JUDGMENT : Mr Justice Colman: Commercial Court. 10th May 2005

Introduction

1. This is an application to stay Part 20 proceedings against the applicant reinsurers pending the determination of issues which are said to affect the reinsurers' liability to the Part 20 claimants.

2. I refer to the applicants as "*the Reinsurers*", to the Part 20 claimants as "*Coromin*" and to the claimants in the main proceedings as "KCM". Coromin were co-defendants in the main proceedings with five insurance companies all incorporated in Zambia. I refer to them as "*the Local Insurers*".

3. Reinsurers had initially launched an application for a stay of the Part 20 proceedings on the grounds of forum non conveniens. That has not been pursued.

4. The claims advanced in the main proceedings against Coromin and the Local Insurers can be outlined as follows.

5. KCM is incorporated in Zambia and is the owner and operator of Nchanga open pit copper mine in Zambia. The second claimant, ARH Limited SA ("ARH") is incorporated in Luxembourg. It purchased KCM in March 2000 and owned and controlled it until August 2002. It is assignee of certain of KCM's rights to insurance claims the subject of these proceedings, notice of such assignment having been given to the defendant. ARH is an indirect wholly owned subsidiary of Anglo American plc ("*Anglo American*"). That company is incorporated in England with its head office in London.

6. Coromin is an insurance company incorporated in Bermuda. It was originally set up as a captive to insure and reinsure risks relating to the operation of Anglo American and other companies within that Group. It is now separately advised and represented in these proceedings and is not controlled as regards the conduct of its defence or of its Part 20 claim by Anglo American, KCM or ARH.

7. The Reinsurers of Coromin are either Lloyd's Syndicates or reinsurers domiciled in England, or other European Union states or Switzerland. For the purpose of effecting reinsurance cover in the present case Coromin employed as their brokers Aon London.

8. On 8 April 2001 an avalanche of rock and mud very substantially damaged the Nchanga mine killing ten miners. The claims in these proceedings are directed to recovering an indemnity in respect of the losses suffered by KCM.

9. Until a few days before the commencement of the hearing of this application, a qualification which I explain later in this judgment, KCM claimed its losses in the main proceedings primarily against Coromin under a Combined Commercial Insurance Policy ("the CCIP") and/or a contract called Coromin Limited Global Master All Risks Policy, to which I refer as the "Coromin Policy". The assured under that policy was:

   "ANGLO AMERICAN PLC … and their owned and controlled and associated and affiliated and subsidiary companies or corporations and joint venture partners as they are now constituted or may be hereafter constituted or acquired…"

10. KCM clearly fell within that description at the time of the loss. The claim against Coromin was for US$50,521,998. That was 100 per cent of the loss, including losses said to fall under the Business Interruption Section of the policy. The claim was advanced on the basis that the loss was caused by an all risks peril.

11. KCM also advanced in these proceedings an alternative claim. This was against the Local Insurers. It was advanced under a Local Market Insurance Contract, "the Zambian Contract" effected through the brokers Aon Zambia, under which the Local Insurers provided property damage and business interruption insurance expressed as "assets all risks" cover "limited to specified insurance perils as follows: fire, lightning, explosion, flood, collapse including shaft collapse". The claim advanced by KCM under the Zambian Contract was for US$47,886,704. It was on the basis that the losses had been caused by a "collapse" within the meaning of the specified perils.

12. Finally, KCM included an alternative claim against Coromin. This was advanced under clause 4.17 of the Coromin Policy which provided as follows:

    "4.17 <u>DIFFERENCE IN CONDITIONS/DIFFERENCE OF CONDITIONS</u>

    Notwithstanding Condition 4.3, OTHER INSURANCE, it is agreed that cover under this Policy is to apply when the perils, limits and/or conditions set forth in this Policy are in addition to or broader in meaning and/or scope that those of specific local or primary policies. This Policy is also extended to cover the loss sustained by the Insured resulting from the application of any co-insurance or average clause forming part of any local or primary policy effected by the Insured, as a resulted of under insurance."

13. I refer to this as "*the DIC clause*".

14. The particulars of claim make it clear that this alternative claim rests upon the basis that KCM is entitled to recover a greater amount under the Coromin Policy than it is under the Zambian Contract. On this basis it is said that it must be entitled to recover at least US$ 2,635,294 which is the difference between US$50,521,998 and US$ 47,886,704. However, it is pleaded that this *"DIC clause*" could respond to the extent of the entire US$50,521,998 if, for example the Local Insurers were entitled to avoid the Zambian Contract. The DIC clause would be said also to respond if the losses were not covered by the Zambian Contract because they were not caused by insured specified perils. At the present time it is not known precisely what defences will be taken if and when proceedings are commenced against them in Zambia, although it is probable that a coverage issue will be raised as to the applicability of the specified perils.

15. KCM and ARH expressly pleaded that they only sought to be indemnified once in respect of KCM's losses. In that connection it is to be noted that clause 4.3 of the Coromin Policy provided:

"4.3 OTHER INSURANCE

If at the time of any Occurrence resulting in a loss under this Policy there is any other insurance effected by or on behalf of the Insured covering such loss or any part of it, the liability Insurers under this Policy shall be limited to their rateable proportion of such loss."

16. By way of defence Coromin pleaded that it never became a party to any direct contract of insurance with KCM or alternatively any such contract would be illegal and void and/or unenforceable in English Law because it was contrary to public policy as being illegal under the law of Zambia which was the place of performance. Coromin went on to plead that KCM was directly insured by the Local Insurers and that they in turn were reinsured by Coromin to the extent of 90 per cent.

17. By its Part 20 claim against the Reinsurers Coromin pleaded that it was not a direct insurer of KCM and that it was a reinsurer of the Local Insurers who had directly insured KCM to the extent of 90 per cent of the risk. Coromin further pleaded that it was entitled to be indemnified by Reinsurers if Coromin were liable as a direct insurer of KCM for the whole risk or as a direct insurer of KCM for its liability under the DIC clause or if Coromin were liable as a reinsurer of the Local Insurers in respect of their cover of KCM under the Zambian Contract. In other words, Coromin claimed to be indemnified by the Reinsurers whether they were directly liable as insurers of KCM or liable as reinsurers of the Local Insurers.

18. The Reinsurers' position in response to Coromin's Part 20 claim is that, whereas they accept that they reinsured Coromin, they maintain that the applicable wording of that reinsurance incorporated what has been conveniently called "*the KCM wording*". That wording had, at least for present purposes, two salient characteristics:

i) the basis of cover was the specified perils as in the Zambian Contract;

ii) there was a Zambian Law and Jurisdiction Clause.

19. Accordingly, that reinsurance would respond only if the losses fell within the specified perils and not on an all risks basis. It is in issue whether the loss was attributable to a "collapse" within the meaning of the specified perils.

20. KCM obtained leave to serve the Local Insurers outside the jurisdiction on the basis that they were 100 per cent direct insurers of KCM and necessary or proper parties to the proceedings (Order of Gloster J., 29 June 2004). On 29 October 2004 the Local Insurers applied to set aside that order on the basis of the Zambian Law and Jurisdiction Clause in the Zambian Contract. In making that application the Local Insurers did accept that they were 100 per cent direct insurers of KCM.

21. The Local Insurers' application has not been determined. On 9 March 2004, nine days before the hearing date of the Reinsurers' application now before the court, KCM and ARH and the Local Insurers entered into an agreement to settle the Local Insurers' application. By that agreement it was agreed that the Local Insurers accepted that they were 100 per cent direct insurers of KCM/ARH on the terms of the KCM wording including the specified perils basis and that KCM/ARH would commence proceedings under the Zambian Contract against the Local Insurers in the High Court of Zambia. The parties to the agreement agreed that in the English proceedings there should be a consent order staying the action against the Local Insurers and that such stay would remain in place until final determination of the proceedings to be commenced by KCM/ARH in Zambia. There was to be no order as to the costs of the Local Insurers' application and all previous orders as to costs were to be treated as discharged. A consent order in these terms as between the second, fourth, fifth and sixth defendant Local Insurers and KCM/ARH was initialled by Cresswell J. on 11 March, two weeks before the hearing date for this application and a consent order between the third defendant Local Insurers and KCM/ARH was initialled by Andrew Smith J. on 18 March, eight days before the hearing of this application commenced. The terms of the consent orders were not disclosed to the Reinsurers' solicitors until 15 March.

22. Accordingly, the position with which this court was confronted on 26 March, when the hearing of the Reinsurers' application began, was that KCM was maintaining or was committed to maintain two separate sets of proceedings against different insurers in respect of the same loss:

i) against the Local Insurers in Zambia on the basis of the specified perils cover; and

ii) against Coromin on the basis of the CCIP/Coromin Policy all risks wording and in the alternative under the DIC clause if and to the extent that the loss was not covered by the Local Insurers.

23. Coromin in turn was claiming against the Reinsurers in the English proceedings to be indemnified in respect of its liability to KCM and, as the case might be, to the Local Insurers.

