Neutral Citation Number: **[2020] EWHC 1228 (Comm)**

Case No: CL-2019-000042

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 May 2020

Before :

MR JUSTICE FOXTON

- -

Between :

(1) GENERALI ITALIA S.p.A. and others

Claimants

- and –

(1) PELAGIC FISHERIES CORORATION
(2) FAIRPORT SHIPPING LIMITED

Defendants

- -
- -

Michael Davey QC (instructed by **Shoreside Law Ltd**) for the **Defendants/Applicants**
Peter MacDonald Eggers QC and **Marcus Mander** (instructed by **Kennedys Law LLP**) for the **Claimants/Respondents**

Hearing dates: 4 and 5 May 2020
Draft judgment circulated: 12 May 2020

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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 18 May 2020 at 10.30am.

Mr Justice Foxton:

INTRODUCTION

1. This application is brought by Pelagic Fisheries Corporation ("Pelagic") and Fairport Shipping Limited ("Fairport") (and together "the Insureds") to challenge the Court's jurisdiction in respect of proceedings commenced by Generali Italia SpA and twenty two other insurers (together "the Insurers") who issued Hull and Machinery and Increased Valued insurance policies ("the Policies") to the Insureds, or alternatively to stay those proceedings.

2. The Insurers commenced these proceedings seeking declarations that they are not liable to the Insureds under the Policies, which the Insurers claim that they have avoided for misrepresentation and non-disclosure amongst other claims.

3. The jurisdictional challenge has been brought in circumstances in which Pelagic had already commenced proceedings in Treviso, Italy ("the Treviso Proceedings") against the First Claimant ("Generali"), the Third Claimant ("India International"), the Fourth Claimant ("SIAT"), the Fifth Claimant ("Swiss Re"), the Twenty-First Claimant ("SISL") and the Twenty-Second Claimant ("PICC") (and together with the Seventh and Eighth Claimants "the Treviso Insurers"). The Insureds contend that the policies between the Insureds and the Treviso Insurers ("the Treviso Policies") are subject to an agreement giving the Italian Court jurisdiction. The Treviso Insurers have challenged the jurisdiction of the Italian courts, contending that the Treviso Policies are subject to an exclusive English jurisdiction clause. The first instance court stayed the Treviso Proceedings pending a determination by the English court as to whether the Treviso Policies are subject to an exclusive English jurisdiction clause. Pelagic has appealed against that decision.

4. It is common ground that the policies between the other Insurers ("the non-Treviso Insurers") and the Insureds are subject to English law and exclusive English jurisdiction.

5. In this application, the Insureds ask the Court:

   i) to declare that it has no jurisdiction to hear the claims by the Treviso Insurers, alternatively to stay those claims pending a final determination by the Italian courts of whether the Treviso Policies are subject to an Italian jurisdiction clause under Articles 29 and/or 31(2) of the Brussels I Recast Regulation ("Brussels I Recast"); and

   ii) to stay the claims brought by the remaining Insurers pending the final determination of the Treviso Proceedings under Article 30 of Brussels I Recast.

6. The Insurers resist both applications.

7. The Insureds were represented by Mr Davey QC, and the Insurers by Mr MacDonald Eggers QC and Mr Mander (both of whom addressed the court). I am grateful to all three counsel for their written and oral advocacy. The hearing was

conducted remotely using Skype for Business. Thanks to the co-operation of the parties' legal teams and the court staff, the hearing proceeded smoothly and efficiently.

THE BRUSSELS I RECAST REGULATION

The test to be applied

8. It was common ground that it was for the Insurers to show a good arguable case that this Court has jurisdiction under Brussels I Recast (BNP Paribas v Anchorage [2013] EWHC 3073 (Comm), [40]).

9. I was referred to the helpful recent guidance given by the Court of Appeal on the application of the "good arguable case" test in the jurisdictional context in Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and others [2019] EWCA Civ 10. Green LJ reviewed the recent authorities which had considered the question, including the decisions of the Supreme Court in Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 and Goldman Sachs International v Novo Banco SA [2018] UKSC 34. He noted (at [70]-[71]) that it is clear in the light of Goldman Sachs that there is a three-limb test:

    i) The claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway.

    ii) If there is an issue of fact about the gateway, or some other reason for doubting it applies, the court must take a view on the material available, if it can reliably do so.

    iii) The nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

10. Green LJ also gave guidance as to the practical application of that three-limb test:

    i) The "plausible evidential basis" in limb (i) is a reference to "an evidential basis showing that the claimant has the better argument" ([73]), but that is something other than the balance of probabilities ([75]).

    ii) Limb (ii) is an instruction to the court "to seek to overcome evidential difficulties and arrive at a conclusion if it reliably can", using "judicial common sense and pragmatism" ([78]).

    iii) Limb (iii) addresses the position where the court is unable to form a conclusion on the evidence before it, and is therefore unable to determine who has the better of the argument ([79]).

    iv) For the purposes of establishing jurisdiction under Article 25 of Brussels I Recast, it is necessary for the court to consider whether it has been "clearly and precisely demonstrated" that "the clause conferring jurisdiction … was in fact the subject of consensus between the parties". In an Article 25 case, the "clear and precise" test provides "at least an

indication of the quality of the evidence required" to establish a good arguable case ([83]).

11. On this last issue I was also referred to the judgment of Mr Justice Jacobs in Etihad Airways PJSC v Flöther [2019] EWHC 3107 (Comm), [55], where he noted that the "clear and precise" test does not impose some heightened burden on a claimant seeking to establish jurisdiction by reference to a choice-of-court agreement beyond that arising under the "good arguable" case test set out in the English authorities.

Article 25 of Brussels I Recast

12. The Insurers found their claim to jurisdiction under Article 25 of Brussels I Recast, which provides:

"Article 25

(1) If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State 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, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

13. The agreement or consensus required by Article 25 must be "clearly and precisely demonstrated" to ensure that there is a real consensus (Aspen Underwriting Ltd v Credit Europe Bank NV (The Atlantik Confidence) [2020] UKSC 11, [24]). The agreement or consensus must itself be evidenced or confirmed in writing: Pan Ocean Co Ltd v China-Base Group Co Ltd (The Grand Ace 12) [2019] 2 Lloyd's Rep 335, [32]-[33].

14. Section 3 of Brussels I Recast provides a special jurisdictional regime for matters relating to insurance. Article 15 of Section 3 allows parties to a contract of insurance in respect of seagoing ships to depart from the provisions of Section 3 by agreement.

15. The Insurers contend that they have each agreed with both of the Insureds that the English courts shall have exclusive jurisdiction, and that this agreement satisfied the requirements of Article 25. Before me, Mr Davey QC for the Insureds

disputes that there was an agreement for exclusive English jurisdiction between the Treviso Insurers and the Insureds, in the sense of an agreement which was exclusive of Italian jurisdiction. He contends that the effect of the Treviso Policies was that both the English and Italian courts had jurisdiction. Mr Davey QC did not advance his application on the basis that there was an exclusive jurisdiction agreement in favour of the Italian courts (which appears to be the position taken by Pelagic in Italy, and was the basis on which the Insureds issued their application notices in this case). That was a realistic approach. Whatever else it might be possible to say about the choice-of-court agreements in this case, there is no basis upon which they might be said to confer exclusive jurisdiction on the Italian courts.

16. As I have stated, it is common ground that there is an agreement for the exclusive jurisdiction of the English courts between the non-Treviso Insurers and both of the Insureds.

The *lis pendens* provisions of Brussels I Recast

17. The relationship between these proceedings and the Treviso Proceedings is governed by the *lis pendens* provisions in Section 9 of Brussels I Recast, and in particular Articles 29 to 31.

