England and Wales High Court (Commercial Court) Decisions
Ace Capital Ltd v CMS Energy Corporation [2008] EWHC 1843 (Comm) (30 July 2008)
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Case No: 2007 FOLIO 1635IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

30/07/2008
B e f o r e :
MR JUSTICE CHRISTOPHER CLARKE

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Between:

ACE CAPITAL LTD ("ACE") (suing on its own behalf and on behalf of all underwriting members of Lloyd's Syndicates 488 and 2488 that subscribed to Political Risk Insurance Policies 509/DF054599, 509/DF054699, 509/DF054799 and 509/DF054899) and others identified in Schedule 1 to the Claim Form) ("Underwriters")

Claimant

and

CMS ENERGY CORPORATION (in its own right and on behalf of any other associated, affiliated or subsidiary companies not identified below that were privy to or covered by Political Risk Insurance Policies numbers 509/DF054599, 509/DF054699, 509/DF054799 and 509/DF054899)("CMS")

Defendant

Steven Gee QC & Richard Waller (instructed by Clyde & Co) for the Claimant
Steven Berry QC & Ricky Diwan (instructed by Addleshaw Goddard) for the Defendant
Hearing dates: 8th & 9th April 2008
HTML VERSION OF JUDGMENT

MR JUSTICE CHRISTOPHER CLARKE:
The claimant, Ace Capital Ltd ("Ace"), is the Lead Underwriter under certain political risk insurance policies. It sues on behalf of itself and the other subscribing underwriters ("the Underwriters"). The defendant, CMS Energy Corporation ("CMS"), is a Michigan corporation and is the Insured under the policies (together with its associated, affiliated or subsidiary companies). Ace seeks a permanent injunction to restrain CMS from continuing proceedings commenced by it against the Underwriters on 22nd October 2007 before the Circuit Court for the County of Jackson in the State of Michigan.

The Policies
The policies in question are as follows:

(i)	Primary Policy:	No 509/DF 054599;
(ii)	First Excess Policy:	No 509/DF 054699;
(iii)	Second Excess Policy	No 509/DF 054799;
(iv)	Third Excess Policy	No 509/DF 054899.

The Primary and First Excess policies expired in November 2007. The Second and Third Excess policies expired in November 2005. The policies were placed on the London market in 1999 through CMS' brokers, Marsh Ltd. The policies constituted a multi-national programme under which the Underwriters provided political risk cover to the companies insured in respect of investments in specified foreign countries. The policies covered, inter alia, Expropriatory Acts and Selective Discrimination of the Government in whose country the investment was based, provided that those actions had certain specified effects. One such effect was that the acts in question rendered the foreign enterprise Economically Unviable, as defined in the Policies for a term of 6 months.
CMS invested in the Atacama project. That involved a natural gas pipeline between Argentina and Chile; the transmission of natural gas from Argentina into Chile; the generation of electricity at a plant in Chile using that gas; and the sale of that electricity to off-takers in Chile. The insured percentage of cover for the project was agreed to be 50%. CMS claims that actions taken by the Government of Argentina during the period 2004-2006 amounted to Expropriatory Acts and/or Selective Discrimination rendering CMS's investment in the Atacama Project "Economically Unviable" within the meaning of the policies such that it is entitled to indemnification under them for 50% of its total net loss.

The Michigan proceedings
In the proceedings instituted in Michigan CMS claims $ 132,895,000 under the policies and, on the basis of an alleged "unfair trade practice" under a Michigan statute, interest at the rate of 12% per annum. It also claims trial by jury.
The policies contain the following wording:
"ARTICLES VI. GENERAL CONDITIONS
……
I. Choice of Law and Arbitration
a) *The construction, validity and performance of this Policy, shall be governed by the laws of England and* ***all disputes*** *that may arise under, out of, or in relation to this Policy or to the determination of the amount of loss hereunder* ***shall*** *be submitted to*