24. It will at once be seen that the consent orders have given rise to the risk of substantial procedural dislocation. Thus in the English proceedings there are two fundamental groups of issues:

i) The contract structure issues, namely whether Coromin is, as KCM assert, the direct 100 per cent all risks insurer of KCM, or whether, as Coromin asserts, it is 90 per cent reinsurer of the Local Insurers and whether the Reinsurers reinsured Coromin as direct 100 per cent all risks insurer of KCM or as reinsurer of the Local Insurers on the terms of the KCM wording.

ii) The coverage issue under the KCM specified perils wording, namely whether the loss was caused by a specified peril.

25. As to the coverage issue, this arises both between Coromin and KCM and between Coromin and the Reinsurers. Thus, as between Coromin and KCM the quantum of indemnity under the DIC cover depends on whether and to what extent the Zambian Contract responds to the loss. If it does respond, Coromin's liability would be just over US$ 2 million, whereas, if it does not respond, Coromin's liability is arguably (depending on the proper construction of the DIC provision) the full amount of the loss (over US$ 50 million). As between Coromin and the Reinsurers, a similar issue arises since the latter maintain that the reinsurance was on the basis of an underlying risk defined by reference to the KCM wording. Thus, if the loss fell outside that cover, Reinsurers would contend that they were not liable to Coromin.

26. If there are to be proceedings between KCM and Coromin in England and between KCM and the Local Insurers in Zambia it will at once be seen that there is a very real risk of inconsistent determination of issues in circumstances where all parties are not bound. The Zambian courts might, for example, hold that the loss was not within the specified perils cover. Coromin would not be bound by the determination of the Zambian courts, unless it had already been joined as third party by the Local Insurers. In the English proceedings it might be held as between KCM and Coromin that Coromin were direct insurers of KCM and that the loss was within the specified perils. In that event, Coromin's liability under the DIC indemnity would be held in the English proceedings to be limited to about US$ 2 million. However, if it were held in the English proceedings that the Reinsurers' cover was subject to the KCM wording, Coromin would not be entitled to recover their DIC liability from the Reinsurers.

27. Further, Coromin have potential claims against Aon for breach of contract and/or negligent breach of duty as brokers if and to the extent that Coromin are unable to recover from the Reinsurers an indemnity against Coromin's liability to either or both of KCM and the Local Insurers on the grounds that Aon, as placing broker, failed to procure that Coromin's outwards reinsurance coverage matched its insurance of KCM or its reinsurance of the Local Insurers. Unless joined in the Zambian proceedings Aon would not be bound by the Zambian court's decision on coverage or structural issues which bore on the question of its liability to Coromin.

28. It will therefore be seen that the just, cost-effective and consistent determination of all the issues could only effectively be achieved if they were all determined by the same tribunal.

29. It became clear in the course of the hearing before me that when the two draft consent orders were sent to the Commercial Court Registry for judicial approval they were not accompanied by any explanation of the effect that, if approved, they would be likely to have in causing the dislocation of the proceedings. Although a solicitor's contact name and telephone number were provided should more information be required, it was quite impossible to derive from the terms of the consent order what the issues were in the proceedings as a whole or what the effect of a stay on the other parties would be likely to be. I therefore considered it appropriate to adjourn this application and to require representatives on behalf of KCM and the Local Insurers to appear in order to explain why the consent orders had been tendered without full disclosure of their effect and to make representations as to whether the consent orders should be set aside or KCM's claim against Coromin should be stayed pending determination of the Zambian proceedings.

30. With the assistance of submissions by counsel, Mr Tom Beasley QC, on behalf of KCM and of Mr Edwards on behalf of the Local Insurers as well as counsel for Coromin and the Reinsurers, in spite of this unsatisfactory solution, respectively, I came to the conclusion that in all the circumstances it would not be appropriate either to set aside the consent orders and lift the stay or to stay the proceedings by KCM against Coromin.

31. I am satisfied that those advising both KCM and the Local Insurers genuinely believed that their consent orders would not be approved by commercial judges without first viewing the court files and in particular the pleadings. This was a misapprehension. Judges invited to approve consent orders settling pre-trial disputes do not normally have placed before them any document except the order itself. It would thus be impossible for a judge to be alerted to the procedural implications of the orders requested in this case. Had Mr Justice Cresswell or Mr Justice Andrew Smith been given a full explanation of the procedural background, it is most improbable that they would have made the consent orders without first hearing representations from Coromin and possibly also from the Reinsurers. These consent orders should therefore have been accompanied by letters explaining fully all the procedural factors relevant to the exercise of the judge's discretion to make the orders, including the risk of inconsistent decisions that might affect other parties.

32. In the course of the parties' representations in relation to these orders Mr Simon Bryan for Coromin made it clear that his clients did not at this stage invite a stay of KCM's claim against Coromin even if the claim by KCM against the Local Insurers was to be pursued in Zambia and was to be stayed in England. The main reason for this was that Coromin was concerned that the English proceedings should be driven forward so that (i) all the issues between the parties should be decided as soon as possible by this court, (ii) Aon could be joined before time expired under the Limitation Act and (iii) these proceedings would be brought to trial before proceedings in Zambia. Although both KCM and Coromin would have preferred to have all the issues tried by the English courts, it was at least KCM's belief that because of the Zambian Law and Jurisdiction clause in the KCM wording it might be unable to hold the order of Gloster J. giving leave to serve the Local Insurers with the English proceedings. On the other hand, Mr David Lord for the Reinsurers invited me to stay the entirety of the English proceedings in favour of all issues being tried in Zambia, for he submitted that the key issue in the whole litigation was whether the Local Insurers were liable to KCM. Failing that course, he relied on the Reinsurers' basic submission in these proceedings, that at least there should be a stay of the Part 20 proceedings against the Reinsurers.

33. Having given due consideration to these representations I concluded that it would not be appropriate either to set aside the consent orders or to strike out or stay KCM's claim against Coromin. Although counsel both for KCM and Coromin volunteered that it would be much more preferable for all issues between all parties to be determined in the English courts, Coromin did not object to the fragmentation of the proceedings resulting from the consent order and KCM strongly preferred to adhere to its agreement on jurisdiction with the Local Insurers rather than to embark on the application by the Local Insurers to set aside service outside the jurisdiction.

34. Accordingly, the Reinsurers' application to stay the Part 20 claim against them by Coromin must be approached in the context of the English proceedings subject to the stay of KCM's claim against the Local Insurers and to KCM's intention to resort to the Zambian courts for that claim.

The Submissions of the Reinsurers

35. The Reinsurers' primary submission is that the contract of reinsurance between them and Coromin included an exclusive Zambian Jurisdiction Clause. Whereas it is common ground between the Reinsurers and Coromin that there was a contract of reinsurance between them covering the KCM liabilities of Coromin at the time when the loss occurred, there is a dispute as to its terms. Coromin asserts that the contract was subject to the following clause: *"This Insurance shall be governed and construed by the laws of England, whose Courts shall have jurisdiction in any dispute arising hereunder which has not been resolved through arbitration in accordance with Condition 4.7.A"*

36. That term was included in Coromin's primary insurance of Anglo-American (KCM) for June 1999 to June 2000 and in the renewal of that policy for June 2000 to June 2001. Coromin say that the Reinsurers reinsured Coromin subject to the same term for the same period and that upon the renewal of the primary cover of Anglo-American (KCM) for a further 12 months to June 2001 the contract of reinsurance was renewed to include the same term.

37. The Reinsurers say that when Anglo-American took over KCM in 2000 it became necessary to place direct insurance of KCM by the Local Insurers in order to comply with Zambian Law. Consequently, direct insurance was placed with the Local Insurers for the period 31 March 2000 to 30 June 2000. The cover note expressly provided for Zambian Law and jurisdiction. Coromin in turn reinsured the Local Insurers as to 90 per cent for that three month period and effected outward reinsurance of that risk by an endorsement to the reinsurance of Coromin's Anglo-American exposure. The wording agreed to apply to that reinsurance was the KCM wording which included the Zambian Law and Jurisdiction Clause as follows: *"This policy is subject to Zambian law, practice and jurisdiction. In the event of any dispute concerning this Policy which has not been settled through arbitration in accordance with Clause 18A above, each party agrees to submit to the jurisdiction of any Court of competent jurisdiction within Zambia and to comply with all requirements necessary to give such Court jurisdiction. All matters arising under this Policy shall then be determined in accordance with Zambian law and practice."*

38. It is submitted by the Reinsurers that this was an exclusive Zambian jurisdiction clause.

39. The Local Insurers agreed to provide direct cover for KCM for a further 12 months from 1 July 2000 to 30 June 2001 and Coromin agreed to a similar extension on the same terms as for the previous 3 months period of cover. At this point there arises the key dispute between Coromin and the Reinsurers as to whether when the Reinsurers agreed to cover Coromin's liability as reinsurers in respect of KCM for the period of 12 months to 30 June 2001 they did so on terms which also included the Zambian Law and Jurisdiction Clause or whether, as Coromin asserts, they reverted to the English law and jurisdiction clause in the reinsurance of Coromin as insurer of Anglo-American.