18. Article 29 provides:

> "1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> …
>
> 3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

19. It is common ground that the claims asserted by Pelagic against the Treviso Insurers in the Treviso Proceedings involve the same parties and the same cause of action as the claims brought by the Treviso Insurers against Pelagic in these proceedings (Nipponkoa Insurance v Inter-Zuid Transport [2014] 1 All ER (Comm) 288, [42]). However, Article 29 is subject to Article 31(2).

20. Article 31 provides:

> "1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.
>
> 2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the

proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement".

21. There is a dispute between the parties as to whether Article 31(2) obliges this Court to stay these proceedings unless and until there is a determination in the Treviso Proceedings that the Italian courts do not have jurisdiction.

22. Finally Article 30 provides:

> "1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
>
> 2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

23. If I reject the Insurers' contention that this Court has jurisdiction over the claims brought by the Treviso Insurers against Pelagic under Article 25, then the Insureds ask the Court to stay the remainder of the proceedings (that is to say the claims by the Treviso Insurers against Fairport and by the non-Treviso Insurers against both Insureds) under Article 30.

The issues for decision

24. Accordingly the issues which it is necessary for me to determine are as follows:

    i) Should the English Court proceed to determine whether there is an exclusive jurisdiction clause in favour of this Court, in circumstances in which Pelagic is contending in Italy that the Italian courts have jurisdiction, or should it await a ruling on jurisdiction in the Treviso Proceedings?

    ii) If it is appropriate to determine the issue, is there an English exclusive jurisdiction agreement in the Treviso Policies for the purposes of Article 25?

    iii) Should the Court stay the remainder of the proceedings under Article 30?

25. Before addressing those issues in turn, I will briefly summarise the relevant factual background.

THE BACKGROUND

The 2015 Fleet Policy

26. The Kapitan Veselkov (the "Vessel") is a pelagic freezer stern trawler owned by Pelagic, a Marshall Islands company. The Vessel is part of a fleet managed by Fairport, a Liberian company managed from Greece. The Vessel sank on 5 February 2017, leading to claims under the insurances covering the Vessel.

27. The Vessel was insured by the Insurers under Hull and Machinery and Increased Value policies, which were taken out by Fairport for the benefit of Pelagic. The Hull and Machinery and Increased Value insurances of vessels in the fleet managed by Fairport have been led by Generali for a number of years, the insurances having been placed with Generali by the Italian brokerage firm of Auscomar srl ("Auscomar"). It is sufficient for present purposes to begin with the policy covering the fleet managed by Fairport which incepted on 6 May 2015 ("the 2015 Fleet Policy"). Generali, SIAT, Swiss Re, India International and PICC subscribed to the 2015 Fleet Policy. The terms on which Generali, SIAT and Swiss Re did so were set out in documents prepared by Auscomar and provided to those insurers which were described as "cover notes".

28. These documents did not serve the traditional purpose of a cover note (by which a broker informs its insured client of the cover it has placed on the client's behalf), but were provided by Auscomar to the insurer to record the terms of the cover which had been placed with that insurer, with the insurer stamping the cover note to confirm its agreement to those terms. However, both contemporaneously and in presenting their respective cases, the parties referred to these documents as cover notes, and I have adopted that description. In relation to the November 2016 renewal of the 2015 Fleet Policy, Auscomar also issued a document to the Insureds which summarised in one place the terms of participation of all subscribing Treviso Insurers (i.e. a cover note in a more conventional sense.) The parties referred to this document as the "Composite Cover Note".

29. The cover note provided by Auscomar to Generali contained a section headed "CONDITIONS" which set out a number of conditions or sets of terms which formed part of the 2015 Fleet Policy. These included the following:

    i) Under the Hull and Machinery cover:

        "English Jurisdiction. Subject to English Law and practice".

        I will refer to this provision, in both the 2015 Fleet Policy and in the renewal of that policy for 2016 as "the Jurisdiction Condition".

    ii) Under the Increased Value cover:

        "All other Hull terms and conditions deemed incorporated herein if and as applicable".

        It was common ground before me that this included the Jurisdiction Condition.

30. The cover notes also provided:

    "FORM: Camogli Policy – Edition 1988".

31. This was a reference to a printed form of marine insurance policy prepared for use in the Italian market, on which Italian and English language versions appear side-by-side. I shall refer to this document as the Camogli Policy. It provides as follows:

> "Art. 1 Conditions of Insurance
>
> This Insurance is granted at the conditions of the attached clauses of the Institute of London Underwriters, as indicated in art. 1 of the 'Additional Conditions', where the expressions 'For use only with the new marine policy form' and 'This insurance is subject to English law and practice' referred to in the heading are deemed to be cancelled.
>
> Art 2. Law governing the contract and Interpretation of the English Clauses
>
> This contract is governed by Italian law. The English Clauses attached to this Policy must nevertheless be interpreted and applied as they are interpreted and applied in England.
>
> Art 3. Jurisdiction and competent Court
>
> Any dispute in connection with this contract is solely subject to Italian jurisdiction. Competent Court, at plaintiff's option, is solely the one of the place of residence of the Head Office of the company or the Agency having in charge this contract or where this contract has been concluded".

32. The cover note issued in respect of Swiss Re's participation in the 2015 Fleet Policy was also issued by Auscomar, in the same terms. The cover note in respect of SIAT's participation is no longer available, but the cover was placed with SIAT by Auscomar, and I therefore infer that the cover note was in the same terms as the Generali and Swiss Re cover notes.

33. The terms of PICC's participation in the 2015 Fleet Policy were recorded in a cover note produced by another firm of brokers, Cambiaso Risso Asia Pte Ltd ("Cambiaso Risso"). This provided:

> "This Insurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the Courts of England and Wales".

This document did not refer to the Camogli Policy.

34. India International's participation in the 2015 Fleet Policy was set out in a placing slip prepared by Lochain Patrick Insurance Brokers Limited ("Lochain Patrick"). This provided:

> "CHOICE OF LAW & JURISDICTION:
>
> Law: English
>
> Jurisdiction: English

> This contract shall be governed and construed in accordance with Italian law and subject to Italian jurisdiction".

35. Once again this document did not refer to the Camogli Policy.

36. The Vessel did not become part of the Fairport Fleet until after the 2015 Fleet Policy had incepted. The circumstances in which the Treviso Insurers came to insure the Vessel are best considered on an insurer-by-insurer basis.

Generali

37. Following initial contact in July 2015, Generali was approached by Auscomar to provide insurance for the Vessel on 3 March 2016, when Mr Massimo Garbarino received an email from Auscomar stating "Owners request us, as per message below, to add the unit new top value to the slip of the fleet". Auscomar's email then quoted from an email which Auscomar had received from Fairport stating:

> "Following our conversation over phone you are kindly requested to approach our undrws Generali in order to obtain their approval for entering the vessel in the Fairport fleet for a total value of $50m".

38. Auscomar produced a provisional cover note for the Vessel on 3 March 2016, which identified the owner of the Vessel as "TBA", and which was in the same terms as the cover note provided to Generali in respect of its participation in the 2015 Fleet Policy. There was subsequently some negotiation about the terms on which the Vessel would be added, albeit these did not concern the issues of law and jurisdiction. On 10 May 2016, Auscomar told General that it had received a firm order to place cover "at the terms agreed and hereby attached". The document summarising the terms which was attached contained no reference to the Camogli Policy, but did contain the Jurisdiction Condition.

39. On the evidence, Generali agreed to hold the Vessel covered while certain issues were resolved. The matter does not appear to have received any further attention until the 2015 Fleet Policy came up for renewal in November 2016. On 4 October 2016, Auscomar contacted Generali again, attaching a sheet of renewal terms which did not refer to the Jurisdiction Condition or the Camogli Policy. On 26 October 2016, Auscomar contacted Generali again, stating that the risk was being placed with the Italian market "for all the terms expiring", attaching a list of terms in the same form as that attached on 4 October. On 16 November 2016, Generali confirmed it was willing to renew on the basis of "the application of the conditions originally agreed with the following amendments" (none of which concerned the issues of law and jurisdiction). On 1 December 2016, Ms Paola Antonelli of Generali confirmed cover retroactive to 6 November 2016. A cover note was drawn up by Auscomar and sent to Generali on 6 December 2016, which Generali was asked to sign and return. The cover note was stamped and returned by Generali and signed by Auscomar. This document ("the Generali Cover Note") contained the Jurisdiction Condition and the same reference to the Camogli Policy as the 2015 Fleet Policy.