arbitration at the London Court of International Arbitration according to its rules at the date of submission. The award rendered by the Arbitrator(s) shall be final and binding upon all parties and may be enforced by any court having jurisdiction.
b) *The parties hereto agree that the speedy resolution of any disputes between them to be had as a consequence of this clause is a mutual and material inducement to enter into this Policy and that this* ***in no way infringes on any rights accorded in the Service of Suit clause of this Policy the effect of which is to provide without waiver of any defence an ultimate assurance of the amenability of Underwriters to process of certain courts****.*
c) *Service of Suit Clause (NMA 1998) in respect of US Insured's:*
It is agreed that in the event of the failure of Underwriters hereon to ***pay any amount claimed to be due hereunder****, Underwriters hereon, at the request of the Insured, will* ***submit to the jurisdiction of a court of competent jurisdiction within the United States****, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any State in the United States.*
It is further agreed that service of process in such suit may be made upon:
Mendes & Mount, 750 Seventh Avenue, New York, NY 10019-6829, USA.
And that in ***any suit*** *instituted against any one of them* ***upon this Policy****,*
Underwriters will ***abide by the final determination of such cour****t or of any appellate court in the event of any appeal.*
The above-named are authorised and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the insured to give a written undertaking to the Insured that they will enter a general appearance upon Underwriters' behalf in the event such suit shall be filed.
Furthermore, pursuant to any statute of any state, territory or district of the United States which makes provision therefore, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other office specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be serviced any lawful process in any action, suit, or proceeding instituted by or on behalf of the insured or any beneficiary hereunder arising out of this Policy and hereby designate the above-named as the person to whom the said officer is authorised to mail such process or a true copy thereof".
[Emphasis added in each case]

Ace submits that there is an obvious omission from the wording of the first paragraph of clause (c). You would not normally speak of submitting "*to the jurisdiction of a court of competent jurisdiction within the United States, to remove an action ... or to seek a transfer"*. Clause (c) with the inclusion of the words said to be omitted underlined would read as follows:
"It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Insured, will submit to the jurisdiction of a court of competent jurisdiction within the ***United States****, Nothing in this clause constitutes or should be understood to constitute a waiver of Underwriter's right to commence an action in any court of competent jurisdiction in the* ***United States*** *to remove an action to a United States District*

Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any State in the United States". [Bold and underlining added]

The reason why the mistake is said to be obvious is firstly, that the clause, as drafted leaves the words "*to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any State in the United States*" without any antecedent wording that is apt to govern them. Secondly, as the heading of clause (c) makes plain the wording is intended to be the NMA 1998 form, which includes the words omitted[1]. Thirdly, the omission is readily explained as a homoeoteleuton, in which the writer (more accurately the typist) has allowed his or her eye to wander from an expression (here "*United States*") to the same expression where it next appears, as a result of which he or she has left out the entirety of the intervening words. That he has done so is apparent from looking at the NMA 1998 clause, in which the second "*United States*" is followed, as with the only "*United States*" in the present clause, by a comma, whereas the first is followed by a full stop. The Court, applying English law, should interpret the clause with the words omitted written in: as the House of Lords did *in* ***Homburg Houtimport BV and Others v Agrosin Private Ltd, The "Starsin"*** [2004] 1 AC 715, where it read in 17 words omitted for this reason from a standard clause.

I accept these submissions. By heading the relevant clause "*Service of Suit Clause (NMA 1998)*" the parties showed that they intended to agree the clause that they specified, which they then purportedly set out. Something is obviously missing. In those circumstances, the Court is entitled to look at the full terms of the specified clause. The case is stronger in this respect than *The "Starsin"* where the clause was not specifically identified. When regard is had to the full terms, it is obvious that a mistake has been made, what it is, and how it has come about. The mistake was to omit the words underlined in paragraph 7 above, and it came to be made on account of a homoeoteleuton.

The contrary construction would appear to require reading in before the words "*to remove an action to a United States District Court*" something like "*and will also submit to the jurisdiction of such a court*". But the interposition of some such words does not fit well with the next following words since the phrase "*and will also submit to the jurisdiction of such a court ... to seek a transfer etc*" is inapt. An alternative is to read the clause as if it said *"will submit to the jurisdiction of a court of competent jurisdiction within the United States and to any attempt by the insured to remove etc…or to seek etc"*, which seems somewhat contrived. Where there is an obvious explanation as to what has happened, which is wholly consistent with the heading of the clause, I decline to reject the obvious in favour of a conclusion that the parties must (or may) have taken care deliberately to omit the words "*Nothing ....United States*" but not to do anything to adapt the clause in the light of that excision.

The central issue

The arbitration agreement contained in clause (a) extends to "all disputes that may arise under, out of, or in relation to this Policy or to the determination of the amount of loss hereunder". The dispute between the parties is a dispute of that character. The central issue for decision is whether, as CMS contends but Ace disputes, the Service of Suit clause entitles them, none the less, to sue the Underwriters on the merits in the United States. If it does not and the dispute falls to be dealt with by arbitration, then Ace seeks an injunction precluding CMS from proceeding in Michigan. It submits that, in the absence of good reason for not giving effect to the arbitration agreement, it is entitled to that relief; see ***The Angelic Grace*** [1995] 1 Lloyd's Rep 87; ***Starlight***

v Tai Ping [2007] 2 CLC 440.

