Neutral Citation Number: [2022] EWHC 2049 (Comm)

Case No: CL-2021-000314

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

Rolls Building
Fetter Lane
London,
EC4A 1NL

29 July 2022

Before :

MRS JUSTICE COCKERILL

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Between :

AL MANA LIFESTYLE TRADING L.L.C. & OTHERS	**Claimant**
- and -	
(1) UNITED FIDELITY INSURANCE COMPANY PSC **(2) SOCIETE D'ASSURANCES LIBANO SUISSE SAL (COMMERCIAL REGISTRATION NO. 7533) AND ITS QATARI BRANCH LEBANESE-SWITZERLAND CO. FOR INSURANCE (COMMERCIAL REGISTRATION NO. 23825), TRADING AS "LIBANO-SUISSE S.A.L."** **(3) LIBANO-SUISSE INSURANCE CO. S.A.L. – KUWAIT**	**Defendants**

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Mr Gavin Kealey QC and Ms Josephine Higgs QC (instructed by **Mishcon de Reya**) for the **Claimant**
Mr John Lockey QC and Mr David Walsh (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing dates: 27 July 2022

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 29 July 2022 at 10:30am.

Mrs Justice Cockerill:

1. This is the hearing of the Defendants' application to challenge the jurisdiction of the English court. The Defendants seek to set aside service of the Claim Form, which they contend was wrongly served without permission. Alternatively they invite the Court to decline jurisdiction to hear the Claimants' claims.

2. The claims are brought by the Claimants under a suite of seventeen "Multi-Risks" insurance policies underwritten by the Defendants (the "Policies"). The claims are all for indemnities for business interruption losses, said by the Claimants to arise from the Covid-19 pandemic, which claims are estimated by the Claimants to have a combined value of some US$40m.

3. The principal issue is one of construction: whether or not the Policies contain a jurisdiction agreement entitling the Claimants to bring their claims before the English Courts. The parties are *at idem* on one point relating to construction: the clause in question is not a model of drafting. It says this:

> "APPLICABLE LAW AND JURISDICTION:
>
> In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. Otherwise England and Wales UK Jurisdiction shall be applied,
>
> Under liability jurisdiction will be extended to worldwide excluding USA and Canada."

4. The background to the dispute is uncontentious.

BACKGROUND

The parties

5. The Claimants form part of the Al Mana Group, an enterprise which the Defendants understand includes businesses in the food and beverage and retail sectors operating in the Middle East and Gulf region.

6. The Defendants are insurance companies operating within Gulf Cooperation Council countries. The First Defendant has its headquarters located in the United Arab Emirates, the Second Defendant is located in Qatar and the Third Defendant is located in Kuwait. There is a small part of the Al Mana business which operates in Ireland and others in Bahrain and Oman. There is no business in England or Wales.

The Policies

7. It is common ground that the Policies were issued in (respectively) the UAE, Qatar and Kuwait. Specifically:

    i) The fifteen policies identified in paragraph 11 of Ms Campbell's Second Witness Statement were issued by the First Defendant in the UAE.

ii) The policy identified in paragraph 12 of Ms Campbell's Second Witness Statement was issued by the Second Defendant in Qatar.

iii) The policy identified in paragraph 13 of Ms Campbell's Second Witness Statement was issued by the Third Defendant in Kuwait.

8. The parties are not entirely *ad idem* as to whether the policies referred to in paragraphs 12 and 13 of Ms Campbell's Second Witness Statement were part of a fronting arrangement, with the First Defendant effectively carrying all of the risk. However:

i) The Defendants do not dispute that it would be open (in principle) for the Claimants to bring claims under the policies referred to in paragraphs 12 and 13 of Ms Campbell's Second Witness Statement.

ii) Furthermore, whilst there are certain differences between the policies which the Defendants say were part of the fronting arrangement, none of those differences are relevant to the questions before the Court at this hearing.

iii) All of the Policies are, for present purposes at least, on materially identical terms. They each contain a "POLICY SCHEDULE", which is bespoke in the sense that it is adapted to each of the Claimants (the "Schedule").

iv) They are essentially as Mr Lockey QC put it in opening, package policies. The Schedule identifies that there are five sections of cover or potential cover (because not all the Claimants procured cover under each section), namely:

a) Section 1 – Property All Risk, which extends to include cover for certain business interruption losses;

b) Section 2 – Money All Risks;

c) Section 3 – Blanket Fidelity;

d) Section 4 – Workmen Compensation; and

e) Section 5 – Public & Product Liability.

9. The Schedule contains a table at the very top of the first page indicating that each section could be given its own "POLICY NUMBER", "EFFECTIVE" date and "EXPIRY" date [133], although it is fair to say that these are sometimes identical on the Policies.

10. The Schedule in each of the Policies contains the relevant jurisdiction clause, reproduced here with the numbering used by the parties for the purposes of argument:

> "APPLICABLE LAW AND JURISDICTION: [1] In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. [2] Otherwise England and Wales UK Jurisdiction shall be applied,

> [3] Under liability jurisdiction will be extended to worldwide excluding USA and Canada."

11. The Policies then also contain some standard, non-bespoke, non-adapted "POLICY WORDING", which put flesh on the bones of the cover outlined in the Schedule (the "Standard Terms", see e.g. [142-192]).

12. On the first page of the Standard Terms there is reference to "LM7 WORDING" (viz. London Market 7 Wording). The Defendants contend that generally such wording is found in Section 1 (Property All Risks) only.