SIAT

40. As I have stated, the cover note in respect of SIAT's participation in the 2015 Fleet Policy is no longer available. However, on the evidence SIAT agreed to add the Vessel to that cover on 7 August 2015. SIAT was approached again in respect of the Vessel on 10 May 2016, when it was sent a copy of the terms sent to Generali on that date which I have set out in paragraph [38] above. On 30 August 2016, SIAT scratched an endorsement adding the Vessel to the 2015 Fleet Policy. The endorsement was stated to be an "integral part" of the cover note in relation to the 2015 Fleet Policy. It did not refer to the Camogli Policy but did include the Jurisdiction Condition.

41. When the 2015 Fleet Policy came up for renewal, SIAT received the same communications from Auscomar as Generali on 4 and 26 October 2016. On 26 October 2016, Auscomar informed SIAT that it was "pleased to confirm the renewal … under the same terms and conditions as the expiring warranties". On the evidence, SIAT confirmed its readiness to renew on 4 November 2016. Auscomar then sent SIAT a cover note on 6 December 2016 which was signed by Auscomar and stamped by SIAT ("the SIAT Cover Note"). The SIAT Cover Note was, in relevant respects, in the same terms as the Generali Cover Note.

Swiss Re

42. The position of Swiss Re is essentially the same as that of SIAT. It participated in the 2015 Fleet Policy and was approached to add the Vessel to that cover. It signed an endorsement doing so on 30 August 2016, which was in the same terms as the SIAT endorsement.

43. Swiss Re was approached by Auscomar on 26 October 2016 to renew the 2015 Fleet Policy "at all the terms and conditions at expiration". On 31 October 2016, Swiss Re confirmed renewal "at all terms at expiration". Following a telephone conversation on 4 November 2016, Auscomar sent Swiss Re a cover note ("the Swiss Re Cover Note") which was in the same terms, in relevant respects, as the Generali Cover Note. This was signed by Auscomar and stamped by Swiss Re.

StarStone

44. The Seventh and Eighth Claimants, StarStone Corporate Capital 1 Limited and SGL No. 1 Limited, are corporate members of Lloyd's Syndicate 1301 for the 2016 year ("StarStone"). StarStone's managing agent is SISL.

45. StarStone was initially approached to provide cover for the Vessel in February 2016. On 10 May 2016, it was sent the same set of proposed terms which Generali received on that date (as set out at paragraph [38] above), and on 18 May 2016 Auscomar told StarStone that it had a firm order "from the customer". Starstone was told that the risk on the Vessel had attached on 30 August 2016, when it was sent a copy of a cover note by Auscomar. That cover note contained the Jurisdiction Condition and the same reference to the Camogli Policy as the 2015 Fleet Policy. StarStone stamped and returned that cover note.

46. Starstone was approached to renew the 2015 Fleet Policy "at all terms and conditions as expiring" in October 2016. It confirmed its participation on 4 November 2016. Auscomar sent it a cover note ("the StarStone Cover Note")

which was in the same terms in relevant respects as the Swiss Re Cover Note . The StarStone Cover Note was signed by Auscomar and stamped by StarStone.

PICC

47. Cambiaso Risso invited PICC to add the Vessel to the 2015 Fleet Policy on 13 August 2015, seeking cover "as per fleet". In May 2016, PICC was told that Cambiaso Risso had a firm order to place cover on the attached terms. These contained the Jurisdiction Condition, but did not refer to the Camogli Policy. PICC confirmed that the Vessel was held covered on 5 August 2016. On 26 October 2016, Cambiaso Risso invited PICC to renew on the basis it would "keep same current terms as expiry". On 29 December 2016, PICC was sent a draft cover note ("the PICC Cover Note") which provided:

> "Law & Jurisdiction: This Insurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the Courts of England and Wales".

48. PICC stamped and returned the PICC Cover Note.

India International

49. India International was approached by a Dubai-based broker, K M Dastur, on 7 August 2015, and asked to add the Vessel to the 2015 Fleet Policy "as per fleet". India International was contacted again on 11 May 2016 when K M Dastur stated that it had a firm order to include the Vessel. India International was asked to sign certain endorsements. These were signed and returned the same day. The endorsements recorded amendments to the 2015 Fleet Policy to add the Vessel on the attached conditions. Those conditions did not contain any law or jurisdiction clauses.

50. On 5 August 2016, India International stamped an endorsement confirming that the Vessel was covered under the 2015 Fleet Policy, "all other terms, clauses and conditions remaining unaltered". On 1 November 2016, India International was asked to participate in the renewal of the 2015 Fleet Policy. It confirmed its participation by scratching slips provided by K M Dastur on 7 November 2016 ("the India International Slip"). The India International Slip provided:

> "CHOICE OF LAW AND JURISDICTION
>
> Law: English.
>
> Jurisdiction: English.
>
> This contract shall be governed and construed in accordance with Italian law and subject to Italian jurisdiction".

The Composite Cover Note

51. On 9 November 2016, Auscomar issued the Composite Cover Note for the Vessel. This stated:

> "INSURED BY ORDER OF Fairport Shipping Ltd
>
> Enclosed herewith are details of insurance(s) we have effected on your behalf. Please check the document carefully and let us know immediately if you believe that the cover arranged or security given is not in accordance with your requests or requirements in any way".

52. The Composite Cover Note contained the Jurisdiction Condition and the same reference to the Camogli Policy as the Generali Cover Note. It listed the Security as follows:

    i) For the Hull and Machinery insurance, Generali (12.5%), SIAT (12.5%), StarStone (5%), Swiss Re (7.5%), PICC (15%) and India International (15%).

    ii) For the Increased Value insurance, Generali (12.5%), SIAT (12.5%), StarStone (5%), Swiss Re (7.5%), and India International (15%).

The non-Treviso Policies

53. As I have noted, it is common ground that the non-Treviso Policies are subject to exclusive English jurisdiction agreements, so it is not necessary to set out the chronology of the placing of those insurances in any detail.

54. The following summary should suffice:

    i) On 30 October 2015, the Twenty-Third Claimant ("Taiping") provisionally agreed to take a line on the Hull and Machinery cover from a date to be advised, scratching a slip which contained an exclusive English jurisdiction clause. Further versions of the slip were signed on 1 March and 1 June 2016, which included a provision requiring Taiping to follow Generali as leader.

    ii) On 2 November 2015, the Ninth Claimant ("QBE"), as the leading underwriter under a lineslip subscribed to by the Sixth and Ninth to Nineteenth Claimants, agreed to take a line on the Vessel's Increased Value cover "from date to be advised", the slip containing an exclusive English jurisdiction clause. Revised slips were scratched on 14 December 2015, and 18 January and 27 May 2016. The linselip insurers were required to follow the settlements of the Hull and Machinery insurers.

    iii) On 1 March 2016, the Sixth Claimant ("Ascot") approved a draft slip for an 8% line on the Vessel's Hull and Machinery insurance, on terms which included an exclusive English jurisdiction clause and a term obliging Ascot to follow Generali's settlements.

    iv) On 13 December 2016, the Twentieth Claimant subscribed to a 2.5% line on the Hull and Machinery insurance as leader of Lloyd's hull consortium 9577, on terms providing for English law and exclusive English jurisdiction.

v) The Second Claimant ("Mapfre") scratched two policies for the Hull and Machinery and Increased Value policies on 9 September 2016, both of which provided for English law and exclusive English jurisdiction.

vi) On 31 May 2016, Sunshine Property & Casualty Insurance Co Ltd stamped a slip providing cover for the Vessel from a date to be advised. It later signed an endorsement attaching such cover from 5 August 2016. The slip signed by Sunshine provided for English law and exclusive English jurisdiction.