The history of the proceedings

On 10th December 2007, by which time the Underwriters had received notification of the Michigan proceedings, Ace issued in this Court an application for permission to serve anti-suit proceedings out of the jurisdiction on CMS. Permission was granted and the Claim Form was issued on 14th December 2007. It was served on 17th December.

On 11th December 2007, in response to CMS's Complaint, the Underwriters filed a notice of removal to the US District Court for the Eastern District of Michigan, on the basis that that Court had diversity jurisdiction over the subject matter and that the proceedings concerned federal issues. On 18th December 2007 the Underwriters filed in the District Court a motion to dismiss, alternatively stay, the Michigan proceedings in favour of the present proceedings. Thereafter there was considerable briefing between the parties on the various motions.

On 15th February 2008 Flaux J made an order expediting the trial of the claim for an anti-suit injunction. On 24th March 2008, at a hearing which he had directed in order to consider (inter alia) Underwriters' motion to dismiss or stay, Judge Gadola in the District Court decided to await the determination of this Court on the English law point of construction before deciding the motion.

US case law

There is a large body of United States case law on the interaction between clauses like (a) and (c), to which both parties have referred. Since the policies are governed by English law none of the US authorities is binding on this Court. It is right, however, to have regard to them for three reasons.

Firstly, decisions of the courts of the United States are of persuasive effect: see the decision of the House of Lords in ***Premium Nafta Products Ltd v Fili Shipping Co Ltd*** [2007] UKHL 40. The views of US courts on issues of this kind are often instructive, at any rate in the absence (as here) of any fundamental difference in the principles of interpretation as between the English and the US Courts. Ace submits that that is particularly so, in the present case, where the body of US authority is, they submit, compelling and persuasive. Further, since the Service of Suit clause is inserted into agreements for US regulatory purposes, it is relevant to consider what effect it may have in the United States.

Secondly, the clauses in question will have to be interpreted either in England, if the party seeking arbitration seeks injunctive relief against the party proposing Court action, or in one or other of the United States under the jurisdiction to dismiss or stay proceedings in order to give effect to the arbitration agreement. In the interests of commercial certainty it is desirable that, if possible, the same or similar clauses should be interpreted in like manner wherever the interpretation takes place**:** ***The "World Symphony"*** [1992] 2 Lloyd's Rep 115; ***King v Brandywine Reinsurance Co*** *[2004] Lloyd's IR 554*. A situation where courts on either side of the Atlantic attribute different meanings to the same or very similar clauses is a recipe for conflict, chaos and confusion.

Thirdly, the US authorities (up until 1999) form part of the background and context in which the Service of Suit clause came to form part of the policies. Insureds such as CMS would have available to them US legal advice on that case law. CMS itself took advice from the US law firm Chadbourne & Park on the policy wording prior to the conclusion of the policies.

I bear in mind, however, (i) that there are differences in the wording of the relevant clauses in several of the US cases, both among themselves and by comparison with the wording in the present case, and (ii) that the essential task for this Court is to interpret the wording in the instant case, without assuming that any of the US cases will, even persuasively, provide the answer.

The rival constructions

Ace submits that it is apparent from the heading of Article VI.I (c), i.e. "*Service of Suit Clause (NMA 1998)"*, that the sub-paragraphs of Article VI.I are treated as clauses; that "*this clause*" in the second line of clause (b) is a reference to the immediately preceding clause, i.e. clause (a), and that the "*speedy resolution of any disputes between them*" referred to in clause (b) is a reference to the arbitration for which clause (a) provides. By Clause (b) the parties agreed that the arbitration clause in no way infringes on any rights accorded by the Service of Suit clause whose effect is to provide an *ultimate* assurance of the amenability of Underwriters to process of certain courts. The ultimate amenability of the Underwriters to process must be contrasted with the exclusive and primary forum for dispute resolution which is to be the arbitral tribunal.

CMS submits that, whilst the parties agreed on arbitration and that the speed of resolution thereunder was a material inducement to their entering into the policies, nevertheless they made it plain that their agreement to that effect "*in no way*" infringed on the rights accorded in the Service of Suit clause. One of those rights was a right on the part of the Insured to require the Underwriters to submit to the jurisdiction of a court of competent jurisdiction in the United States. This right entitled CMS, if it wished, to start and pursue a case in the United States on the merits.