13. The Defendants drew my attention to the following additional provisions found in the Standard Terms:

    i) Section 1 (Property All Risk), under the heading "POLICY's GENERAL CONDITIONS", contains an arbitration agreement (see e.g. [146]), which only applies where there is "*any difference…as to the amount to be paid under this policy (liability being otherwise admitted)*". Neither party has invoked this clause, rightly from the Defendants' perspective given liability has not been admitted.

    ii) Section 5 (Public & Product Liability) contains a clause 1 (see e.g. [187]), headed "OPERATIVE CLAUSE", which states, in relevant part, as follows:

> "The Underwriters will indemnify the Assured against their liability to pay damages (including claimants' costs, fees and expenses) in accordance with the law of any country but not in respect of any judgment, award, payment or settlement made within countries which operate under the laws of the United States of America or Canada (or to any order made anywhere in the world to enforce such judgment, award, payment or settlement either in whole or in part) unless the Assured has requested that there shall be no such limitation and has accepted the terms offered by Underwriters in granting such cover, which offer and acceptance must be signified by specific endorsement to this Policy."

14. Section 5 also contains a clause 13, headed "GENERAL CONDITIONS", which states as follows:

> "13.6 Any dispute concerning the interpretation of this Policy and/or Schedule will be determined in accordance with the schedule of the policy. The Assured and Underwriters submit to the exclusive jurisdiction of any court of competent jurisdiction within England and agree to comply with all requirements necessary to give such court jurisdiction. All matters arising hereunder shall be determined in accordance with the law and practice of such court.
>
> 13.7 Any phase or word in this Policy will be interpreted in accordance with the law of England. The Policy and the Schedule shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this Policy

or the Schedule shall bear such specific meaning wherever it may appear."

15. To the extent that it is relevant (the Defendants say it is not), the Defendants reinsured the risks underwritten in the Policies as follows:

    i) The Defendants had a treaty reinsurance programme for the 2019-2020 period with the following reinsurers: Everest Re in the USA; R&V in Germany; GIC Re in India; Kuwait Re in Kuwait; Trust Re in Bahrain; Barents Re in Lebanon; Saudi Re in the KSA; Africa Re in Egypt; Santam Re in South Africa; CCR in France; Arab Re in Lebanon; and China Re in the PRC.

    ii) The First Defendant also has facultative reinsurance for 19% of the risk with Swiss Re in Switzerland and Tunis Re in Tunisia.

The claims

16. As indicated above, the underlying claims in respect of which the Claimants seek an indemnity relate to alleged BI losses during the Covid-19 pandemic. Beyond this, and despite the alleged total quantum of the claims apparently being in the region of US$40m, the Defendants know relatively little about them.

17. The claims were put forward on a group basis, as is evident from the letter from Mr Al Mana.

The proceedings before the English High Court

18. The Claim Form was initially issued on 21st May 2021. It was then subsequently amended and re-amended to identify correctly the corporate entities, names and addresses of the Defendants, as well as the Policies under which claims were being brought.

19. The Claimants did not seek the Court's permission to serve the Claim Form out of the jurisdiction. Instead, their solicitors completed form N510, ticking the box which states that CPR r. 6.33(2B)(b) applies and that: "*each claim made against the defendant to be served and included in the claim form is a claim made pursuant to a contract which contains a term to the effect that the court shall have jurisdiction to determine that claim*".

20. In the skeleton argument filed in support of the Claimants' application for alternative service, the Claimants explained that they were relying "*on an Applicable Law and Jurisdiction clause in each insurance policy*" which was "*an exclusive, failing which non-exclusive, jurisdiction clause in favour of the Court of England and Wales and…English law is the proper law of the insurance policies*". Although the precise wording being relied upon was not identified, the Claimants acknowledged (the application being made ex parte) that the "*proper construction of these clauses may be challenged by the Defendants*".

21. The Claimants' application was supported by a Witness Statement from the Claimants' London solicitor Ms. Campbell which, in paragraph 65 asserted that "*the Applicable Law and Jurisdiction clause*" in the Policies, whilst "poorly

worded", is an exclusive jurisdiction agreement in favour of the courts of England and Wales and that English law is the proper law of the Policies.

22. In a letter dated 8th April 2022, the Claimants' solicitors asserted that: "*the policies under which the claims are brought all contain express clauses providing for the jurisdiction of the English courts and for English law, specifically the 'Applicable Law and Jurisdiction' provision in the Schedule and General Conditions 13.6 and 13.7*".

23. Mr Justice Jacobs made an order for alternative service on 5th August. The First and Second Defendants were served in accordance with that order in August/September 2021. The Second Defendant initially disputed that it had been lawfully and validly served but by the time of this hearing that point was no longer pursued.

24. The First and Second Defendants filed Acknowledgments of Service, indicating an intention to dispute jurisdiction, on 6th October 2021.

25. The Third Defendant was served with the Claim Form and associated documents on 10th January 2022 and filed an Acknowledgment of Service, indicating an intention to dispute jurisdiction, on 1st February 2022.

26. The Defendants each applied to contest jurisdiction. The applications were supported by witness statements from Mr Patrick Foss of Kennedys, the Defendants' English solicitors.

27. In his evidence, Mr Foss referred to expert input he had received from various experts on UAE, Qatar and Kuwait law upon whether the local courts would, if asked, accept jurisdiction in respect of any claims under the Policies. Each of the experts opined that the local courts would accept jurisdiction and, in the case of the UAE and Kuwait, it would be mandatory for the courts to do so. On the latter point, in short:

    i) Under UAE law, because the First Defendant is incorporated in the UAE, the local courts would have to accept jurisdiction over any claims brought by the Claimants under Article 20 of the Federal Civil Procedures Law No. 11/1992. Furthermore, by reason of Article 24, any agreement between the parties violating Article 20 is invalid.

    ii) Under Kuwait law, and in particular Article 23 and Article 24(b) of the Kuwaiti Procedure Law as interpreted by the Kuwaiti courts, the Kuwaiti courts would have to accept jurisdiction over any claim brought against the Third Defendant.