THE ITALIAN PROCEEDINGS

55. On 5 June 2018, Pelagic commenced proceedings in Treviso against Generali, SIAT, Swiss Re and SISL, seeking decrees from the Italian court requiring those insurers to make payment under their policies. Jurisdiction was asserted either on the basis that the insurers were Italian companies, or that they had written the business through their Italian offices. It was not asserted that jurisdiction could be established on the basis that the policies contained exclusive (or indeed non-exclusive) Italian jurisdiction clauses. The decrees were granted on 18 October 2018.

56. The claim against SISL was expressed to be brought against SISL "not in its own capacity but as insurance agent acting on behalf of Lloyd's Syndicate SCC 1301". SISL later contended that it has not been properly sued in the Treviso Proceedings because it was not an insurer. However, an order of the Treviso Court of 31 May 2019 required SISL to serve a further power of attorney confirming its capacity to act on behalf of StarStone because that was "the capacity in which it received the injunction". No amendment was made to the form of proceedings issued by Pelagic, and it was common ground before me that the proceedings continued thereafter on the basis that the injunction had been granted against StarStone. In these circumstances, I have concluded that the Treviso Court was seised of the proceedings against StarStone on 5 June 2018.

57. On 5 November 2018, Pelagic commenced further proceedings in Treviso against PICC and India International, with jurisdiction being asserted on the basis that as co-insurers, they could be sued in the same court as Generali and the other insurers under Article 8(3) of the Brussels Convention 1968 and Article 11(1)(c) of Brussels I Recast. The Insurers argue that the Treviso court did not have jurisdiction over PICC and India International on the basis asserted, because the provisions referred to only apply to co-insurers domiciled in contracting/member states, and therefore did not apply to PICC and India International. The Treviso court granted a decree requiring payment on 8 November 2018.

58. Together with the other insurers, the Treviso Insurers issued proceedings in this jurisdiction on 18 January 2019. Thereafter, they applied to set aside the decrees which had been granted in the Italian proceedings (those applications being made on 21 January and 29 March 2019), contending that the Italian court had no jurisdiction over the claims. The Treviso Insurers referred in this connection to what they contended were exclusive English jurisdiction clauses in the Treviso Policies. In its responses filed in the Treviso Proceedings on 15 April and 14 June 2019, Pelagic contended for the first time that the Treviso Policies contained

clauses giving the Italian courts jurisdiction (as well as certain other arguments which were said to provide a basis for the jurisdiction of the Italian courts).

59. The Insureds issued their applications to challenge the jurisdiction of this Court on 1 July 2019 (Fairport) and 16 September 2019 (Pelagic) (the interval reflecting the time it had taken the Insurers to effect service on Pelagic).

60. On 14 and 17 December 2019, the Treviso Court stayed the Treviso proceedings ("the Stay Orders"). The Stay Orders provided as follows:

> "The lis alibi pendens defence which has been raised requires that these proceedings are suspended in order to allow the High Court of London to rule on the exclusive English jurisdiction clause pursuant to art 31.2 of EU Reg 1215/2012.
>
> That since, in the light of what is established by the said provisions, it is irrelevant that the Italian Judicial Authority has been seised first, …. Indeed article 31 of the above mentioned regulation represents an exception to the operation of the ordinary rule of priority in matter of lis alibi pendens, in order to allow the judges chosen by the parties in contractual terms (cover notes) to be the first to rule on the validity of the clause itself (according to the law chosen by the parties). In the concerned case all the cover notes, in the special insurance conditions, contain the clause 'English jurisdiction. Subject to English law and practice", with consequent waiver to the general insurance conditions provided in Camogli Policy 1988 form".

61. The Insureds appealed against the Stay Orders on 10 January 2020. Those appeals have yet to be heard.

Should the English Court proceed to determine whether there is an exclusive jurisdiction clause in favour of this Court, in circumstances in which Pelagic is contending in Italy that the Italian courts have jurisdiction, or should it await a ruling on jurisdiction in the Treviso Proceedings?

62. Brussels I Recast introduced an important qualification to the general rule governing *lis pendens* under the regulation and its predecessors. The general rule is that any court subsequently seised is required to stay its proceedings to await a decision on jurisdiction by the court first seised. Recital (22) to Brussels I Recast explains why, and how, that general principle was qualified so far as exclusive choice-of-court agreements are concerned:

> "In order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter declares that it has no jurisdiction under the exclusive

> choice-of-court agreement. That is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it".

63. In Ablynx NV and another v VHsquared Ltd [2019] EWCA Civ 2192, the Court of Appeal considered the approach which should be adopted by the English Court when, as the court first seised, the defendant contends that there is an Article 25 exclusive jurisdiction agreement in favour of a subsequently seised court. In Ablynx, proceedings had been commenced in England in reliance on Article 24(4) of Brussels I Recast, which confers exclusive jurisdiction in proceedings concerned with the registration or validity of patents or similar rights on the courts of the member state where the deposit or registration has been applied for. The defendant contended that the dispute, or at least parts of it, fell within an exclusive jurisdiction clause in favour of the Belgian courts (the court second seised). In response, the claimant contended that the effect of Article 25(4) was that the exclusive jurisdiction agreement had no legal force, because it purported to confer exclusive jurisdiction on the Belgian courts in respect of matters falling within Article 24(4).

64. A threshold issue for the Court was the order in which the judge should approach the issues – should the judge first determine whether the English court had jurisdiction under Article 24 (as the claimant contended), or should the judge determine whether there was an apparent or prima facie case that Article 31(2) was engaged, and, if there was, stay the proceedings to allow the Belgian court to rule on the exclusive jurisdiction clause (as the defendant contended)? The Court of Appeal upheld the defendant's argument. Lewison LJ stated:

> "[72] As Ms Lane put it, the judge mixed up articles 24(4) and 25(4) which are substantive rules about jurisdiction; and article 31(2) which is a procedural rule about which court should take the lead in deciding the question of jurisdiction where there are parallel actions. I agree.
>
> [73] I consider, therefore, that the judge was wrong when he said: 'I must resolve this last question'. In my judgment he was only required to decide whether there was a prima facie case that article 25(4) did not invalidate the jurisdiction agreement. If the English court reaches that conclusion, then it is up to the Belgian court to decide definitively".

65. Mr Davey QC for the Insureds relies on Article 31(2) and the Ablynx decision to argue that the only issue which I should consider is whether I am satisfied that there is a *prima facie* case that the Italian court has jurisdiction (which he says there is on the basis that the parties agreed that both the English and Italian courts would have jurisdiction). He contends that if I am so satisfied, I should stay the English proceedings, pending the outcome of Pelagic's appeal in the Italian proceedings.

66. I am unable to accept this submission.

67. Article 31(2) requires courts other than a court designated by the parties as having exclusive jurisdiction to stay their proceedings while the designated court

determines whether it has exclusive jurisdiction over proceedings of which it is seised. While Article 31(2) refers to a court "on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised", it is clear from the language that follows that it is not necessary for the existence of such an agreement to be definitively established before Article 31(2) applies. As the matter is put by Professor Briggs QC in *Civil Jurisdiction and Judgments* (6th) at para. 2.277, "it is the duty of the court first seised to have regard to Article 31(2), and to be prepared to stay its proceedings if the court on which exclusive jurisdiction has been (arguably) conferred by agreement has not yet declared that it has no jurisdiction under the agreement".