40. The Reinsurers argue that it would be quite contrary to commercial common sense for the 12 months extension of the reinsurance to be subject to different terms, specifically as to law and jurisdiction, from those governing the previous 3 months cover, particularly in view of the fact that the primary insurance between KCM and the Local Insurers and the reinsurance of the Local Insurers by Coromin were both subject to Zambian Law and jurisdiction. Reinsurers point to a number of features of the documents which point to the 12 months extension of the reinsurance having been on the same terms (the KCM wording) as the initial 3 months cover.

41. Coromin say that the wording for the March/June 2000 reinsurance was never finally agreed and further that in June 2000 they instructed Aon to effect consolidated reinsurance cover under the Anglo-American reinsurance contract, including the English Law and Jurisdiction Clause. In the result the Reinsurers became bound in July 2000 to a contract of reinsurance of declarations and risks attaching for a period of 24 months from 30 June 2000 on terms including the all risks CCIP/Coromin Policy wording and the DIC clause as well as English Law and Jurisdiction. This was consistent with Coromin's purpose in achieving uniformity of protection for all its Anglo-American exposures, including KCM. Contemporary correspondence suggested that Aon shared that purpose. The draft slip which had been signed on 13 July 2000 by Swiss Re, the leading Reinsurers, was in terms of reinsurance on an all risks basis and subject to the CCIP wording which had applied to the Anglo-American cover in 1999-2000. Further, Aon declared KCM as one of the Anglo-American entities in relation to which reinsurance protection was to be provided.

42. The Reinsurers submit that, on the basis that the Zambian Law and Jurisdiction clause applied to the contract of reinsurance, it was an exclusive jurisdiction clause and, accordingly, effect should be given to it by this court granting a stay of the Part 20 proceedings against the Reinsurers, thereby reflecting the approach of the House of Lords in ***Donohue v. Armco*** [2002] 1 Lloyd's Rep 425.

43. The Reinsurers submit that in view of the fact that the dispute as to whether the loss was covered will be determined by the Zambian courts in accordance with Zambian Law, the sensible course would be for all the disputes to be determined in the Zambian proceedings.

44. Alternatively, the Reinsurers submit that the issue of jurisdiction should be shelved and that this court, in exercise of its case management powers, should stay the Part 20 proceedings until there have been conclusive determinations of the following issues:

    i) The coverage issue as between KCM and the Local Insurers under the KCM specified perils wording, to be determined in Zambia.

    ii) If the Local Insurers are held liable in relation to the loss, whether Coromin is liable to indemnify the Local Insurers under their reinsurance.

    iii) Whether and, if so, for what amount Coromin is liable to KCM under the DIC clause in its direct insurance of KCM, an issue determinable only after issues (i) and (ii) have been conclusively determined.

45. It is submitted that this course would be an efficient and expeditious method of resolving the disputes between all parties. In particular, depending on the outcome of these three issues, no issue might arise between Coromin and the Reinsurers.

46. Finally, the Reinsurers submit that another alternative would be for the court to stay both the Part 20 proceedings and this application pending conclusive determination of issues (i), (ii) and (iii). This would remove the need to determine the jurisdiction issue at this stage in circumstances where, depending on the outcome of those other issues, it might never be necessary to decide the jurisdiction issue.

Coromin's Further Submissions

47. On behalf of Coromin Mr Simon Bryan further submits that, while accepting that this court cannot determine conclusively on this application that the reinsurance contract between Coromin and the Reinsurers incorporated an English Law and exclusive Jurisdiction Clause as in the CCIP, he can at least show a good arguable case to that effect.

48. Further, Coromin submit that, even if it is established that the Reinsurers have a sufficiently strong case that the reinsurance of Coromin contained a Zambian exclusive jurisdiction clause as distinct from an English exclusive jurisdiction clause, it is not open to the English court to stay the English Part 20 proceedings because the Reinsurers are either Lloyd's syndicates or English market companies domiciled in the EU or companies domiciled in Switzerland which is a party to the Lugano Convention. It is common ground that the English courts had jurisdiction over all the Reinsurers by reason of their domicile, as distinct from any binding exclusive English jurisdiction clause. In respect of those Reinsurers domiciled in England, Article 2 of the Judgments Regulation provided for mandatory jurisdiction thus:

    "1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the Courts of a Member State."

49. As regards the Swiss-domiciled Reinsurers, they are subject to English jurisdiction, regardless of an exclusive English jurisdiction clause, on the grounds of Article 6 of the Regulation:

    "A person domiciled in a Member Stated may also be sued:

    2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case."

50. It is submitted on behalf of Coromin that the decision of the European Court in ***Andrew Owusu v. NB Jackson & Others*** ECJ Case No. 281/02, (1.3.05) leads to the conclusion that the English courts are precluded from staying the English Part 20 proceedings so as to give effect to the alleged Zambian exclusive jurisdiction clause. Put shortly, the argument is that, given that it would not be open to this court to stay the Part 20 proceedings in favour of the Zambian courts on the grounds of forum non conveniens, by parity of reasoning it is not open to this court to stay these proceedings on the grounds of a foreign jurisdiction clause given that Zambia is not a member of the EU and therefore bound by the Judgments Regulation nor a party to the Lugano Convention.

51. Finally, it is submitted that even if, contrary to Coromin's case, it is concluded that the Reinsurers can take the benefit of an exclusive Zambian jurisdiction clause, a stay should not be ordered because there is strong cause for keeping the Part 20 proceedings alive in this court, having regard in particular to Coromin's clear intention to join Aon as co-defendant to the Part 20 proceedings in case it is held that the Reinsurers are not on risk in respect of Coromin's direct insurance of KCM under the all risks cover. Coromin relies on ***The El Amria*** [1981] 2 Lloyd's Rep 119.

52. In the course of argument there was identified a further issue, namely whether, having regard to the substantial amount of evidence adduced upon this application, the Reinsurers had sufficiently established their case in respect of the application of the Zambian jurisdiction clause to justify reliance on it for the purpose of their application for a stay.

Discussion: Evidence as to the applicable Jurisdiction Clause

53. The Reinsurers apply for a stay of proceedings properly commenced in the English courts. Accordingly, as a starting point, this court must be satisfied that they have established to the appropriate evidential standard of proof that Coromin is party to an exclusive Zambian jurisdiction clause. The case advanced by Mr Geoffrey Vos QC, on behalf of the Reinsurers, is that the consequence of the various communications between Coromin, Aon and Swiss Re, the leading Reinsurers, is that there was insurance of KCM to the following effect:

i) KCM was insured by the Local Insurers on the basis of the KCM specified perils wording, including the Zambian Law and Jurisdiction Clause.

ii) KCM was also directly insured by Coromin on the terms of the Anglo American global all risks cover subject to the DIC provision and English Law and Jurisdiction.

iii) The Local Insurers' were reinsured by Coromin as to 90 per cent in respect of their primary insurance of KCM. The reinsurance was subject to Zambian Law and Jurisdiction.

iv) Coromin was reinsured in respect of the KCM risk but subject to the specified perils cover and the Zambian Law and Jurisdiction Clause.

54. In other words the Reinsurers submit that the only relevant reinsurance of Coromin in respect of the KCM risk was that in (iv). There is thus an issue directly relevant to the existence of binding jurisdiction clauses. English jurisdiction does not depend on it being established that there is a binding English jurisdiction clause because it can be securely grounded on domicile of the Reinsurers, but Zambian Jurisdiction does depend on the establishment of the Zambian Jurisdiction clause, the case on forum non conveniens now having been abandoned.

55. How then should this court approach the evidential standard required in order to assume for present purposes the applicability of a Zambian Jurisdiction Clause? Neither the Reinsurers nor Coromin assert that there is double reinsurance of Coromin. This is a case where there must either be assumed for present purposes, albeit without conclusively deciding the point, to be a binding Zambian Jurisdiction Clause or a binding English Jurisdiction Clause.

56. It is settled law that the evidential threshold for the purpose of establishing English jurisdiction where the issue is whether there should be permission to serve outside the jurisdiction is a good arguable case that the necessary factual foundation exists: see ***Seaconsar Far East Ltd v Bank Markazi*** [1994] 1 AC 438. Some of the problems arising from the application of this test were discussed in the judgment of Waller LJ. in ***Canada Trust Co v. Stolzenberg*** [1998] 1 WLR 547. In that case, the relevant issue was whether leave should have been given to serve various co-defendants outside the jurisdiction on the grounds that they were necessary or proper parties to proceedings in which another defendant had been duly served within the jurisdiction. Due service within the jurisdiction depended on whether that defendant had at the time of service been domiciled in this country. The question of the correct evidential threshold arose in relation to his domicile. Waller LJ., having observed, at page 553, that Lord Goff's analysis of the authorities in ***Seaconsar,*** supra at p453-454 established that the ordinary civil standard of the balance of probability should not apply to the establishment of the factual foundations for leave under Order 11, but that is should be a good arguable case, continued at p555:

*"But Lord Goff was not concerned to explore in Seaconsar the application of the standard "good arguable case" to all the various factors that can arise. It is I believe important to recognise, as the language of their Lordships in **Korner** demonstrated, that what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. That may involve in some cases considering matters which go both to jurisdiction and to the very matter to be argued at the trial, e.g. the existence of a contract, but in other cases a matter which goes purely to jurisdiction, e.g. the domicile of a defendant. The concept also reflects that the question before the court is one which should be decided on affidavits from both sides and without full discovery and/or cross examination, and in relation to which therefore to apply the language of the civil burden of proof applicable to issues after full trial, is inapposite. Although there is power under Ord. 12, r. 8(5)-- to order a preliminary issue on jurisdiction, as Staughton L.J. pointed out in **Attock,** it is seldom that the power is used because trials on jurisdiction issues are to be strongly discouraged. It is also important to remember that the phrase which reflects the concept "good arguable case" as the other phrases in **Korner** "a strong argument" and "a case for strong argument" were originally employed in relation to points which related to jurisdiction but which might also be argued about at the trial. The court in such cases must be concerned not even to appear to express some concluded view as to the merits, e.g. as to whether the contract existed or not. It is also right to remember that the "good arguable case" test, although obviously applicable to the ex parte stage, becomes of most significance at the inter parties stage where two arguments are being weighed in the interlocutory context which, as I have stressed, must not become a "trial". "Good arguable case" reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.*

The civil standard of proof has itself a flexibility depending on the issue being considered and the concept "good arguable case" has a similar flexibility. It is natural for example in a case concerned with a contract where the jurisdiction depends on whether the breach took place within the jurisdiction, but where the issue to be tried will be whether there was a contract at all, not to wish to give even the appearance of pre-trying the central issue, even though the concept of being satisfied must apply both to the existence of the contract and the place of the breach. It is equally natural for the court in the process of being satisfied to scrutinise most jealously that factor which actually provides jurisdiction. It is equally natural that where the foundation of jurisdiction is domicile, i.e. an issue that will not arise at the trial, that particular scrutiny of the material available takes place in the context of the limitations applied to an interlocutory process. "

57. It is true that the ***Canada Trust Case;*** supra, was concerned with proof of the factual foundations for the court taking jurisdiction over a foreign defendant and not with the issue before this court as to the factual foundation for the court declining jurisdiction over defendants within its jurisdiction in favour of a foreign jurisdiction.

Nevertheless, the two discretionary exercises have sufficiently similar characteristics to suggest that a broadly similar approach should be taken to the standard of proof called for. Thus in both cases there is a pre-trial investigation ancillary to the main action as to which the court should avoid any final determination of any issue of fact or law going to the substantive rights of the parties which will have to be conclusively determined at the trial. That is because at the trial the court will have the benefit of full disclosure of documents, oral evidence, the cross-examination of witnesses and full argument on the relevant issue, whereas at the interlocutory stage all the evidence is on affidavit or in witness statements, there has not been full disclosure and there has been no cross-examination. Accordingly, in arriving at a conclusion on an issue relevant to jurisdiction, whether by giving leave to serve out or staying proceedings in favour of a foreign jurisdiction, the court is required to form only a provisional view on the limited materials before it. There may be many cases where all that is necessary is to show a good arguable case in the sense that, in the absence of a positive evidential challenge to the applicant's case on the relevant foundation for his jurisdictional application, the applicant need only adduce just sufficient evidence to make good a "strong argument". As recognised by Waller LJ. in ***Canada Trust,*** there may be other cases where in order for the court to be adequately satisfied that it should take jurisdiction it would be necessary for enough to be put before the court to permit it to accede to the application in spite of the countervailing evidence. That might in many cases involve a provisional view as to whether, on the limited evidence available from both sides the respondent's evidence could at least provisionally be regarded as less compelling than that adduced by the applicant. A similar approach would, in my judgment, be called for where, as in this case, the applicant invited the court to cede jurisdiction to a foreign court rather than to assume it.

58. The problem as to the reinsurance of Coromin arose from the acquisition by Anglo-American of KCM in the course of March 2000. The global master all risks policy by which Coromin insured Anglo-American and its subsidiaries was due to expire on 30 June 2000. KCM was not included in that cover. There is evidence that, following the acquisition of KCM, Swiss Re were distinctly wary about assuming a reinsurance risk covering KCM, largely because of the location of the Konkola Mines in a very high rainfall area of Zambia. That is clear from the first witness statement of Mr Stanley Cochrane of Swiss Re. Aon, the brokers acting for both Anglo American and KCM and for Coromin, were anxious from the outset to incorporate cover of the KCM risk into the global all risks policy and into the reinsurance of Coromin. The result of that desire for amalgamation on the one hand and of Swiss Re's concerns about the risk on the other, led to there being put in place a *"fill-in"* cover of KCM from 31 March to 30 June 2000, the date for renewal of the global policy. However, Swiss Re did not wish to provide such cover except on a specific perils basis. There were also to be local market primary insurers, although Mr Cochrane's understanding was that the reassured would be Coromin. The slip signed by Swiss Re on 27 March 2000 did not identify the reassured but it did make it clear that it was a facultative reinsurance of a reassured on risk in respect of the Konkola Mines and that KCM was the original assured, whereas the reassured were *"Local companies to be advised by Leading Reinsurer"*. The slip indicated that the conditions were *"following all terms, clauses and conditions as Original Policy"* which was stated to contain a *"local law and jurisdiction clause"*. The wording was to be agreed with Swiss Re. The reference number was the same as that given to the reinsurance of Coromin in respect of the global all risks policy.

59. On 25 May 2000 Mr Cochrane agreed to the three months reinsurance cover wording, including an express Zambian Law and Jurisdiction clause.

60. In anticipation of the renewal for 2000-2002 of the reinsurance of Coromin in respect of its primary cover of Anglo American, Aon sent a draft slip to Swiss Re on 19 June 2000 and a final version on 11 July 2000. Mr Cochrane signed them both, the latter on 13 July 2000, for a 26 per cent line. It showed the reinsured to be Coromin with Anglo American and its subsidiaries as its original insured. The all risks wording was that of the global policy and did not refer to specified perils as in the KCM wording.

61. The slip sent by Aon to the Reinsurers on 19 June 2000 contained a long list of original conditions, but they made no mention of local law and jurisdiction. Indeed, the only reference to KCM is to be found in a trading activity and assets list dated 22 May 2000 in which the sub-limits of liability are to be *"tba"*. The slip made provision for reinsurers accepting risks/declarations attaching during the 24 months period of cover. The final version of this slip was signed by Mr Cochrane on 13 July 2000. His evidence is that KCM was not specifically discussed with Aon because he believed that the Reinsurers were simply continuing the same cover which they had been providing up to 31 March 2000. In any event, he was not prepared to reinsure the KCM risk for a further period except subject to the same specified perils wording. On 18 January 2001 Aon sent for signature to Swiss Re an endorsement slip dated 8 January 2001 stated to attach and form part of the slip dated 19 June 2000 which noted and agreed an increase in the Original Insured's cession for KCM whereby the limit for refurbishment and/or course of construction and/or minor works was amended. There was another endorsement slip dated 5 February 2001 which stated that: *"Further to agreement dated 8 January 2001, it is hereby noted and agreed that schedule of sub-limits and retentions for operating company KCM in Zambia are as attached."*

62. Attached to that slip was another list of assets for KCM under which alongside "coverage" appeared the words *"All Risks of Physical Loss or Damage"*. Swiss Re signed that on 12 February 2001. Mr Cochrane said in his witness statement that these words were not drawn to his attention, but were in any event not inconsistent with the three months cover which was express as "all risks limited to specific insured perils."

63. It is to be observed that when on 17 July 2000 Aon sent their cover note to Anglo American in respect of the 30 June renewal, copied to Coromin, they asked Anglo American to advise them of applicable sub-limits and

retentions for operating companies which currently showed "*TBA*". KCM fell into that group and no details about KCM were attached to the cover note. It therefore appears that the endorsement slip of 5 February 2001 was intended to deal with this deficiency.

64. On the face of these documents it seems that at least Aon was proceeding on the basis that in so far as the Reinsurers were concerned, their cover was in respect of underlying cover of KCM under the global all risks policy. Although, Swiss Re may well not have been prepared to reinsure except with an underlying primary policy which was on a specified perils basis, it appears that they outwardly proceeded into 2001 as if they accepted that KCM had been brought under the global all risks cover. After 30 June 2000 Aon only sent them endorsements for the renewal relating to KCM's relationship with that cover and not a single piece of paper relating to primary insurance of KCM under the specified perils wording. If Aon and Swiss Re had been proceeding on the basis that the reinsurance of Coromin KCM risk was on expiring terms, there is no documentation which supports that.

65. Mr Geoffrey Vos QC argues on behalf of the Reinsurers that, apart from the fact that Mr Cochrane now says that he would never have signed up to an unqualified all risks cover, it would be extraordinary for the reinsurers to have entered into reinsurance of Coromin on the terms of the global all risks policy in circumstances where Coromin's reassured was the Local Insurers who were known to be primary insurers on a specified perils basis and not Anglo American and its subsidiaries.

66. As one might expect, on the limited evidence now available, it is difficult to form anything more than a tentative view on the relative strength of the submission that the Reinsurers can invoke the Zambian clause as against Coromin's Part 20 claim.