28. Response evidence on foreign law was then served by the Claimants, exhibiting the expert reports of Mr Aly, Mr Georgiades and Mr Rezeik on UAE, Qatar and Kuwait law respectively.

29. After the service of reply evidence from Mr Foss, the Claimants have sought to serve further evidence from their foreign law experts. The admission of that evidence was not contentious.

30. Following the service of the Defendants' reply evidence, the parties commendably sought to identify the areas of agreement between the foreign law experts so as to narrow the issues for the Court at the forthcoming hearing. The areas of common ground are articulated in the 6th July 2022 letter from the Claimants' solicitors, namely:

    i) The policies identified in paragraph 11 of Ms Campbell's Second Witness Statement were issued in the UAE.

    ii) The policy identified in paragraph 12 of Ms Campbell's Second Witness Statement was issued in Qatar.

    iii) The policy identified in paragraph 13 of Ms Campbell's Second Witness Statement was issued in Kuwait.

    iv) If proceedings under the policies identified in paragraph 11 of Ms Campbell's Second Witness Statement had been brought in the UAE, the local courts would have had jurisdiction.

    v) If proceedings under the policies identified in paragraph 13 of Ms Campbell's Second Witness Statement had been brought in Kuwait, the local courts would have had jurisdiction.

31. There is an issue as to whether local court jurisdiction would be mandatory, but it forms no part of the Defendants' case that the local courts' jurisdiction is mandatory. There is also an issue as to whether the courts in Qatar would have jurisdiction over the Qatar policy.

THE ISSUE AND THE PARTIES' SUBMISSIONS

32. The issue of construction for the Court is whether, in the contractual context in which it appears, the "*Applicable Law and Jurisdiction*" provision contains an agreement between the parties which gives the English Court jurisdiction over claims brought by the Claimants under the Policies in these proceedings.

33. The Defendants' case is that [1] amounts to an exclusive choice of jurisdiction in favour of the courts of the country where the Policies were issued (the UAE, Qatar and Kuwait in this case) and a choice of the laws of that country as the applicable law. It notes that:

    i) The words "In accordance with" are imperative and directory, particularly when read alongside the title of the clause and should be read as equivalent to "subject to". *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm) and *Konkola Copper Mines plc v Coromin* [2005] 2 Lloyd's Rep 555, [69] to [72].

    ii) That reading is consistent with the natural purpose of the words *Hin-Pro International Logistics v CSAV* [2015] 1 CLC 901, [63] per Christopher Clarke LJ;

iii) It makes obvious sense to make law and jurisdiction a mandatory matching pair;

iv) The absence of the word exclusive is not decisive: *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505, 509.

34. The Defendants also submit that:

i) [2] relates only to jurisdiction and otherwise is akin to the words "*If notwithstanding the foregoing*" considered by the Court of Appeal in *Hin-Pro*.

ii) [3] is irrelevant to the present dispute, being a reference to Section 5 of the cover (Public and Product Liability).

iii) It is impossible to read [ii] as an exclusive English jurisdiction clause which trumps [i]. It is also neither permissible nor sensible to read [i] and [ii] as together providing for the English courts to have non-exclusive jurisdiction – to do so would result in an unattractive and uncommercial result.

iv) Clauses 13.6 and 13.7 are irrelevant and apply only to section 5 of the Policy.

35. In the event that the conclusion at which I arrive is that [2] is a non-exclusive jurisdiction clause, the Defendants submit that jurisdiction should be declined on *forum non conveniens* grounds, listing a number of factors tying the claims to the local courts, not least the proper law of the contracts.

36. The Claimants submitted that the exercise of construction should not be overcomplicated and a useful starting point was one of impression. The Claimants submitted that:

i) The correct construction of the clause is that the parties may bring proceedings in the courts of the country where the Policy was issued or, otherwise, in the courts of England and Wales. That, it is said, is the obvious and natural meaning of the first and second sentences of the provision. That construction gives proper effect to both sentences.

ii) The Defendants' proposed construction introduces a condition precedent to the operation of the second sentence that is not there and amounts to a rewriting of the provision.

iii) "Otherwise" should be read as equivalent to "alternatively".

iv) That approach reflects the London market scheme and makes good commercial sense against the commercial background in which each of the Policies was issued in conjunction with the others as part of a suite providing comprehensive coverage for the Al Mana Group's operations in numerous jurisdictions.

v) [3] operates to amend clauses 13.6 and 13.7.

37. The Claimants submitted that the Defendants' approach to construction should be rejected as taking an excessively narrow approach to [2]. Specifically:

    i) [1] does not say "subject to" or anything like it;

    ii) The approach to [2] reads "otherwise" too narrowly and in result is either uncommercial (in particular as to the need to investigate whether the local forum would accept jurisdiction) or leading to surplusage.

38. On *forum conveniens* the Claimants submit that at least strong reasons are required not to give effect to even a non-exclusive jurisdiction agreement. Here there are no strong reasons where the factual enquiry covers other locations than the UAE, Qatar and Kuwait. England is a convenient neutral forum with expertise and the alternative would be fragmentation of proceedings. All the *forum non conveniens* factors relied on by the Defendants were known at the time of contracting.

39. Alternatively the Claimants submitted that the clause provides that the parties should bring any proceedings under the Policies in the local courts if, under local law, it is mandatory to do so but, if it is not mandatory, they can bring proceedings in England and Wales (not elsewhere): the "Mandatory Jurisdiction Construction". If that is so on the balance of the evidence (including the new evidence) the jurisdiction of Qatar, UAE and Kuwait is not mandatory and English jurisdiction is thus available to the parties pursuant to [2].