68. In this case, however:

i) It is the English Court on which "exclusive jurisdiction has been (arguably) conferred by agreement". The effect of Article 31(2) is to allow the designated but second-seised court to decide if it has exclusive jurisdiction by virtue of Article 25, and, if it does so decide, to proceed with the case, irrespective of the position in the court first seised (Commerzbank AG v Liquimar Tankers Management Inc [2017] 1 WLR 3947, [77]-[78], Cranston J).

ii) As advanced before me, the Insureds' argument was not that there was a prima facie case that the Italian court had exclusive jurisdiction, but rather a prima facie case that the English and Italian courts both had jurisdiction which was non-exclusive as regards the other courts. Article 31(2) provides no basis for the English court to stay its proceedings pending a determination by another court that it has jurisdiction on some basis other than an exclusive jurisdiction agreement (it being effectively accepted by the Insureds before me that they could not show even a prima facie case of *exclusive* Italian jurisdiction).

iii) The practical effect of granting the stay application before me would be to require the Italian court to determine whether or not the jurisdiction clause in favour of the English court is exclusive or non-exclusive, whereas the purpose of Article 31(2), as recorded in Recital (22), is "to ensure that …. the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute", and to do so "irrespective of whether the non-designated court" (which in context must mean a court not designated as having exclusive jurisdiction) "has already decided on the stay of proceedings".

69. For these reasons, the scheme of Article 31(2) strongly suggests that the English Court should determine whether or not it has exclusive jurisdiction under Article 25 in a case such as the present.

70. Further, in circumstances in which the Italian court has stayed its proceedings to allow the English court to determine if it has exclusive jurisdiction, it would be particularly surprising if the English court was then bound to stay its proceedings pending a decision on jurisdiction by the Italian court. This approach, in which the dispute might become caught in the self-perpetuating politeness of an Alphonse and Gaston cartoon, is not consistent with enhancing "the effectiveness

of exclusive choice-of-court agreements" and avoiding "abusive litigation tactics" which Article 31(2) is intended to achieve. It does not matter for these purposes that the decision of the Italian court granting such a stay is presently under appeal. For the present, the Treviso Proceedings are and remain stayed.

71. Had the Insureds been contending before me that the claims brought by the Treviso Insurers were subject to an agreement for exclusive Italian jurisdiction, at the same time as the Treviso Insurers were contending before this court that the claims were subject to an agreement for exclusive English jurisdiction, the position would have been more complex. The last paragraph of Recital (22) provides:

> "This exception should not cover situations where the parties have entered into conflicting choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seised first. In such cases, the general *lis alibi pendens* rule of this Regulation shall apply".

72. This paragraph appears to be addressing the position, not infrequently encountered, where the parties enter into more than one agreement as part of one overall transaction or relationship, which agreements contain different exclusive jurisdiction agreements, rather than the position where the effect of a jurisdiction clause in the same agreement is in dispute, with one contracting party contending that it gives exclusive jurisdiction to the courts of one state, while the other contends that it gives exclusive jurisdiction to the courts of a different state.

73. So far as the former position is concerned, I was referred to the decision of Mr Ali Malik QC sitting as a Deputy Judge of the High Court in Dexia Crediop SpA v Provincia Di Brescia [2016] EWHC 3261 (Comm), which considered a case in which the parties had entered into a mandate agreement providing for the exclusive jurisdiction of the Italian courts, and an ISDA Master Agreement providing for the exclusive jurisdiction of the English courts. The Provincia commenced proceedings in Italy alleging various breaches of the mandate agreement, and in response, Dexia commenced proceedings in England seeking various forms of declaratory relief. Mr Malik QC determined that, as a matter of construction, the declarations being sought in the English proceedings fell within the jurisdiction clause in the ISDA Master Agreement and not that in the mandate agreement.

74. The Deputy Judge determined that Article 29 was not engaged because the causes of action asserted in the English proceedings were not the same as those which had been brought first in Rome. In those circumstances, it was not necessary for the judge to address the Provincia's argument that the English court, as the court second seised, was obliged to stay its proceedings under Article 31(2) pending a determination by the Italian court as to whether it had exclusive jurisdiction by virtue of the mandate agreement. However, the judge did consider the issue on an obiter basis, holding at [141]:

> "In my judgment there is nothing in Recital (22) that assists Brescia. Had the Court of Rome jurisdiction over the Declarations (2) and (3) as alleged by Brescia, it would have been the designated court. However I have concluded under Issue 2 that Declarations (2) and (3) fall within the jurisdiction clause

> of the ISDA Master Agreement and that the English court has exclusive jurisdiction concerning all the declarations sought in the English proceedings. It follows from this that the English Court is the designated court for the purposes of Article 31(2) and the Court has priority over the Court of Rome even though commenced first. There is no basis for contending that the English Court should stay its proceedings under Article 29."

75. The reference in the last paragraph of Recital (22) (which was not set out in the judgment in Dexia) to "conflicting choice-of-court agreements" suggests that there is scope for at least some consideration by the court second seised of the potential application of the two exclusive jurisdiction agreements, before determining whether the court is obliged to stay proceedings under Article 29, or whether it is able to determine its own exclusive jurisdiction under Article 31(2). However, the appropriate level of review for this purpose (which it was not necessary to consider in Dexia) may well be the "prima facie" test approved in Ablynx or, perhaps, whether there is a serious issue that the other exclusive jurisdiction clause applies. If this issue was approached by considering who had the better of the argument as to which exclusive jurisdiction agreement applied, the inevitable result would be that the court second seised would proceed to determine its own jurisdiction in all cases without waiting for the court first seised to rule.

76. What is to happen where the dispute does not involve two competing jurisdiction agreements, but is a dispute as to the proper construction of the parties' agreement (e.g. a "battle of the forms" case) and whether it gives exclusive jurisdiction to the courts of one country or another? There would seem to be three possibilities:

    i) The ordinary *lis pendens* provisions apply, such that the court first seised should automatically proceed to determine its jurisdiction, and the court second seised should automatically stay its proceedings pending that determination. This would involve the risk of abusive proceedings of the kind which Article 31(2) is intended to avoid, because a bare claim that the agreement conferred exclusive jurisdiction on the first court might be sufficient to halt proceedings in what could readily be shown to be the designated court.

    ii) The court could determine who had the better of the argument, without waiting for the determination of the other court, and regardless of who was first seised. However, that would involve both courts effectively deciding which court had jurisdiction, with the attendant risk of parallel proceedings and inconsistent judgments.

    iii) The court second seised could stay proceedings only if satisfied that the assertion that the court first seised was the designated court was at least arguable (without deciding who had the better of the argument).

77. That third approach avoids the difficulties inherent in the first two, and achieves an outcome similar to that in the "two exclusive jurisdiction agreements" case considered in para. [75] above. In my view, it is the preferred approach. In this case, as I have stated, it was not suggested that there was a serious argument that the Italian court has exclusive jurisdiction.

78. For these reasons, I have concluded that I should proceed to consider whether the Treviso Insurers have a good arguable case that this Court has exclusive jurisdiction in respect of their claims because:

    i) Articles 29 and 31(2) do not require the English Court to stay its proceedings in circumstances in which it is contended that the English Court is the designated court, and it is not suggested that the Italian Court is the designated court, and given that the Italian Court has stayed its proceedings to allow the English Court to determine whether it has jurisdiction under Article 25 (paragraphs [67] to [70]); alternatively

    ii) the English Court is alleged to be the designated court, and there is no serious issue that the Italian Court is the designated court (para. [77]).

Is there an exclusive jurisdiction agreement in the Treviso Policies for the purposes of Article 25?

79. I therefore turn to the issue of whether there is a good arguable case that the Treviso Policies are subject to exclusive jurisdiction agreements in favour of the English court which satisfy the requirements of Article 25 of Brussels I Recast. For this purpose, it is necessary to consider the Treviso Insurers in the following groups:

    i) Generali, SIAT, Swiss Re and StarStone ("the Generali Insurers").

    ii) PICC.

    iii) India International.