The background

The basic purpose of the Service of Suit clause is to ensure that out of state surplus lines insurers can readily be sued in the United States. Lloyd's syndicates are not "*admitted*" (i.e. licensed) insurers in any States save Kentucky and Illinois[2] and are known as "*surplus line*" insurers. In-State insurers can be served within the relevant state, to whose jurisdiction they are subject. In most cases State insurance laws requires an admitted insurer to appoint an officer of the State, usually the State Insurance commissioner or the Secretary of State, or a resident agent, as its agent for the receipt of service of process.

States usually require out-of-State insurers to do the same; and some States also require them to include a Service of Suit clause in their policies. This puts out-of-State insurers into a position equivalent to in-State insurers by ensuring that the court will have personal jurisdiction over them (because of their consent) and that they will accept process through a law firm such as Mendes & Mount. It is not, however, the purpose of the Service of Suit clause to prevent or restrict the arbitration of insurance or reinsurance claims. There are in certain states prohibitions on insurers having arbitration clauses in their policies, but Michigan is not one of them.

The evidence establishes that at the time when the policies were concluded it was fairly common for insurance policies, and standard for reinsurance agreements, to include both an arbitration agreement and a Service of Suit clause.

The US case law

I have before me the expert reports of (1) Mr Leo Fraser, who is a partner in Mendes & Mount, the firm nominated in this (and countless other) Service of Suit clauses; and (2) Mr Larry Saylor

who is a member of CMS' legal team in Michigan. They and the parties have assembled over 60 cases, both English and US, said to bear upon the topic. Ace's Counsel have identified 18 cases, 2 at the US Court of Appeal level, 9 in the Federal District Courts, and 7 at State level, which appear to be the most relevant.

United States Courts of Appeal

In ***Hart v Orion Ins. Co Ltd*** 453 F.2d 1358 (10th Cir **1971**) the US Court of Appeals for the 10th Circuit was concerned with a claim under an occupational disability policy against an English insurer. The policy provided for arbitration in that Condition 3 required the question of whether the insured was suffering from personal disability to be decided by independent medical referees to be appointed in accordance with the terms of the policy. Condition 14 of the policy provided for suit in the event of the failure of the insurer to pay[3]. An arbitration took place which resulted in a decision adverse to the insured. The lower court granted summary judgment to the insurer and the insured appealed on the basis that the insurer had waived its right to arbitration. The Court of Appeals held that there was no inconsistency between conditions 3 and 14 in that:

"Policy Condition 14 relating to court actions is said to be inconsistent with Condition 3 relating to arbitration. We find no inconsistency. The purpose of Condition 14 is to ease possible burdens which the insured might encounter in obtaining jurisdiction over the insurer, which is incorporated under the laws of England and has its principal place of business in London. The assent of the insurer to jurisdiction does not prevent it from raising a defense based on policy terms".

The reference to a defence based on policy terms was a reference to the defence that the insurer had a right to arbitrate.

In ***McDermott International Inc v Lloyd's Underwriter*s** 944 F.2d 1199 (5th Cir **1991**) the claimant was insured at Lloyd's for every year from 1952 to 1989. The 1989 policy contained an earlier version of the NMA Service of Suit clause together with an arbitration clause. The insured sued on the policy in a Louisiana state court. The underwriters demanded arbitration. Thereupon the insured filed a separate petition asking the Louisiana court to decide that it had no obligation to arbitrate. Underwriters removed both suits to the Federal District Court which held that the insured was, pursuant to the Service of Suit clause, entitled to choose the forum where the parties' dispute regarding whether arbitration must take place would be resolved and remanded the case to the Louisiana State court. The argument was that the underwriters had waived their right to remove the dispute from the State court by virtue of the Service of Suit clause which entitled the assured to require them to submit to jurisdiction in any competent court. The assured having required them to submit to the jurisdiction of the State Court, the underwriters could not, it was submitted, remove the case to a different court.

The Court of Appeals for the Fifth Circuit decided that an explicit waiver was needed; and that there was no such waiver because the Service of Suit clause could be interpreted consistently with the arbitration clause (a) to apply to suits concerning the enforcement of an arbitration award and (b) as merely preventing the insurers from objecting to personal jurisdiction.