40. In the further alternative [1] is applicable to arbitrations relating to disputes over quantum, with the second sentence, providing for the jurisdiction of England and Wales, applying to all other disputes: the "Arbitration Construction".

DISCUSSION: CONSTRUCTION

41. Both parties have heroically restrained themselves from citing the usual authorities on the correct approach to contractual construction. They assume, rightly, that I have them well in mind.

42. The Claimants urged me to take an impressionistic view of the question, pointing me to a variety of passages in Lewison on the Interpretation of Contracts. While this was not conceded as a correct approach by the Defendants, their own suggestion that I proceed by reference to the reasonable businessman advised by his broker invokes the following passages.

    i) The first is from the judgment of the Supreme Court in *FCA v Arch*:

    > "[77] …the overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis (cf Jumbo King Ltd v Faithful Properties Ltd (1999) 2 HKCFAR 279, para 59). It is an ordinary policyholder who,

on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting."

ii) The second is what I have elsewhere described as "the Mance Variation" at [18] of the China Taiping Award:

"The latter passage does not address all the conundra raised in an insurance context by the law's familiar invocation of the "reasonable person". The pedantic lawyer is easily and uncontroversially despatched. The insurer and any broker through whom the policy may have been placed are not mentioned. The reasonable person is identified with the ordinary policyholder. That is an assimilation by which I am probably bound, but with which I can also have sympathy, since insurance policies, and especially standard wording, should be readily digestible by the users to whom they are sold, even though they may in some cases have brokers who can sometimes advise them."

43. Those passages effectively emphasise the need for any contractual construction to remain user friendly while remaining true to the tenets and more granular modes of testing established by the cases.

44. Before turning to the to the individual points made by the parties it is probably appropriate to review the main authorities on construction of jurisdiction clauses on which the parties relied, because a number of the individual submissions were themselves grounded firmly in these cases.

45. The main authority relied upon by the Defendants was *Hin-Pro International Logistics v CSAV* [2015] 1 CLC 901, a decision of Christopher Clarke LJ. In that case (which as will readily be detected, was not an insurance case), the relevant clause read as follows:

"This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceeding shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such dispute and proceedings shall be referred to the Chilean Ordinary Courts."

46. Hin-Pro argued that the clause ought not to be construed as an exclusive English jurisdiction clause and, in particular, that the second sentence ("*If notwithstanding the foregoing…*") implicitly recognised that proceedings could be brought elsewhere and made provision for that.

47. The Court of Appeal rejected this argument, as did the judge at first instance. At [61-67] of the judgment Christopher Clarke LJ said:

"[61] the words 'shall be subject to' are imperative and directory. They are not words which are apt simply to provide an option. That is certainly the case in relation to the applicable law and, prima facie, the same should be so in relation to jurisdiction…

> [63]…whilst I accept: (i) that a non-exclusive English jurisdiction clause is not worthless or otiose even when there is express provision for English law, and (ii) that there can, generally speaking, be only one law governing the contract but that there can be more than one court having jurisdiction over disputes, the natural commercial purpose of a clause such as the present is to stipulate (a) what law will govern; and (b) which court will be the court having jurisdiction over any dispute. If 'shall be subject to' makes English law mandatory (as it does) the parties must, as it seems to me – as it did to Staughton LJ - be taken to have intended (absent any convincing reason to the contrary) that the same should apply to English jurisdiction. I do not think that the reasonable commercial man would understand the purpose of the clause to be confined to a submission to English jurisdiction, if invoked, or to an underscoring of the convenience of litigation here
>
> [66]…there is obvious sense in making both English law and English jurisdiction mandatory. Whilst foreign courts may (but will not necessarily) apply English law if that is what the parties have agreed, England is the best forum for the application of its own law
>
> [67]…the use of the phrase 'If notwithstanding the foregoing, any proceedings are commenced in another jurisdiction' in the second sentence is, as it seems to me, a recognition that the first sentence requires litigation in England as a matter of contract. I do not regard it as realistic to interpret it as meaning 'notwithstanding that advantage is not taken of the option for English jurisdiction'. If the first sentence made English jurisdiction optional, the phrase 'notwithstanding the foregoing' would be unnecessary. Like the judge I would treat the phrase as if the clause read 'If notwithstanding the parties' agreement that all claims or disputes arising under the bill of lading shall be determined in accordance with English law and by the English High Court'.
>
> [77] …the tenor of English authorities is that an agreement to English law and jurisdiction in this form is likely to be interpreted, as the judge recognised at [26], as involving both the mandatory application of English law and the exclusive jurisdiction of the English court: see The Alexandros T [2012] 1 Lloyd's Rep 162 and the authorities there cited.
>
> 78. I recognize that the suggestion in some of the authorities that an agreement to non-exclusive English jurisdiction is otiose if English law is agreed to apply, is misplaced. But the other considerations that have led to the result in earlier authorities are not; and the tendency to construing clauses such as this as exclusive provides some confirmation of what view the reasonable businessman would take".

48. The second main case relied upon by the Defendants is *AIG v John Wood* [2022] EWCA Civ 781. That was (equally self evidently) an insurance case concerning an "insurance tower", comprising a primary liability policy, together with a number of excess layers. The jurisdiction clause provided as follows:

> "This Policy of insurance shall be governed by and construed in accordance with the laws of England and Wales, or Scotland (in respect of any policies issued in Scotland), and except in the case of Scottish policies the Commercial Court of the Queen's Bench Division High Court of Justice Strand London WC2A 2LL shall have jurisdiction in respect of any dispute under this Policy."

