the argument. I therefore dismiss Robertson's application.

41. I am grateful to both Counsel for their very helpful oral and written submissions.