67. In approaching this issue it is important to remember that Coromin seeks an indemnity from Reinsurers on alternative bases. First, it claims as reinsurer of the Local Market. Secondly, it claims as primary insurer of KCM under the global all risks policy. Whereas one can see that the Reinsurers might have insisted on their reinsurance incorporating the terms of the underlying primary cover, including Zambian jurisdiction, if they were reinsuring Coromin as reinsurer of the Local Insurers, as under the three months policy, it is distinctly improbable that they would have insisted on Zambian Law and Jurisdiction if they were reinsuring Coromin's exposure as primary insurer under an English Law and Jurisdiction primary policy covering Anglo Ameican and all its subsidiaries, including KCM. Nor is it likely that they would have reinsured on a hybrid basis, that is to say with Coromin's exposure to claims by KCM under the global all risks policy being subject to Zambian Law and jurisdiction and Coromin's exposure to all other claims by Anglo American or its subsidiaries being subject to English Law and Jurisdiction. Such a reinsurance provision would be inconceivable without very specific wording.

68. In these circumstances, I am not persuaded that the Reinsurers have indeed shown a strong enough case that such reinsurance of Coromin as they underwrote was subject to Zambian Law and Jurisdiction so as to engage the jurisdiction of this court to stay these Part 20 proceedings. The case advanced by Coromin for the Reinsurers being reinsurers of Coromin's liability to KCM only under the global all risks policy appears at this stage to be stronger than the Reinsurers' case that they reinsured Coromin's liability to the Local Insurers subject to the Zambian Law and Jurisdiction Clause. Accordingly, on my provisional view of the evidence adduced on this application, I do not consider that the Reinsurers have shown a good arguable case that they can invoke the Zambian Law and Jurisdiction clause against Coromin.

69. Had I concluded that the Reinsurers had established a good arguable case that Coromin was bound by the Zambian Law and Jurisdiction clause, it would have been necessary first to determine whether that was an exclusive jurisdiction clause. This is a short point of construction to be determined by asking whether the clause operates transitively in the sense of imposing on all parties a duty to refer their disputed claims to the named tribunal or intransitively in the sense of requiring all parties to consent to the jurisdiction of a given court if that jurisdiction is invoked by the claimant party. In the present case I have no doubt that the clause operates transitively. I repeat it here for convenience: *"This policy is subject to Zambian law, practice and jurisdiction. In the event of any dispute concerning this Policy which has not been settled through arbitration in accordance with Clause 18A above, each party agrees to submit to the jurisdiction of any Court of competent jurisdiction within Zambia and to comply with all requirements necessary to give such Court jurisdiction. All matters arising under this Policy shall then be determined in accordance with Zambian law and practice."*

70. The wording of the opening sentence, had it stood alone, would have signified that all parties were to refer all disputes to the Zambian courts, not merely to consent should that jurisdiction be invoked. The second sentence means that all parties agree that any dispute not settled by arbitration (claims as to quantum) will be referred to the Zambian courts. I am quite unable to read this clause as expressing an intransitive approach to jurisdiction. The case is similar to but stronger than that considered in the judgment of Romer LJ. in ***Austrian Lloyd Steamship Co v. Gresham Life Assurance Society Ltd*** [1903] 1 KB 249. In that case the clause provided: *"For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters."*

Romer LJ. said this: *"This is a simple point; and, though I can understand that different persons might take different views of it, I must say that to my mind the meaning of condition 24 is that contended for by the defendants. The question is this: Does the condition merely mean that, if one of the parties to the contract is sued by the other in the Court of Budapest, he will not take any objection to its jurisdiction; or, does it mean that the parties mutually agree*

that, if any dispute arises under the contract, it shall be determined by the Court in Budapest? Having regard to the nature of the contract and its language, I am of the opinion that the latter construction is the correct one. It is not as if the insurance company only had agreed that they would submit to the jurisdiction of the Court of Budapest: both parties mutually agree to submit to that jurisdiction in respect of any dispute which may arise under the contract. If there had been an agreement by the parties in similar terms to submit to the decision of a particular individual, I think there could have been no doubt that it would have amounted to an agreement to submit any dispute under the contract to the arbitration of that person. In this case, instead of nominating a particular individual as arbitrator, the parties agree to submit any dispute arising under the contract to the Courts at Budapest. I think the appeal should be allowed."

71. Mr Bryan referred me to the judgment of Waller LJ. in the Court of Appeal ***in Sabah Shipyard (Pakistan) Ltd v. Islamic Republic of Pakistan*** [2002] EWCA Civ 1643 where the wording differed from that in the present case and in which, having cited Romer LJ. above, he relied on the judgment of Hobhouse J. in ***Cannon Screen Entertainment Ltd v. Handmade Films (Distributors) Ltd*** (11 July 1989) Unrep, in which it was held that the following clause was of intransitive effect: *"This agreement shall be construed and interpreted pursuant to laws of England and the parties hereby consent and submit to the jurisdiction of the Courts of England in connection with any dispute arising hereunder. The parties further agree that process in any such action may be served upon either of them by registered or certified mail at the address of first above given or such other address as the party being served may from time to time have specified to the other party by previous written notice."*

72. Taking the clause in the present case as a whole, the first sentence is worded in a way which conveys a meaning of the assumption of mutual mandatory obligations as regards both law and jurisdiction. It requires the invocation of the Zambian jurisdiction for all purposes relating to the policy save for disputes as to quantum, just as it mandatorily imposes Zambian law for all purposes. I am not persuaded that the second sentence dilutes the essentially transitive effect of the first sentence. It has the limited function of requiring the party who has not first invoked Zambian jurisdiction in accordance with the first sentence to accept the other party's choice of Zambian court provided that such court is of competent jurisdiction to determine the issue referred to it.

73. There was thus an exclusive Zambian jurisdiction clause in the unsigned three month policy wording.

Does the English Court have Jurisdiction to stay the Part 20 Proceedings?

74. Coromin's challenge to this application on the grounds of want of jurisdiction raises a point of far-reaching importance in relation to the work of the Commercial Court. If that submission is correct the effect will be to remove from this court a frequently-used power to protect the enforcement of jurisdiction agreements in commercial contracts either by staying proceedings in this court in favour of proceedings in a non-EU state or by granting anti-suit injunctions to restrain proceedings in non-EU courts where there is a binding exclusive English jurisdiction clause. I have used the description "non-EU" to include non-parties to the Brussels, Lugano and San Sebastian Conventions.

75. Put shortly, Coromin's argument is as follows.

76. In ***Andrew Owusu v. NB Jackson & Others,*** supra, the ECJ decided that it was not open to the English court to decline to exercise jurisdiction over a claim for breach of contract against a defendant domiciled in England by application of forum non conveniens principles. The claim was brought by an English-domiciled claimant for breach of an implied term in a contract of letting of a holiday villa in Jamaica, owned by the defendant, to the effect that the adjacent beach would be reasonably safe and free from hidden dangers. The claimant was rendered tetraplegic after striking his head against a submerged sandbank while swimming. The claimant also joined other defendants in Jamaica, claiming against them in tort for breach of a duty of care. The defendants, including Mr Jackson, applied to the English court to decline to exercise jurisdiction on the grounds that Jamaica was clearly the more appropriate forum having regard to the location of the evidence and of most of the defendants. The trial judge declined so to order, holding that, having regard to the decision of ECJ in ***UGIC v. Group Josi*** [2000] ECR1-5925, if a defendant were sued in a contracting state in which he was domiciled by a claimant domiciled in a non-Contracting State, Article 2 applied so as to confine jurisdiction to the state of the defendant's domicile. The decision of the Court of Appeal in **In re Harrods (Buenos Aires) Ltd** [1992] Ch 72 was wrong. He could not therefore stay the English proceedings against Mr Jackson and he declined to stay the proceedings against the Jamaican defendants because, if he did so, there would be parallel proceedings in England and Jamaica. On appeal to the Court of Appeal questions were referred to the ECJ. The only material one is as follows:

"Is it consistent with the Brussels Convention …, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:

(a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;

(b) if the proceedings have no connecting factors to any other Contracting State?"

77. The ECJ decided that the answer to that question was: *".. the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State."*

78. The reasoning by which the ECJ arrived at that conclusion may be summarised as follows:

i) The jurisdictional code contained in the Brussels Convention does not operate exclusively by reference to legal relationships involving Contracting States alone, but also takes effect where there is an international legal relationship between a contracting state and a non-Contracting State.

ii) The Brussels Convention was concluded on the basis of Article 220 of the Rome Treaty (now Article 293 EC) specifically "to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States."

iii) Paragraph 34 of the judgment states: "… the consolidation as such of the rules on conflict of jurisdiction and on the recognition and enforcement of judgments, effected by the Brussels Convention in respect of cases with an international element, is without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject."

iv) Article 2 provides as follows:

"Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State."

It therefore applies to circumstances involving the relationship between the courts of a Contracting State and those of a non-Contracting State.

"(v) It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention.

Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the forum non conveniens doctrine"

v) At Paragraphs 39-43 the court said this:

"According to its preamble, the Brussels Convention is intended to strengthen in the Community the legal protection of persons established therein, by laying down common rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the various national courts before which proceedings in a particular case may be brought.