49. In that case the Court of Appeal (Males LJ) referred at length to *Hin-Pro* and went on to say:

> "[62] This reasoning has been applied in later cases. For example Mr Justice Foxton in Generali Italia SpA v Pelagic Fisheries Corpn at [92] said that 'the choice of English law in conjunction with the reference to English jurisdiction is a powerful factor in favour of construing the choice of English jurisdiction as exclusive', citing Global Maritime Investments Cyprus Ltd v OW Supply & Trading A/S [2015] EWHC 2690 (Comm) at [50]. It is equally applicable to clause 11 in the present case. The words 'shall be governed by and construed in accordance with' provide for the mandatory application of English law. The same mandatory language ('shall have jurisdiction') is used in relation to jurisdiction. The natural commercial purpose of the clause is to stipulate that English law will govern any dispute and that the Commercial Court will be the court having jurisdiction over any dispute. That makes obvious commercial sense, while the fact that the English cases have generally taken this approach provides some confirmation of what view reasonable business people would take. Moreover, there are no countervailing indications to suggest that, while the application of English law was mandatory, the clause was intended to provide for the non-exclusive jurisdiction of the Commercial Court."

50. The Claimants relied rather on *Berisford v New Hampshire* [1990] 2 QB 631, also an insurance case, where the words in question were "*This insurance is subject to English jurisdiction*" in circumstances where the English court for a raft of reasons had jurisdiction already. In particular weight was put on the fact that there it was suggested that insurance contracts may be more apt to a finding of non-exclusive jurisdiction than (for example) contracts of international sale. Hobhouse J held:

> "In the present case, in my judgment, the words used are inapt to create any obligation. If an obligation was intended it could easily have been so stated in clear words. The provision appears in the underwriter's printed form of policy which is issued to the assured. The mutuality of the clause must in practice be very limited. Under English law where a contract has been placed through brokers it will be very rare indeed that an underwriter will ever have to start an action against an assured. The primary relevance of the clause must be to actions to be brought by the assured against the underwriter. To construe this wording as requiring the assured to sue only in England is to go beyond the natural meaning of the words actually used. Further, to construe the words as declaratory is not to deprive them

> of significance. It is a statement to the assured, who may be foreign, that the rights that he has under the policy are capable of enforcement in the English courts."

51. Both parties also directed my attention to the judgment of Colman J in *Konkola Copper Mines plc v Coromin* [2005] 2 Lloyd's Rep 555. The Defendants prayed in aid the result (exclusive jurisdiction) and the Claimants referred to the wording of the clause and the background at, [69] to [72].

52. All of these authorities have some points of contact with the present case, but none is directly on point. I must therefore carry out an exercise of construction *de novo*.

53. The starting point is the words, albeit with a consciousness that we are not transporting the clause to the laboratory for microscopic analysis. In such a case it is always useful to write out the clause in its entirety, to ensure that consideration is given to every word and that it is viewed in its place, and not in the slightly overfocussed context of the written or oral submissions.

54. The result of any such exercise is first to reach an entire accord with the submission that this is a problematic clause. As Mr Lockey put it: the language is not felicitous. A few certainties do however emerge:

    i) There is only one proper law: the relevant local law;

    ii) The wording of [1] is "in accordance with" not "subject to";

    iii) [1] and [2] do not run together as a sentence, but they do in formatting;

    iv) In [2] the formulation is "otherwise … shall";

    v) [1] can result in different jurisdictions and laws applying to different policies; whereas [2] would result in a single forum which is not any of the fora which would arise under [1] (i.e. it is a neutral forum).

    A further feature is that punctuation is not a strong suit of the drafter so the full stop between [1] and [2] may or may not be intentional – just as the comma before [3] should probably be a full stop. There is therefore little to be gained here from resting construction on punctuation, as is sometimes done.

55. I will start with that first certainty, on which the Defendants (predictably) rested heavily. I accept that there is only one possibility for law. I also accept that that is a factor in favour of the result for which the Defendants contend.

56. However I cannot follow the submission to its full extent. It was submitted that the effect of the authorities was that there was a presumption against construing a jurisdiction agreement as non-exclusive, particularly in circumstances where within the same clause or in the same contract there is an express choice of applicable law. That is taken from the passage at [63] in *Hin-Pro* where it was said that the natural purpose of the words is to stipulate which law will govern and <u>the</u> court having jurisdiction over any dispute which follows. Stress was also

placed on *Konkola, AIG* and *Pelagic* [2020] EWHC 1228 (Comm) [2020] 1 WLR 4211 in this context.

57. However those are different scenarios. *Konkola* was a case with the simplest of formulations: *"This policy is subject to Zambian law, practice and jurisdiction"*. In *AIG* it was also a single jurisdiction in question. In *Pelagic* the clause considered in the passage relied upon by the Defendants was likewise a single venue clause: "*English Jurisdiction. Subject to English Law and practice*".

58. In effect those cases looked at situations where the dichotomy was exclusive/non-exclusive (all the world). Here the dichotomy is very different. It is exclusive/non-exclusive (local or England and Wales only). So while I have no difficulty at all with the proposition that in the former case the Court will usually construe the jurisdiction as exclusive and the choice of law will be a powerful factor in the consideration of whether the jurisdiction choice is exclusive:

    i) I would not agree that there is a presumption, even in the situation where only one possible jurisdiction is identified. Where the courts intend to create a presumption they will generally say so. The language of all the cases relied on rather carefully does not do that, speaking rather of "tendencies" and "usually";

    ii) In my judgment a still more wary approach has to be taken where (as here) two potential jurisdictions are named;

    iii) There is also some basis for saying that this is particularly so in the case of an insurance contract, for the reasons identified in *Berisford.*

59. I should deal here specifically with *Hin-Pro*, because the clause there was slightly more complex. In that case the jurisdiction clause said this:

> "23. Law and jurisdiction
>
> This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceeding shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such dispute and proceedings shall be referred to the Chilean Ordinary Courts."