The Generali Insurers

80. The issue of whether the Generali Insurers are parties to exclusive jurisdiction agreements with the Insureds in favour of the English court turns solely on the interrelationship of the Jurisdiction Condition and the reference to the Camogli Policy:

    i) While there was some debate before me as to the contractual status of the Generali Insurers' Cover Notes (which the Treviso Insurers contended recorded the terms of the policies), and the Composite Cover Note (which the Insureds contended recorded the terms of the policies), it was not suggested that any different issue of construction arose as between these different documents, which were materially identical in the relevant respects.

    ii) For the same reason, it is not necessary to address the Insureds' contention that only the Composite Cover Note satisfies the requirements of consent "clearly and precisely demonstrated" arising under Article 25. If that is assumed in the Insureds' favour for the present, the same issue of construction arises in relation to the Composite Cover Note as arise in relation to the Generali Insurers' Cover Notes.

iii) Nor is it necessary to consider the prior history of the placement, or the particular negotiations which culminated in the renewal of the 2015 Fleet Policy by the Generali Insurers. On the evidence, the 2015 Fleet Policy (and indeed the prior policies) each contained the Jurisdiction Condition and the reference to the Camogli Policy in materially identical form as they are to be found in the documents said to contain the Treviso Policies issued by the Generali Insurers. As a result, any assumption that the insurances were renewed "as expiring" raises exactly the same issue as arises if the 2016 documentation is considered on a stand-alone basis. Nor did either party suggest that the negotiations of the 2016 policies involved a departure from the law and jurisdiction provisions which had previously prevailed.

81. It will be recalled that the Camogli Policy provides for Italian law (save that the "English Clauses" are to be "interpreted and applied as they are interpreted and applied in England"), whereas the Jurisdiction Condition provides for "English law and practice". To the extent that the Court is looking for an express choice of law under Article 3 of Regulation (EC) No. 593 of 2008 (Rome I) to apply in determining the relative status and interrelationship of the two documents, it can be said that any attempt to do so by applying English law principles presupposes the very matter which the court is seeking to ascertain. Dicey, Morris & Collins, *The Conflict of Laws* (15th edn) para. 32-067 discuss the issue in the following terms:

> "Art. 10 (which deals with the existence and validity of a contract) does not provide an answer to the question of what law applies if there are conflicting contractual standard forms, where one contains an express choice of law and the other does not, or where both contain conflicting choices of law. In these circumstances, the only laws which could provide an answer are the *lex fori* or the law which would govern the contract in the absence of an express choice of law. The latter is probably more in keeping with the spirit of the Regulation".

82. This passage was cited by Cooke J in Whitworths Limited v Synergy Food Ingredients and Process BV [2014] EWHC 4239 (Comm), although he noted that on the case before him, both systems of law led to exactly the same result ([40]). In this case, there was no suggestion that Italian law differed from English law when it came to interpreting the interrelationship between the Jurisdiction Condition and the Camogli Policy, and the argument before me on this issue was conducted by reference to English law principles.

83. In any event, I am satisfied that if the issue is approached by asking what would be the applicable law in the absence of an express choice of governing law, the applicable law would in any event be English law as the law "clearly demonstrated by the terms of the agreement or the circumstances of the case" under Article 3(1) (and English law is, of course, also the law of the forum):

i) The Treviso Policies contain a large number of London market clauses: for example the Institute Time and Additional Perils Clauses and clauses of the London Market Joint Hulls Committee (such as the Violent Theft,

Piracy and Barratry Exclusion and the Sanction Limitation and Exclusion Clause).

ii) In Gard Marine & Energy Limited v Glacier Reinsurance AG and another [2010] EWCA Civ 1052, Thomas LJ at [43] relied in reaching his conclusion that the placement with a Swiss reinsurer involved a demonstrable choice of English law on the fact that the slip included well-known London market terms such as the Several Liability Notice Reinsurance, the radioactive, chemical contamination and cyber-attack exclusion clause and a clause addressing the consequences of a failure to pay premium. He found that "the use of London market terminology and London market clauses throughout the slip are clear indicia of a real choice of English law". There are similar clauses in the policies here.

iii) Further, the Treviso Policies formed part of a package of insurances placed as a coherent whole, which in aggregate made up 100% of the Hull and Machinery and Insured Value Cover for the Vessel. The close relationship of those contracts is reinforced by the Claims Lead clauses in all policies save the Generali Cover Note, under which the other Insurers agreed to follow decisions of Generali so far as claims handling and settlements are concerned. It is common ground that the policies placed with the non-Treviso Insurers were all subject to an express choice of English law. That provides a strong factor in support of the argument that the parties to the Treviso Policies had manifested their choice of English law as the applicable law. As Thomas LJ noted in Gard v Glacier at [41]:

> "It would make no commercial sense for one part of the reinsurance to be governed by one system of law and another to be governed by a different system".

84. The principal issue between the parties is whether the reference to "English jurisdiction" in the Jurisdiction Condition prevented the Italian jurisdiction clause in the Camogli Policy from being incorporated into the Treviso Policies (as the Treviso Insurers submitted), or whether the clauses could and should be read together so as to provide for the courts of England and Italy to have jurisdiction (as the Insureds submitted).

85. Where a contract contains specifically negotiated terms, and also incorporates a pre-existing set of standard or printed terms, the former will prevail over the latter to the extent of any inconsistency: Indian Oil Corporation v Vanol Inc [1992] 2 Lloyd's Rep 563. However, there are also cases which suggest that, where possible, the court should seek to read the specifically negotiated and the incorporated terms together. For example in Bayoil SA v Seawind Tankers Corp [2001] 1 Lloyd's Rep 533, 536, Langley J stated that:

> "The Courts will … seek to construe a contract as a whole and if a reasonable commercial construction of the whole can reconcile two provisions (whether typed or printed) then such a construction can and in my judgment should be adopted".

86. Similarly, Sales J in Alchemy Estates v Astor [2008] EWHC 2675 (Ch), [35] observed:

> "It is true that special terms take precedence over standard conditions if there is a clear conflict between them … However, where the parties have adopted both standard conditions and special conditions and have not indicated that the standard conditions they have adopted are to be displaced in some respect by a special condition and there is no necessary inconsistency between them, then it appears that the parties' intention is that the standard conditions and the special conditions should be interpreted together as parts of one coherent contractual structure".

87. Elsewhere, I have suggested that what might be described as a "jigsaw" approach to construction, under which all the pieces are to be used if at all possible, can sometimes risk a false equivalence between bespoke and boilerplate contractual provisions. Whatever the merits of seeking to read provisions together as a general rule of construction, however, it is clear that the enthusiasm with which this approach should be pursued will vary between contractual terms, and contractual contexts. In Homburg Houtimport BV v Agrosin Ltd (The Starsin) [2003] UKHL 12, the House of Lords criticised attempts to read the clear identification of the carrier as the charterer on the front of a bill of lading, together with the elaborately drafted "identity of carrier" provision on the back. Lord Bingham warned that "to seek perfect consistency and economy of draftsmanship in a complex form of contract which has evolved over many years is to pursue a chimera" ([12]). Lord Hoffmann said that the courts below had been led into error because "they conscientiously set about trying, as lawyers naturally would, to construe the bill of lading as a whole" whereas "the reasonable reader of a bill of lading does not construe it as a whole, for some things he goes no further than what it says on the front", and if that is clear enough, "no attempt at reconciliation is required" ([82], [85]).

88. There are a number of reasons in this case which, cumulatively, have led me to conclude that the Treviso Insurers clearly have the better of the argument on this issue, and that the Jurisdiction Condition is intended to operate as a standalone provision, rather than one whose contractual effect depends on reading it together with Article 3 of the Camogli Policy in the way Mr Davey QC contends.