The Court has thus held that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in Article 2 of the Brussels Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued.

Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.

The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another State and the prolongation of the procedural time limits.

Moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules."

vi) At paragraph 44-45 the Court, while recognising the extremely inconvenient consequences of imposing English jurisdiction on the facts of that case, concluded that they were not such as to call in question the mandatory nature of "the fundamental rule of jurisdiction contained in Article 2" of the Convention.

79. Coromin submit that the mandatory nature of Article 2 coupled with the purpose of the jurisdictional rules being to achieve (i) jurisdictional uniformity between the courts of Contracting States and (ii) certainty and predictability as to the basis on which courts of Contracting States will exercise jurisdiction preclude the exercise by the English courts of their discretionary jurisdiction to stay proceedings in order to give effect to jurisdiction clauses referring disputes exclusively to the courts of non-Contracting States.

80. In this connection Mr Bryan, on behalf of Coromin, argues that the Convention and Judgments Regulation make express provision as to the circumstances in which the basic domicile rule in Article 2 may be departed from.

81. Thus Article 3 of the Judgments Regulation provides:

"1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex 1 shall not be applicable as against them.

82. Article 23 of the Regulation provides:

"1. If the parties, one or more of whom is domiciled in a Member State, 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(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."

83. Since Article 23 relates only to jurisdiction agreements prorogating jurisdiction to the courts of member states, that provision has no application to the courts of non-member states and accordingly the Regulation confines jurisdiction by reference to the domicile rule in Article 2. Similarly Article 5 (proceedings in the place of performance as distinct from the place of the defendant's domicile) is confined to circumstances where the place of performance is a member state. Therefore, just as the Convention made no express provision for departure from the domicile rule on the grounds of the place of domicile being a forum non conveniens, so it makes no express provision for departure from the domicile rule where the prosecution of the claim in the place of domicile would be in breach of an agreement for jurisdiction in a non-Contracting State. The circumstances being outside the express provisions of the Regulation/Convention regime on jurisdiction, this court could only apply the provisions of the regime, specifically Article 2.

84. It is further argued that the reasoning in the judgment of the ECJ in ***Osuwu,*** supra, strongly rests on the purpose of certainty and predictability of the jurisdictional rules in the Convention and, in contrast, on the intrinsic uncertainty and unpredictability of the forum non conveniens principle. It is then submitted that the English courts' discretionary stay jurisdiction in the use of a foreign jurisdiction clause in respect of the courts of a non-member state is equally unpredictable and uncertain. In support of this proposition Mr Bryan relies on ***The El Amria*** [1981] 2 Lloyd's Rep 119 which has stood for many years as a reference case as regards the enforcement of foreign jurisdiction clauses. Brandon LJ. there formulated at p123-124 the applicable approach as being that previously stated by him in ***The Eleftheria*** [1970] p94 and p99 as follows:

"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the court should take into account all the circumstances of the particular case.

The following matters, where they arise, may properly be regarded: (a) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies, and if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons unlikely to get a fair trial."

85. It is submitted that the granting of a stay to give effect to a foreign jurisdiction clause is clearly a discretionary exercise which can take into account a broad spectrum of circumstances and is therefore of uncertain result. The approach is not dissimilar to a forum non conveniens analysis albeit the concept of *"strong cause"* gives substantial weight to the applicability of the jurisdiction clause. The decision of the House of Lords in ***Donohue v. Armco Inc*** [2002] 1 Lloyd's Rep 425 adopts substantially the same approach as Brandon LJ, Lord Bingham substituting *"strong reasons"* for "*strong cause"* and taking into account as a highly material fact, the risk of proliferation of litigation.

Owusu: Discussion

86. The present case shares with ***Owusu*** two important features.

87. First, the material choice as to jurisdiction was between the courts of a Convention State and the courts of a non-Convention State. Secondly, the methodology for resolving that choice was either the strict jurisdictional regime of the Convention (Article 2) or the discretionary regime of the Common Law. The ECJ rejected the latter methodology in ***Owusu*** because (i) there was no principle of application of the Convention which confined it to resolving jurisdictional location as between the courts only of the states of Contracting Parties but extended to situations where the choice involved the courts of non-Contracting Parties. Second, the discretionary methodology of the Common Law was disallowed because it was inconsistent with the objectives underlying the Convention to

the effect that jurisdiction should be certain and predictable. This second consideration goes to the intrinsic character of the methodology and is strongly identified in the Opinion of Advocate General Leger thus:

"First, by allowing the court seised the opportunity to decline – in a purely discretionary manner – to exercise the jurisdiction which it derives from a provision of the Convention, such as Article 2, the doctrine of forum non conveniens seriously affects the predictability of the effects of the jurisdiction rules laid down by the Convention, in particular the rule in Article 2. As already pointed out, that predictability of the jurisdiction rules constitutes the only way of ensuring observance of the principle of legal certainty and ensuring greater legal protection for people established in the Community, in accordance with the objectives pursued by the Convention. Any impact of that kind on the predictability of the jurisdiction rules laid down by the Convention, in particular in Article 2 (which is a general jurisdiction rule) thus ultimately detracts from the effectiveness of the Convention.

In that connection, it is important to bear in mind that the Convention is largely inspired within the civil law system, which attaches particular importance to the predictability and inviolability of rules on jurisdiction. That dimension has a lower profile in the common law system, since the application of the rules in force is approached in a somewhat more flexible manner and on a case-by-case basis. In that way, the forum non conveniens doctrine fits easily within the common law system, since it grants the court seised the power to exercise a discretion in considering whether or not it is appropriate to exercise the jurisdiction vested in it. It is therefore clear that that doctrine is hardly compatible with the spirit of the Convention."

88. There is, however, a difference between the Convention methodology potentially applicable in circumstances where the defendant is domiciled in a Member State but there is no applicable jurisdiction clause and it is only forum non conveniens which would provide a basis for any other forum in a non-Contracting State and that potentially applicable where there is a foreign jurisdiction clause relating to a non-Contracting state. In the former case there is simply no provision in the Convention that deals with forum non conveniens, whereas in the latter case there is Article 17 (Convention)/Article 23 (Judgments Regulation) which provides for the court in a member state selected by the jurisdiction clause to have exclusive jurisdiction. It could therefore be said that those provisions reflect an underlying policy to give effect at least to jurisdiction agreements relating to courts within Member States in preference to the domicile rule. The question therefore arises why Article 2 should not also yield to an analogous rule in relation to jurisdiction clauses which do not relate to the courts of Member States.

89. There is authority in support of the proposition that the court of a Member State can give effect to a jurisdiction clause in favour of the court of a non-Member State provided that such clause is valid so as to deprive the Member State of jurisdiction in accordance with that State's own conflicts rules. Thus in the Schlosser Report at paragraph 176 it is stated:

"(a) In cases where parties agree to bring their disputes before the courts of a State which is not a party to the 1968 Convention there is obviously nothing in the 1968 Convention to prevent such courts from declaring themselves competent, if their law recognises the validity of such an agreement. The only question is whether and, if so, in what form such agreements are capable of depriving Community courts of jurisdiction which is stated by the 1968 Convention to be exclusive or concurrent. There is nothing in the 1968 Convention to support the conclusion that such agreements must be admissible in principle. However, the 1968 Convention does not contain any rules as to their validity either. If a court within the Community is applied to despite such an agreement, its decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own lex fori. In so far as the local rules of conflict of laws support the authority of provisions of foreign law, the latter will apply. If, when these tests are applied, the agreement is found to be invalid, then the jurisdictional provisions of the 1968 Convention become applicable."

90. The sense of this observation appears to be that, in cases where there has been an agreement to refer disputes to a court in a non-Member State, the court seised should apply its own conflicts rules to determine two aspects of such an agreement.

i) whether it is valid in the sense of being enforceable;

ii) whether effect should be given to it in the case in question.

91. Although this passage speaks of the "decision on the validity" of such an agreement, the last two sentences refer to applicability and do appear to relate to the conflict rules which decide when such an agreement, having been held to be valid, should be enforced. However, it is further indicated that, if the court seised holds that effect should not be given to the agreement, then the jurisdictional rules of the Convention must be applied. These clearly primarily include the domicile rule.