60. Although this clause does mention a second country it is not, like the present case, one where the non-exclusive option is a limited one. It is effectively within the exclusive/non-exclusive (all the world) paradigm, like *Konkola, AIG* and *Pelagic*.

61. I do of course see force in the submission that there is obvious sense in making both the law of the country in which the Policies were issued mandatory and making it mandatory for the courts of those countries to have jurisdiction because those courts will be the best forum for application of their own laws. However the problem with this is the existence of [2]. On its face [2] cuts across such an approach. On any analysis [2] posits a world in which - on some condition - local

jurisdiction is not mandatory. If a mandatory regime were truly desired, [2] would not be wanted on voyage.

62. Accordingly the local law provision is simply a factor in favour of the Defendants' contention, but it must be considered with the other arguments.

63. The next point is that the Defendants contend that the words "In accordance with" are imperative and directory, particularly when read alongside the title of the clause. I do not entirely concur with that – particularly when read in conjunction with "otherwise".

64. In particular I agree with the Claimants that the submission that "In accordance with" is equivalent to the words "subject to" is, if not fundamentally flawed (as submitted), at least a considerable overreach. There seems to be no basis other than wishful thinking and the partial resemblance between this case and *Hin-Pro* (from which the imperative/directory terminology derives) to see "in accordance with" as synonymous with "subject to". None of the cases cited gives that equivalence. It is therefore in my judgment of limited value to look at how the words "subject to" have been interpreted, not least because it is generally in cases in which those words appeared in the context of very differently worded jurisdiction provisions in different contracts.

65. It follows that the use of those words to read "In Accordance with" as necessarily imperative and directory is erroneous. "In accordance with" may, in context, be directory, but there is nothing in the words themselves (in conjunction with the rest of the clause) which require this. By themselves they might well read that way. Certainly I would tend to regard this wording as somewhat less mandatory and imperative than "subject to".

66. I would add that in terms of reading "in accordance with" in the context of the whole clause the conjunction of "In accordance with…" and "Otherwise…" initially suggests (at least to this reader) a natural balancing which is more suggestive of a non-exclusive jurisdiction clause than the alternative. This links to the third certainty I have noted – of the running together of the formatting to being [1] and [2] together, with the suggestion that they operate together, and not separately (i.e. with [2] as a fall-back).

67. Thus I do not consider that these words do "*indicate that the jurisdiction in which proceedings are brought should conform with that of the country in which the Policies were issued*" or that "*the parties are not permitted to deviate from submitting their disputes to the jurisdiction of that local court*". And while there is no hint in the first sentence that submitting disputes to the local court is in some way optional or non-exclusive, that hint is or at least may be found in the start of sentence [2] (which, given the punctuation error before [3], may not even have been intended to be a separate sentence).

68. Finally, I agree that the fact that [1] does not use the word "exclusive" is not decisive. As Steyn LJ said in *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505, 509: "*it would be a surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen Court is to be the exclusive forum*". However the absence of the word exclusive (when the

significance of it in terms of removing uncertainty is well known) may perhaps be seen as a small indicator against exclusive jurisdiction.

69. That deals with the points on [1]. Turning to [2], as I have noted in the certainties the formulation is "otherwise … shall". I would regard this as *prima facie* (but bearing in mind the other drafting not necessarily) a mandatory formulation. One might therefore say, as the Defendants do, that the mandatory formulation *"in accordance with ...otherwise ... shall"* – suggests an exclusivity: exclusive first part with mandatory fall-back. But in reality this wording, with mandatory or quasi-mandatory elements in both parts, presents more naturally to a reader – and probably particularly to a non-legal reader - as an either/or.

70. As for the suggestion that the way clauses are put together makes it unlikely that the intent was equal choice of jurisdiction, this is, as already indicated, not a submission which resonates. The fact of law and jurisdiction in the first half against jurisdiction only in the second half may suggest a preference, but given that the (local) claimant is the only likely litigant and [2] still exists there is limited mileage in this.

71. One then comes to the vexed word "Otherwise". The Defendants say that it is not synonymous with 'or', at least in this context, but that it is synonymous with or at least akin to the words "*If notwithstanding the foregoing*" considered by the Court of Appeal in *Hin-Pro*. This is an ambitious submission, and one with which I do not find myself in sympathy.

72. There is certainly no semantic reason why "Otherwise" would be regarded as "*If notwithstanding the foregoing*" as opposed to "alternatively", or "if not there". I do not accept that it must be seen as the language of fall-back and cannot be indicative of a free choice. Bearing in mind the eccentricities of the drafting, I would not be minded to place too much stress on why one word (say "otherwise") was used instead of another (such as "or").

73. This really brings us to the heart of the dispute. The Defendants submitted that "*the word 'Otherwise' in [ii] is a recognition that [i] requires disputes to be submitted to the local court but provides for a neutral alternative if, for whatever reason, the local court would not (or has not) accept(ed) jurisdiction.*" The Claimants say this is right – if one stops after the word alternative.

74. One interesting thing about highlighting this distinction is that it throws focus on the contentious words: "*if for whatever reason the local court would not or has not accepted jurisdiction*". Logically that is right. On any analysis this is not a simple one/any dichotomy – as already noted.