89. First, the Jurisdiction Condition is a bespoke provision specifically agreed for the Treviso Policies, and it is set out in terms on the face of the Cover Notes. By contrast, Article 3 is a printed term in a standard set of terms. While the set of terms is specifically referred to in the contractual documentation, Article 3 is not.

90. Second, the way in which the contractual wording refers to each provision itself suggests that the Jurisdiction Condition is intended to have a higher contractual status than, rather than be commensurate with, Article 3. The Jurisdiction Condition is described using what is clearly promissory language as a "condition", and it appears together with those provisions which determine the extent of the insurance cover provided. By contrast, the Camogli Policy is referred to as the "form", suggesting it is (in effect) a documentary vessel into which the conditions are to fit, with its provisions operating only to the extent of filling any gaps. In Schiffshypothekenbank Zu Luebeck AG v Compton (The

Alexion Hope) [1988] 1 Lloyd's Rep 311, when faced with the argument that the list of perils listed in the Lloyd's SG form limited the meaning of the word "occurrence" elsewhere in the policy because that was the only way in which those perils could be given meaning, Lloyd LJ noted the difficulties which this would involve, and concluded that "the SG form was used here as little more than a backsheet" (pp.315-316). In my view, the better view is that that is true of the Camogli Policy here.

91. Third, the contractual documentation in this case, like the bill of lading in The Starsin, is of a type in which the parties would ordinarily look to the matters expressly set out in the primary contractual document (in many insurance cases the slip, here the Generali Insurers' Cover Notes) to identify the key contractual provisions, and they would not expect to have to look in printed terms incorporated by reference to ascertain the meaning and effect of those key contractual provisions.

92. Fourth, the effect of reading the Jurisdiction Condition together with Article 3 is to effect a very fundamental change to the meaning and effect which the Jurisdiction Condition would have considered on its own. The Jurisdiction Condition would ordinarily have the effect of conferring exclusive jurisdiction on the English courts, providing a single and certain jurisdiction in which all parties were required to bring claims. This is so both because of the presumption of exclusivity arising under Article 25 of Brussels I Recast (GDE LLC v Anglia Autoflow Ltd [2020] EWHC 105 (Comm), [127]-[131]), and because 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 (Global Maritime Investments Cyprus Limited v OW Supply & Trading A/S [2015] EWHC 2690 (Comm), [50]). The fact that other subscriptions to the Vessel's Hull and Machinery and Increased Value cover were subject to exclusive English jurisdiction and that the other insurers were bound to follow Generali's claims lead, provides further strong support for the exclusive nature of the Jurisdiction Condition.

93. However, the construction which Mr Davey QC contends should be given to the Jurisdiction Condition when read in conjunction with Article 3 would involve two different courts having jurisdiction, and the possibility of different Insurers or the Insureds commencing proceedings in different jurisdictions in respect of the same casualty, even though the other insurers had agreed to follow Generali's claims lead. The very significant difference between the stand-alone effect of a jurisdiction agreement which has been the subject of specific agreement, and the effect it would have if read in conjunction with a clause conferring jurisdiction on another court in printed terms incorporated by reference, together with the inherently uncommercial outcome of splintering the resolution of coverage disputes to which the latter approach gives rise, makes it all the more likely that the parties intended the express jurisdiction choice in the bespoke terms to apply to the *exclusion* of any inconsistent provision in the printed terms (rather than for the two to be read together to achieve an outcome which neither would have on its own).

94. Finally, in this case the Jurisdiction Condition is inconsistent with the Camogli Policy, and against the background of the matters previously set out, those

inconsistencies are sufficient to favour the conclusion that the Jurisdiction Condition is intended to apply on a standalone basis. Mr Davey QC accepted that the reference to disputes being "solely subject to Italian jurisdiction" in the Camogli Policy is inconsistent with any reference to English jurisdiction in the Jurisdiction Condition. Further the reference to English law and practice in the Jurisdiction Condition is inconsistent with Article 2 of the Camogli Policy, in that it suggests that *all* of the conditions are subject to English law and practice, rather than simply "the English Conditions" (whatever that may have been a reference to).

95. For these reasons, I am satisfied that the Generali Insurers have the better of the argument that their policies are subject to an agreement for exclusive English jurisdiction, and that this Court should determine under Article 31 that its jurisdiction has been established pursuant to Article 25. Had I accepted Mr Davey QC's argument that the appropriate course was for the Court to stay these proceedings and await a decision of the Italian courts if satisfied that there was a prima facie case for the Italian court having non-exclusive jurisdiction by reason of Article 3 of the Camogli Policy, I would have concluded that these policies are so clearly subject to an agreement for exclusive English jurisdiction that no prima facie showing in favour of the Italian court having jurisdiction has been made out. I note in this regard that when Pelagic commenced the Treviso Proceedings, it did not suggest that the Treviso Court had jurisdiction by reason of a jurisdiction agreement.

PICC

96. The high point of the Insureds' case against PICC is to contend that PICC is in the same position as the Generali Insurers, on the basis that the relevant document for Article 25 purposes is the Composite Cover Note. As I have found that the Insureds' jurisdictional challenge to the claims brought by Generali Insurers must fail even if it is assumed in the Insured's favour that the relevant document for Article 25 purposes is the Composite Cover Note, it follows that the Insureds' jurisdictional challenge to PICC's claim also fails.

97. Even if, however, the Insureds' jurisdictional challenge to the Generali Insurers' claims had succeeded, I would in any event have held that PICC had the better of the argument that its claims against the Insureds are subject to an exclusive jurisdiction agreement in favour of the English courts, and that the Insureds had failed to make out even a prima facie case of Italian jurisdiction.

98. Mr Davey QC accepted that this was the clear effect of the English law and jurisdiction agreement in the PICC Cover Note, which contained no reference to the Camogli Policy or Italian law and jurisdiction. However, he contended that, as a matter of Italian law, Cambiaso Risso was not acting as the agent of the Insureds, and that the only agreement to which it might be said that the Insureds' consent had been "clearly and precisely" demonstrated was the Composite Cover Note.

99. I have concluded that there is nothing in this argument.

100. First, for the reasons I have set out in paragraph [83] above, I am satisfied that, irrespective of any express choice of law, the law applicable to the contract between PICC and the Insureds is English law. The position with regard to PICC is, if anything, stronger because (i) the only documents given to PICC provided for English law, and contained no reference to the Camogli Policy or Italian law and (ii) the PICC Cover Note included additional London market clauses over and above those in the Generali and Composite Cover Notes. It is well-established under English law that the broker placing insurance is the agent of the insured.

101. Second, the contemporary documents strongly suggest that Cambiaso Risso was acting for the Insureds, as sub-broker to Auscomar. Cambiaso Risso referred to having a "firm order" to add the Vessel to the 2015 Fleet. On the renewal, Cambiaso Risso referred to the agreement between Generali and "the client" as to the terms on renewal, and the PICC Cover Note recorded that Cambiaso Risso had effected "the following contract of insurance in favour of Messrs Fairport Shipping". The Composite Cover Note issued by Auscomar referred to the PICC insurance having been placed "through Auscomar SA".

102. Third, if Cambiaso Risso was not acting as the Insureds' agent, it was entirely unclear to me on what basis and when it was said that a contract of insurance had been concluded in respect of the Vessel. Mr Davey QC confirmed (as he had to) that the Insureds' case was that PICC committed itself to cover the Vessel when it signed the PICC Cover Note including its exclusive English jurisdiction clause on 4 November 2016.

103. Finally, the Insureds' reliance on the terms of the Composite Cover Note as the contractual document gives rise to a number of further difficulties. The terms of the Composite Cover Note strongly suggest that Auscomar was acting as agent of the Insureds. It refers to insurance "by order of Fairport Shipping Ltd", and continues:

> "Enclosed herewith are details of insurance(s) we have effected on your behalf. Please check the document carefully and let us know immediately if you believe that the cover arranged or the security given is not in accordance with your request or requirements in any way".