92. This passage was referred to by the ECJ in ***Coreck Maritime Gmbh v. Handelsveem BV*** [2000] ECR1-9337. In that case the holders of bills of lading and cargo owners and their insurers brought claims against the shipowners and time charterers of a vessel in the Rotterdam court for damage to a cargo of groundnut kernels. The shipowners were domiciled in Russia and the time charterers, Coreck, were domiciled in Hamburg. The bills of lading contained a jurisdiction clause – "*any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business …*" Coreck submitted that the Rotterdam court should decline jurisdiction on two distinct grounds: (i) Article 2 and (ii) Article 17. As to (i) it was domiciled in Hamburg where it had its principal place of business and, as to (ii), there was a binding agreement in the bills of lading as to jurisdiction. The Rotterdam court refused to decline jurisdiction and its decision was upheld on appeal. The Dutch court held that because there were two possible carriers it was uncertain which was the relevant principal place

of business. This conclusion was upheld on appeal but the Dutch High Court on appeal put a number of questions to the ECJ including:

> *"(2) Does Article 17 of the Brussels Convention also govern the validity, as against a third party holding a bill of lading, of a clause which specifies as the forum having jurisdiction to settle disputes "under this Bill of Lading" the courts of the place where the carrier has his "principal place of business" and which is laid down in a bill of lading also containing an "identity of carrier" clause, that bill of lading being issued for the purposes of the carriage of the goods, where*
>
> *(a) the shipper and one of the possible carriers are not established in a Contracting State and*
>
> *(b) the second possible carrier is indeed established in a Contracting State but it is not certain whether his "principal place of business" is situated in that State or in a State which is not a party to the Convention?"*

93. The ECJ decided that it was for the Dutch court to determine the validity and effect of the jurisdiction clause by reference to its own conflicts rules. Specifically it said this:

> *"As the wording of the first sentence of the first paragraph of Article 17 of the Convention itself makes clear, that provision only applies where the twofold condition is satisfied that, first, at least one of the parties to the contract is domiciled in a Contracting State and, secondly, the jurisdiction clause designates a court of the courts of a Contracting State. So, that rule, which owes its existence to the fact that the Convention is intended to facilitate the mutual recognition and enforcement of judicial decisions, lays down a requirement as to precision which the jurisdiction clause must satisfy.*
>
> *In relation to the first condition, the first paragraph of Article 53 of the Convention provides that the seat of a company is to be treated as its domicile for the purposes of the Convention. Under that provision, the court seised must, in order to determine that seat, apply its rules of private international law. Consequently, the criteria for identifying the seat of a legal person and particularly for determining the significance of the principal place of business in that process must be established by the national law which is applicable under the conflict of laws rules of the court seised.*
>
> *As to the second condition, Article 17 of the Convention does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits (Report by Professor Schlosser on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the enforcement of judgments in Civil and Commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p71, paragraph 176)."*

94. It is to be observed that no question was addressed to the ECJ as to whether effect should be given to the domicile rule (relied on by Coreck) if it were decided that (i) there was a valid jurisdiction clause and (ii) Article 17 did not apply because the designated jurisdiction was in a non-Member State.

95. Accordingly, this decision does not go far enough to solve the problem in the present case.

96. In ***Arkwright Mutual Insurance Co v. Bryanston Insurance Co Ltd*** [1990] 2 QB 649 Potter J. had to consider an argument that in the judgment of Hobhouse J. in ***Berisford (S&W) Plc v. New Hampshire Insurance Co*** [1990] 2 QB 631 at p642-643, that judge had illogically considered that where the Convention provided grounds for jurisdiction there was no discretion to stay on the grounds of forum non conveniens whereas there was a discretion to stay on the grounds of a foreign jurisdiction clause. Hobhouse J. had observed: *"Further the Convention does not preclude the courts of a contracting state from applying principles such as those stated in the* ***Aratra Potato Co****, case (****The El Amria****) [1981] 2 Lloyd's Rep 119 where its jurisdiction is being sought to be excluded in favour of a non-contracting state. Professor Schlosser says, at para 176:*

> *'If a court within the Community is applied to despite such an agreement, its decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own lex fori.'"*

97. At p.660 Potter J in considering this observation in the course of deciding whether similar reasoning applied to a stay on the grounds of lis alibi pendens, stated: *"Third, Mr Ruttle suggests that Hobhouse J. overlooked the illogicality of recognising (as he did) a discretion to stay on the basis of a foreign jurisdiction clause while refusing (as he did) to recognise a general discretion to stay on grounds of forum non conveniens. This criticism does not seem to me to be justified. While the judge did not deal with it in terms, it seems clear that he took the view that, far from being logical, the distinction is to be found within the Convention itself. The Convention clearly recognises the concept of jurisdiction by consent (see Article 17). Further, the report of Professor Schlosser (see Official Journal 1979, No. C59, pp 123 and 124, paras 174 and 176) indicates the logic and propriety of giving effect to pre-dispute agreements of the parties which deprive community courts of jurisdiction (whether stated by the convention to be exclusive or concurrent), according to the lex fori and/or local rules of conflict of laws; however it gives no indication in favour of discretionary stays on other grounds. The only indication which can be gleaned from the Schlosser report seems to me to be unfavourable towards the exercise of such a discretion, albeit it is not specifically dealt with: see paras 176 et seq of the Schlosser report, discussed by Hobhouse J. at p643."*

98. At p663 Potter J. further distinguished between the approach of the Convention to broad discretionary concepts such as forum non conveniens and that to the more certain character of jurisdiction clauses: *"In the case of articles 16 and 17, the Convention deals with particular features of the action concerned in respect of which it recognises as a matter of principle that (a) the status and/or nature of the subject matter of the action and (b) the free agreement*

or consent of the parties as to forum, transcend and otherwise mandatory system and structure of the Convention founded on the defendant's domicile and make it appropriate for one particular jurisdiction only to hear the case. In the case of article 21 (lis pendens), the Convention does not identify the peculiar suitability of any particular court to hear the action by reference to its subject matter or the choice of the parties; nor does it identify any discretion based on cost, convenience or "real connection". It simply requires any Community court to decline jurisdiction or stay an action where another Community court is already seised of it. This seems to me no more than a simple order of priority, imposed as a necessary aspect of the certain and orderly regime of jurisdiction and enforcement in and between the courts of the Community. It does not seem to me a persuasive reason for holding that the Convention contemplates or legitimises an additional and discretionary power, based largely on cost and convenience, to stay in favour of a non-Community court against a plaintiff who has come to a court within the Community to try his dispute in accordance with a right apparently given and a requirement apparently imposed by the Convention on the basis of the defendants' domicile. In this respect I construe the Convention as less concerned with comity than with certainty."

99. This characteristic of cases involving foreign jurisdiction clauses is, in my judgment, an important feature of such cases which distinguishes them from forum non conveniens cases. The Convention by Article 17 recognises that character of certainty and party autonomy by superimposing it on the domicile rule. The Schlosser Report contemplates that the Convention will continue to apply unless the effect of the conflicts rules of the court seised leads to the application of a jurisdiction agreement relating to a non-Member State. However, it does not suggest that the methodology of the local conflicts rules for deciding whether to give effect to the jurisdiction agreement must have any particular characteristic. In particular, there is nothing in Schlosser which suggests that it is necessary to evaluate the intrinsic quality of those rules by reference to certainty or predictability of application or to the general objectives of the Convention. It may be that Professor Schlosser had not directed his mind to the fact that under English conflicts rules there was residual discretion whether to enforce perfectly valid and binding jurisdiction agreements in accordance with the principles in The El Amria, supra, by reference to considerations in some respects similar to those applicable to the forum non conveniens doctrine. Nevertheless, I do not consider that it is now open either to the English courts or to the ECJ to re-write Schlosser so as to import ground rules analogous to the considerations in Owusu which should govern the methodology of the conflicts rules of the court seised. In as much as the Convention is to be interpreted in accordance with the Schlosser Report, it is by reference to that construction alone that the English courts need be concerned.

100. I note that it has been held by the Cour d'Appel of Versailles in ***Bruno v. Societe Citibank***, (1991), referred to in Dicey & Morris, The Conflict of Laws, 13th Edn para 12-090 n.66, that if a defendant is domiciled in a Contacting State, a jurisdiction clause conferring jurisdiction on the courts of a non-Contracting State is ineffective and the domicile rule in Article 2 prevails. This approach necessarily involves that because the Convention makes no express provision for such jurisdiction clauses, the only jurisdiction clauses to which effect can be given are those which are within Article 17. However, this very formalistic approach cannot be based on the need to avoid uncertainty, so much emphasised by the ECJ in ***Owusu,*** supra, but on the implicit assumption that the courts of Contracting States should respect party autonomy only if that is expressed in terms of jurisdiction in the Courts of Contracting States, a limitation which, apart from being inconsistent with the passage from Schlosser at para 176, would appear to have no conceptual foundation.

101. I therefore hold that ***Owusu*** has not disturbed the approach to the applicability of foreign jurisdiction clauses explained in ***The El Amria*** confirmed in ***Donohue v. Armco,*** supra. The view expressed in Dicey & Morris, 13th Edn, para 12-090, is therefore, in my judgment, correct.

The Exercise of the Discretion to Stay

102. The conclusion has already been reached that the Reinsurers have not made out a sufficiently strong case in the circumstances of this case to cross the evidential threshold necessary to qualify for a stay. Nevertheless, in case this matter goes further, I shall consider the factors relevant to the exercise of the court's discretion and their relative weight.

103. The Reinsurers press not only the fact of the Zambian Law and Jurisdiction Clause, but, particularly importantly, the location of the evidence as to the nature of the event said to fall within the policy coverage. If it be correct, as the Reinsurers contend, that the reinsurance is subject to the KCM wording, it will become necessary to ascertain whether the loss was caused by *"a collapse"* of the mine. There is a major factual issue as to whether what happened could be so described. Local evidence of the cause of the loss will therefore be indispensable. Since on the Reinsurer's case the reinsurance responds to the KCM wording, the liability of the Reinsurers must be determined by the construction of the underlying policy in accordance with Zambian Law. Therefore, the whole issue ought to be resolved in the Zambian courts. The English proceedings should await the Zambian courts' determination of the key issues under the underlying policy. It could then be determined by the English courts to what extent Coromin is liable to KCM under the DIC provision in the global policy.