75. This clause indubitably provides some form of alternative. Either it is a true alternative (i.e. a non-exclusive jurisdiction clause) or it is a primary/secondary alternative: exclusive primary with fallback to the secondary jurisdiction. The problem for the Defendants is that the true alternative requires nothing else textually, whereas a fallback has to be triggered by a condition. And two points follow. The first is that the wording apt to introduce a conditionality is missing; the second that nor is there any trigger for the particular implication. And as the Claimants note, where the effect is (in essence) to introduce a condition precedent

that is a strain on the construction, in circumstances where there is no wording apt to a condition precedent – or indeed any form of condition.

76. This might not be too grave a problem if the conditionality were self evident even without words. But it is not the case that there is only one possible form of conditionality – two have been in play in the submissions before me. One is the Defendants' proposed condition *"if for whatever reason ..."* covering mandatory declinature, voluntary declinature and also other issues of inaccessibility. The other is the Claimants' second argument: the Mandatory Jurisdiction Construction; i.e. the parties agreed that they should bring any proceedings under the Policies in the local courts if, under local law, it is mandatory to do so but, if it is not mandatory, they can bring proceedings in England and Wales.

77. Whichever version one chooses one is being asked effectively to imply this conditionality in circumstances where it is hardly conceivable that a term to such effect could be implied. As for the Defendants' formulation it is linguistically far too vague to appear attractive. In reality it is seen as a functional fall-back – to be used when the primary has been tried and failed. That is a backward looking approach and seems unlikely to have been prospectively contemplated. But whether one regards this as a condition precedent strictly so called or not or a likely option prospectively (or not), the point remains that it is completely unclear how that condition becomes that for which the Defendants contend.

78. The alternative – and more forward looking - version is the secondary case posed by the Claimants: i.e. that the secondary jurisdiction is triggered if there is no mandatory applicability. Again the basis for choosing this condition is completely absent. The absence of a trigger to either condition logically suggests that the true alternative is the right answer.

79. That suggestion is in my view supported by the commercialities or practicalities. The first point is that made by the Claimants:

> "One can imagine what might happen if the claiming party was advised that, if it first started proceedings in the country where the policy was issued, jurisdiction would be refused by the local court, and therefore began proceedings in England and Wales. It is quite likely, or entirely possibly, insurers would say that the advice received by that party was wrong and the local courts in that local country would have been happy to entertain the action, such that the proceedings in England and Wales should be dismissed. Perhaps in those circumstances the only effective way to test that argument with confidence would be for the claiming party then actually to begin proceedings in the local country and see what happens. If jurisdiction were then rejected, it will have wasted no doubt considerable time and money in the local court to no avail, and without recourse to insurers to recover its loss."

80. This is not a false point (and similar problems have been illustrated for the mandatory approach in the evidence adduced for this application). The Defendants assert that the risk that the local court might reject or not accept jurisdiction is not fanciful, even though it is not a risk that they say either has

materialised or would materialise in the present case. They give the example of a dispute over and/or different answers applying the law of the forum when it comes to the question of where a particular policy was issued. That is particularly so they say in circumstances where it could have been placed by a broker acting remotely but physically based in jurisdiction A, for and on behalf of an assured in jurisdiction B, with an insurer in jurisdiction C. It is perfectly possible that, in such a case, the courts in jurisdictions A, B and C might all decline jurisdiction on the basis that none say they were the jurisdiction where the policy was issued.

81. The Claimants dispute the plausibility of the example – after all, a policy can only be issued in one place and it is not suggested that these are policies which had any link with brokers with any form of binding authority. But if it is plausible, that merely leads into the commercial/practical issues noted above.

82. If on the other hand (as the Claimants suggest, and the difficulty of positing a good example perhaps tends to bolster) there is no realistic chance of local jurisdiction being declined, the inevitable conclusion is that the entirety of [2] is otiose. That is not a conclusion which this court would readily reach. Furthermore when testing the two possibilities one against the other, this approach would create surplusage which does not exist on the Claimants' approach.

83. Mr Lockey QC of course reminds me that the fact that a construction renders a result where wording is otiose or of vanishingly small use does not mean that the construction is not the right one. He points attention to *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Law Rep 72 and *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127.

84. But this simply leads back into the question of which of the constructions is preferable; and it is not illegitimate, where there is another competing construction, to regard the case for that other construction as somewhat boosted by the problems created for its competitor. That is a common and well established part of the testing of rival constructions.

85. Moving on, there also seems to be force in the point made by the Claimants by reference to the factual matrix: each of the Policies was issued not in isolation but in conjunction with the others as part of a suite of separate policies providing comprehensive coverage for the Al Mana Group's operations in numerous jurisdictions, namely Qatar, UAE, Kuwait, Oman, Bahrain and Ireland, and which was reinsured in the international market. It might well be anticipated (as has proved to be the case) that claims could arise under policies across a number of different jurisdictions. In such circumstances one can readily appreciate that it might make good commercial sense for there to be an option for disputes under those policies to be determined by a single neutral venue – not by way of fallback but to be chosen in a suitable case. This links into the final certainty which I have noted above.

86. There is a further point, of which much was made by Mr Kealey QC in his submissions: the parties could readily anticipate that issues of insurance law relating to terms in common use (and dispute) in the London market might arise under one or more of the Policies and the Courts of England and Wales certainly have an expertise in such matters. I see force in that and note, although it cannot

be relevant to construction, that if the Claimants' approach is correct, the result would be to bring issues of Covid business interruption insurance before a court which has very considerable experience in exactly those issues - and in the abstract that is a result which one might imagine a reasonable businessman would want to bring about.

87. I should also consider the relevance of [3] to the present dispute. I do not see any very strong help being given in the construction by this. The third sentence of the "Applicable Law and Jurisdiction" provision expressly relates only to the Liability Section of the Policy: it commences "Under liability". The Defendants' case was that this was not a true jurisdiction provision at all but modified the operative part of the Liability cover. This was not a proposition which I found attractive, when it was plainly situated in a jurisdiction clause and when the result would be that one third of this clause did not belong there at all.