104. In this respect, the Composite Cover Note is consistent with the contemporaneous exchanges, all of which strongly suggest that Auscomar was acting for the Insureds. In any event, given the clear terms of the PICC Cover Note on the issues of law and jurisdiction, the Insureds offered no explanation as to how Auscomar had authority to agree what (on this hypothesis) would be different law and jurisdiction provisions on PICC's behalf to those set out in that Cover Note.

105. For all these reasons, whatever the effect of the provisions in the Composite Cover Note, PICC has the better of the argument that its claims fall within an exclusive jurisdiction clause in favour of this Court to which the Insureds' consent has been clearly and precisely demonstrated through the consent of the agent acting on their behalf in the transaction. Once again, if relevant, the Insureds have not shown even a prima facie case of an agreement for Italian jurisdiction.

India International

106. As I have noted, India International committed itself to insure the Vessel for the 2016 year by scratching the India International Slip which was provided to it by K M Dastur on 7 November 2016. The India International Slip had been prepared by Lloyd's brokers, Lochain Patrick, on what was recognisably a London (and Lloyd's) market form. For example it had a UMR or Unique Market Reference, and the Lochain Patrick brokers' cancellation and security clauses, and provided that all claims collections were to be through Lochain Patrick. In addition, it provides for Financial Services Authority market classifications and contained the various Institute and Joint Hulls Committee clauses already referred to which themselves provide for the application of English law and practice.

107. However, as noted above, the India International Slip provided:

> "CHOICE OF LAW AND JURISDICTION
>
> Law: English.
>
> Jurisdiction: English.
>
> This contract shall be governed and construed in accordance with Italian law and subject to Italian jurisdiction".

108. India International contends that this is a case in which there has been a mistake in recording the parties' agreement, which the Court is entitled to correct through the process of interpretation (although rectification is also sought by way of relief in the action). India International relies on the principles summarised in Sir Kim Lewison, *The Interpretation of Contracts* (6th edn) paras. 9.01 and 9.04, and considered by the House of Lords in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101. By way of summary:

    i) There must be a clear and obvious mistake.

    ii) In determining whether there is a clear and obvious mistake, the court is not confined to reading the document without regard to its background or context.

    iii) It must be clear what correction ought to be made to correct the mistake.

109. Just as the court is entitled to have regard to the background and context of a document to determine whether there is a clear mistake, so too it must be entitled to have regard to the background and context in determining whether it is clear what correction ought to be made to correct that mistake. Indeed these will very often involve the same enquiry – reading the document with regard to its background and context may make it clear that there has been a mistake because it may make it clear what the parties intended to say, which is not what they have in fact said.

110. In this case, it is clear (certainly to the standard of a good arguable case) that the parties have made a mistake, or, as it is sometimes put, that something has gone wrong in the drafting. The law and jurisdiction clause in the India International

Slip is inherently contradictory. While Mr Davey QC suggested that it was at least possible to read the two jurisdiction clauses together so as to provide for agreed, but not mutually exclusive, jurisdictions, the contract cannot simultaneously be subject to two different proper laws. Further, the nexus between the choice of law and jurisdiction is so clear that it would, in my view, be wrong to treat the parties' mistake as extending only to their provision for applicable law, and not that for competent jurisdiction.

111. That leaves the issue of whether it is clear what correction ought to be made to correct the error. In my view, India International has the better of the argument that the correction to be made is to treat the parties' choice of law and jurisdiction as English law and English jurisdiction, with the references to Italian law and jurisdiction being an error in the drafting:

    i) For the reasons I have set out in paragraph [106] above, it is clear from the other terms which appear on the face of the India International Slip that the parties intended English law to apply, which itself strongly suggests that it is the choice of English law and jurisdiction, rather than Italian law and jurisdiction, which the parties intended.

    ii) That conclusion is reinforced by consideration of the background of and context to the India International Slip, namely that it formed part of a placement of 100% of the Hull and Machinery and Increased Value cover for the Vessel, in which (on the basis of my findings), the better view is that all of the other Insurers had agreed English law and exclusive English jurisdiction (with there being no dispute about this so far as the non-Treviso Insurers are concerned), and in circumstances in which India International had agreed to follow the claims lead of Generali who, on what I have held to be the better view, had agreed English law and exclusive English jurisdiction with the Insureds.

112. In these circumstances, I have not found it necessary to resort to the unsatisfactory ultimate contingent remainderman of considering the order in which the terms appeared in the document (discussed in Lewison, para. 3.08).

Should the Court stay the remainder of the proceedings under Article 30?

113. This application only arose if I had concluded that the Court should stay the proceedings against Pelagic under Article 31 of Brussels I Recast, and I can therefore dealt with it briefly.

114. The Article 30 application was made in respect of:

    i) the claims brought by the Treviso Insurers against Fairport, which is not party to the Treviso Proceedings; and

    ii) the claims brought by the non-Treviso Insurers against both Pelagic and Fairport.

115. Article 30 gives the court seised of related proceedings a discretion to stay those proceedings. Proceedings are related for this purpose if "they are so closely

connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (Art. 30(3)). It was common ground that the claims of the Treviso and non-Treviso Insurers against the Insureds were related proceedings.

116. Had I concluded that it was appropriate to stay the proceedings brought by the Treviso Insurers against Pelagic under Articles 29 and/or 31(2), I would have concluded that it was appropriate to stay the proceedings brought by the Treviso Insurers against Fairport under Article 30. Fairport is in a contractually identical position to Pelagic, and any judgment as between the Treviso Insurers and Pelagic would necessarily be determinative of the position as between those insurers and Fairport.

117. However, I would not have stayed the proceedings brought by the non-Treviso Insurers against Pelagic and Fairport for the following reasons:

i) The contracts between the non-Treviso Insurers and Pelagic and Fairport are subject to English law and exclusive English jurisdiction. It is well-established that this is a powerful factor against staying proceedings under Article 30: The Alexandros T [2014] 1 Lloyd's Rep 233, [95] and Nomura v Banca Monte Dei Paschi [2014] 1 WLR 1584, [78-79].

ii) Any fragmentation of proceedings which would result from proceedings continuing in this Court was simply the result of Pelagic's own choice, in choosing to commence the Treviso Proceedings in circumstances in which (on its own case) the courts of England and Italy both had jurisdiction.

iii) Given that this Court cannot decline jurisdiction in respect of the claims of the non-Treviso Insurers under Article 30(2), to permit consolidation with the Treviso Proceedings (because this Court is the designated Article 25 court so far as the non-Treviso Insurers are concerned), staying the English proceedings under Article 30 would achieve nothing but delay. The non-Treviso Insurers cannot be joined to the Treviso Proceedings, and any judgment involving the Treviso Insurers will not be binding upon them.

iv) Any prospect of a practical benefit resulting from putting the claims brought by the non-Treviso Insurers in England on hold until the conclusion of the Treviso Proceedings must inevitably be speculative, in circumstances in which Pelagic is contending that the claims in the Treviso Proceedings are subject to Italian law (whereas it is common ground that the claims of the non-Treviso Insurers are subject to English law), particularly when the position of Pelagic appears to be that the issues raised in the English proceedings are not relevant as a matter of Italian law.

v) The fact that the non-Treviso Insurers have agreed to follow the decisions of Generali in respect of certain aspects of claims handling does not affect the position, in circumstances in which the "follow" provision does not bind the non-Treviso Insurers to judgments involving Generali.

Conclusion

118. For these reasons, the Insureds' applications are dismissed, and I find that this Court has jurisdiction under Article 25 in respect of the claims brought by the Insurers.

119. The parties are asked to agree a form of order giving effect to my judgment, and any consequential issues which may arise. To the extent that any consequential issues are in dispute, the parties are asked to agree a timetable for the service of written submissions.