104. Coromin's key point is that it is being sued directly by KCM under the global all risks policy as primary 100 per cent insurer and under the DIC provision as "top up" primary insurer subject to the liability, if any, of the Local Insurers. Thus, if it were held liable to KCM for 100 per cent of the loss but yet it were not reinsured to give full protection, in that event, by the Reinsurers, it would wish to join Aon as Part 20 co-defendant claiming that Aon was in breach of duty as placing brokers by having failed to effect any or any sufficient reinsurance protection. This it would wish to do in the English proceedings because the main underlying policy claim against it was by KCM in the English proceedings. KCM was, according to the indication by Mr Beasley QC, on its behalf, claiming

double insurance coverage, under a primary policy by the Local Insurers and under the global all risks policy by Coromin. Further, on the evidence, it would take at least one year from now for the Zambian first instance court to hear and determine a trial as to coverage under the KCM wording and another three years before an appeal could be heard. Consequently, the solution of staying these proceedings and thereby postponing a decision to join Aon until after the result of a trial in Zambia is available would involve prejudicial delay because any proceedings against Aon would be likely to have become time-barred by the time that a trial and certainly an appeal had been resolved in Zambia. It is to be observed that there is no evidence as to whether, if Coromin is joined in the Zambian proceedings it would be possible for it to join Aon as a party in those proceedings. There were therefore *"strong reasons*" or "*strong cause"* for the English court declining to enforce the Zambian jurisdiction clause by granting a stay.

105. There can be no doubt that, as exemplified by the decision on the facts in ***the El Amria*** itself, although the court applied to for a stay must consider all the circumstances of the case, the risk of significant procedural dislocation if a stay is granted is a consideration to which the English courts have traditionally attached great weight on the discretionary balance. Just as in the analogous case of applications to stay in order to enforce arbitration agreements up to the time of the Arbitration Act 1975 (for international arbitrations) and the Arbitration Act 1996 (for domestic arbitration agreements) it was virtually standard practice for a stay to be refused in cases where the respondent to the application showed that it had an alternative or third party claim against a non-party to the arbitration agreement, so upon applications for a stay on the grounds of a foreign jurisdiction clause, the fact that, if a stay is granted, separate proceedings will have to be brought against a third party not bound by the agreement for foreign jurisdiction is capable of providing a good reason for refusing a stay. Until section 9 of the 1996 Arbitration Act made it mandatory to grant such a stay in relation to domestic arbitration agreements which are not subject to the New York Convention, the conceptual basis of the refusal of such applications had been that it was undesirable in the interests of justice that, because the non-party would not be bound by any arbitration award and would therefore be entitled to have issues which had already been determined by the arbitrators re-litigated, one party to the arbitration would be subjected to the risk of injustice arising from the risk of inconsistent decisions. There can be little doubt that under the 1996 Act that conceptual basis changed. The principle of party autonomy which had underpinned the mandatory stay provisions of the New York Convention was adopted for all arbitrations. The risk of injustice yielded to the primacy of party autonomy. That is also the scheme of the Convention and Judgments Regulation under Article 17.

106. It is the duty of this court under CPR 1.1 to deal with this application justly and in accordance with the overriding objective in the special sense identified in CPR 1.1(2). The specifically relevant considerations are as far as practicable (a) ensuring that the parties are on an equal footing (b) saving expense, (c) dealing with the case in ways which are proportionate to the complexity of the issues and (d) ensuring that it is dealt with expeditiously and fairly.

107. Whereas the administration of the stay jurisdiction to protect the enforcement of a foreign jurisdiction clause must naturally give great weight to the existence of a binding agreement for a particular forum, there is no overriding and inflexible party autonomy doctrine as with an arbitration agreement. There are clearly cases where the party autonomy principle must yield to the wider interests of justice. Thus, a party to a jurisdiction agreement who will be exposed to the risk of inconsistent decisions, if the agreement is enforced by the granting of a stay, is entitled to invoke the wider interests of justice by inviting the court to exercise its discretion in a manner which removes or substantially reduces that risk: see by way of analogy the complex network of claims and the solutions arrived at in ***Bouygues Offshore SA v. Caspian Shipping Co*** [1997] 2 Lloyd's Rep 533 and [1998] 2 Lloyd's Rep 461 which was approved by the House of Lords in ***Donohue v. Armco Inc*** supra.

108. In the present case, if a stay were to be granted, Coromin would be unable to join Aon in the English proceedings for as long as the stay was in place and might well not be able to join Aon in any proceedings in which Coromin might be joined by the Local Insurers in Zambia. If the Zambian proceedings concluded that the Local Insurers had insured KCM on the basis of the KCM wording and that the loss fell outside the cover given to KCM by the Local Insurers, Coromin and the Reinsurers would only be bound by that decision if they were both parties to the Zambian proceedings. Similarly Aon would only be bound if it were a party to the same proceedings. If any one of those three parties were not a party to those proceedings, it would not be binding on that party in the English proceedings once the stay was lifted. As things stand, the Zambian proceedings have not been commenced and it is unclear who will be party to those proceedings in addition to KCM and the Local Insurers.

109. In these circumstances, the English proceedings have reached the stage where, if the Reinsurers are to remain parties, they must now plead to Coromin's Part 20 claim and Coromin will have the opportunity, which I find they are almost certain to take, of joining Aon as co-defendants. The proceedings are thus within a few weeks of the case management conference which, if there is no stay, will involve the setting of a trial date, probably in the first half of 2006. There is no basis for preventing KCM from pursuing these proceedings against Coromin including both its 100 per cent all risks claim and its DIC claim. For the latter purpose, it will have to be decided whether the Local Insurers are liable on the specified perils basis. Whether or not that trial is completed before a Zambian trial, if both trials lead to a judgment, Coromin will be faced with the risk of inconsistent decisions on whether the loss falls within the cover. So will Aon. There is also the risk of inconsistent decisions as to whether Coromin's outward reinsurance is subject to the terms of the KCM wording, which may be an essential issue as between Coromin, the Reinsurers and Aon.

110. Further, I am not persuaded that in order to ascertain whether the loss falls within the specified peril of "collapse", should that become necessary, there will have to be a vast body of local evidence as to the observed events. What happened is likely to be well documented. Why it happened may need to be investigated for the purpose of the coverage issue, but that is probably within the realm of expert evidence from a limited number of witnesses. In other words, the location of the trial of this issue in England may well not involve substantial costs implications relative to the amount of the claim.

111. In deciding whether to grant a stay at this stage it is important not to lose sight of the realistic practicalities of this litigation. The key to this is that the parties are responsible and experienced corporations in the insurance industry and in the case of KCM in international commerce. They all have access to the advice of very experienced international litigation solicitors and counsel. If the Part 20 proceedings against the Reinsurers are permitted to continue and Aon are joined as co-defendant, the probability is that, having regard to the time likely to be needed to prepare for trial and to available court time in 2006, the trial in England will be completed and judgment given before the trial of such proceedings as are commenced in Zambia has been completed. In that event, it would be most unlikely that the trial in Zambia would be permitted to continue. The prospects at this stage of all parties, including the Local Insurers, settling all outstanding issues on the basis of the English court's judgment would be very considerable. Taking this likelihood into account, it is, in my judgment, unlikely that if the Part 20 proceedings continue against Reinsurers, the latter will be exposed to a situation in which they are prejudiced in respect of costs or otherwise by a decision of the Zambian courts which is at variance with a previous decision of the English courts.

112. For these reasons, were it necessary to decide the point as a matter of discretion, I should conclude that there are good reasons or strong cause why in the interests of justice a stay of the Part 20 proceedings against the Reinsurers should not be granted. Whereas much weight in the discretionary balance must be given to the Reinsurers' entitlement to the enforcement of the jurisdiction clause and to the location of the evidential centre of gravity of the dispute as to whether the loss was covered by the specified perils in the KCM wording, as well as to the interest of Zambian Law being administered in Zambian courts, these considerations are, in my judgment, outweighed by the general interests of justice that conflicting decisions on key issues should be avoided and by the desirability of permitting the joinder of Aon in the English proceedings and of having the issues between KCM, Coromin, the Reinsurers and Aon all decided by one tribunal and in proceedings in which they are all entitled to participate.

113. It is further argued on behalf of the Reinsurers that a stay of the Part 20 proceedings should be ordered on case management grounds.

114. The discretionary exercise which I have already carried out takes into account all the factors which would have to be considered in applying the overriding objective under CPR 1.1. The most effective case management approach in this case is, in my judgment, that this action should now proceed with normal expedition, involving all parties, including the Reinsurers and Aon, and that at the case management conference in the near future a date for trial be fixed.

115. This application will, for the reasons indicated in this judgment, be dismissed.

Mr Geoffrey Vos QC and Mr David Lord (instructed by DLA) for the Applicant
Mr Simon Bryan (instructed by Ince & Co) for the Respondent