88. Standing back and viewing the arguments overall, I therefore do not agree that it is neither permissible nor sensible to read [1] and [2] as together providing for the English courts to have non-exclusive jurisdiction. Both as a question of impression and on detailed analysis I consider that the better view is that the clause provides for non-exclusive jurisdiction – a true alternative. I accept that the clause is to some extent odd, but this result is less odd and creates fewer difficulties than the approach urged by the Defendants. A non-exclusive jurisdiction clause best harmonises the wording and the commercialities of the clause in the context of the wider factual matrix.

89. I therefore conclude that the Claimants' primary construction argument is correct and need not consider their alternative arguments.

DISCUSSION: FORUM CONVENIENS

90. The Defendants have invited me to decline jurisdiction on *forum non conveniens* grounds.

91. The points made are that:

    i) None of the Claimants or Defendants are located in or connected with England.

    ii) None of the alleged losses were sustained in England nor were they caused by the Covid-19 pandemic in the UK nor by the UK government's response. All the relevant documentary and witness evidence will be located elsewhere, primarily in the Middle East.

    iii) The Policies issued in the UAE will still be governed by UAE law, the policy issued in Kuwait will still be governed by Kuwait law and the policy issued in Qatar will still be governed by Qatar law. Those local courts will be best placed to apply their own laws. And in circumstances where the Claimants have given so little away about the nature of the claims, there can be no assumption that the legal and factual issues in play in those

various jurisdictions will be the same, such that grouping the claims together in England would lead to some significant cost or time saving.

iv) Rightly, neither side has suggested that the Claimants would not be able to obtain a fair trial in the UAE, Kuwait or Qatar. And, again rightly, neither side has suggested that those local courts would not be equipped to handle the claims in an efficient, cost-effective and timely manner.

v) None of the Policies were placed in England.

vi) The Defendants' reinsurers are not based in England.

vii) These factors collectively provide very strong reasons for the Court to exercise its discretion to decline jurisdiction, notwithstanding any non-exclusive jurisdiction in favour of the English courts.

92. This approach however ignores a good deal of not insignificant law, cited by the Claimants and which was ultimately accepted to be applicable.

93. It is established and Mr Lockey accepted that:

i) Where there is a jurisdiction agreement in favour of the English Court, whether exclusive or non-exclusive, the English Court should give effect to it, and exercise its jurisdiction in relation to disputes falling within the scope of the agreement, unless there is (at the very least) "strong cause" or "strong reasons" not to do so: *S & W Berisford v New Hampshire Insurance* [1990] 2 QB 631: see esp. 638B. and 646A

ii) A non-exclusive jurisdiction agreement creates a strong *prima facie* case that a chosen forum is a *forum conveniens*: it does not lie in the mouth of the defendant to assert that a chosen forum is an inconvenient one by reference to matters that were foreseeable at the time of the contract: the ordinary "*forum non conveniens*" factors have no role to play: *Highland Crusader v Deutsche Bank* [2009] 2 Lloyd's Rep. 617 at [61] and [64]:

94. It is therefore for the Defendants to show that there are at least "strong reasons", why the Court should not exercise its jurisdiction and it is a heavy burden.

95. While I accept that there is no absolute rule that matters which should have been anticipated may not in some circumstances come into account – for example where one is looking at the relative convenience of alternative permissible options (see for example *Bass* [92] *Highland* [64]) the above summary represents the general starting point.

96. Here I am entirely persuaded that (even allowing for the existence of identified alternatives) the hurdle of strong reasons is not surmounted and England should be regarded as the *forum conveniens*.

97. Much of the material on which the Defendants rely falls squarely within the ambit of what the parties must be taken to have anticipated and there is no good reason not to discount those factors accordingly. The question of the difference in law is

for example inherent in the clause which *ex hypothesi* they intended to result in a non-exclusive jurisdiction agreement. So too for the location of the parties.

98. Further in the modern world location of witnesses and documents are neither of them factors which weigh heavily as they used to do. The legal resources available in this jurisdiction for dealing with document management and evidence are excellent.

99. Then there are positive factors in favour of England – which not unnaturally to some extent reflect the commercial arguments in favour of the construction which I have favoured. The first point is one to which I have already alluded in the context of the construction argument – the convenience of the ability to amalgamate the claims and have them heard before a single neutral court. The Claimants bring claims for indemnity for Covid-19 related business interruption losses under 17 policies, covering their operations in Ireland, Oman and Bahrain, as well as their operations in the UAE, Qatar and Kuwait. It is not therefore correct to say that all the events giving rise to the claims occurred within the wider GCC. The factual enquiry (i.e. as to what restrictions were imposed in response to Covid-19 and how those restrictions impacted the Claimants' businesses) will not be limited to events in the UAE, Qatar and Kuwait. This Court is particularly well-versed in the issues relating to claims for indemnity for Covid-related business interruption losses. It is also highly experienced in dealing with issues of foreign law, where they arise.

100. The alternative to the English Court exercising its jurisdiction is (*prima facie*) that the Claimants will be required to commence separate proceedings in relation to essentially the same dispute, raising the same issues, in three different jurisdictions. While many of the claims might be capable of being brought under the Fidelity policies, as the Defendants submitted, the underlying events for many of the claims under the Fidelity Policies occurred in Ireland, Oman or Bahrain, so there is no particular advantage to those disputes being heard in the UAE.

101. Overall, there are no strong reasons to conclude that the non-exclusive jurisdiction agreement should not be respected in this case.

102. It follows that the Defendants' application fails. I decline to set aside service or to decline jurisdiction.