Neither of the two cases contained a provision similar to clause (b). But they hold that a condition which provides, as does clause (c), for suit "*in the event of failure to pay*", is not inconsistent with an arbitration clause and does not entitle the insured to seek to enforce his claim by action. In other words the rights accorded in a Service of Suit clause of the type in question do not extend to an entitlement to avoid having the dispute determined by arbitration.

Federal District Courts

NECA Ins Ltd v National Union Fire Ins*. Co*, 595F. Supp 955 (S.D.N.Y. **1984**) is a decision of the District Court for the Southern District of New York. NIL Insurance Ltd, a reinsurance company, sought to recover from National Union, the reinsured, monies paid in connection with the settlement of a personal injury action by National Union. National Union successfully sought a stay of the action pending arbitration. The policy contained an "*all disputes*" New York arbitration clause and a Service of Suit clause under which the reinsurers agreed to submit to the jurisdiction of any court of competent jurisdiction in the event of a failure on their part to pay any amount claimed. The reinsurers argued that their consent to suit eliminated any obligation to arbitrate. The District Court held that the Service of Suit clause simply provided a consent to jurisdiction in order to enforce payments by reinsurers granted through arbitration. The clause: "*was designed to guarantee the enforcement of arbitration awards and is not designed to supercede an obligation to arbitrate disputes within the scope of the arbitration clause*".

The case also noted, as have many others, the strong federal policy in favour of arbitration, embodied in the Federal Arbitration Act, as established by the Supreme Court: e.g. in ***Moses H.Cone Memorial Hospital v Mercury Construction Corp***., US. A 103 S Ct 927,941 (1983).That case had held that:

"The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability".

Hart was cited with approval by the Supreme Court as an example of the consistent holdings by federal Courts of Appeals '*that questions of arbitrability must be addressed with a healthy regard for the federal policy favouring arbitration"*. Michigan, like many other States, has the same public policy: ***Omega Construction Co, Inc v Altman***, 147 Mich.App.649 (Ct.App.Mich 1985).

A series of subsequent cases have followed *Hart v Orion* in holding that there is no inconsistency between a Service of Suit clause and an arbitration clause; that the purpose of such a clause is to ease the difficulties which the insured might encounter in establishing jurisdiction over a foreign, i.e. non US, insurer for enforcement purposes; and that the assent of the insurer to jurisdiction does not prevent him from raising a defence that he has a right to arbitrate the dispute.

Examples include ***Ideal Mutual Ins Co v Phoenix Greek Ins Co*** 1984 US Dist Lexis 15258 (S.D.N.Y. **1984**). In that case there was a London arbitration clause and a Service of Suit clause. There the clause was to operate "*in the event of the failure of the Reinsurers to pay any amount claimed to be due hereunder*. It obliged the Reinsurers, at the request of the Reassured, to submit to the jurisdiction of any court of competent jurisdiction within the US and also to comply with all requirements necessary to give such Court jurisdiction and provided that "*all matters arising hereunder shall be determined in accordance with the Law and Practice of such Court*".

The court said:

"... the arbitration clauses in these contracts retain their validity unless language compels the conclusion that the parties, having gone to the trouble of inserting a broad arbitration clause, intended to eviscerate the clause almost entirely by preceding it with a service of suit clause. But it is entirely possible to read these clauses in harmony, rather than in conflict with each other…... I am in entire agreement with the conclusion reached by the tenth circuit in Hart..., in which the

court rejected an argument similar to the present plaintiff's. ... Confronted with the issue in this case, I do not hesitate to hold that the consents to jurisdiction contained in the service of suit clauses in these contracts are not fatally inconsistent with Phoenix's right to raise the affirmative defense of arbitration, once jurisdiction has been successfully invoked. In consequence, the service of suit clause cannot be read to constitute a waiver of the broad arbitration clauses".
Other examples are: **West Shore Pipe Line Co v Associated Elec & Gas Co** 791 F.Supp 200 (N.D.Ill **1992**)[4]; **Continental Casualty Co v Certain Underwriters at Lloyd's**, 1993 US Dist, Lexis 21345 (N.D. Cal **1993**); **Ochsner/Sisters of Charity Health Plan, Inc v Certain Underwriters at Lloyd's**, 1996 U.S.Dist Lexis 12561 (E.D.La **1996**).
In *Ideal* the court directed the plaintiff to proceed to arbitration, and directed that the court would retain jurisdiction over the parties and the action for the purpose of entering any appropriate motions after awards had been delivered.

Different views
In ***Thiokol Corp* v *Certain Underwriters at Lloyd's*** 1997 U.S.District Lexis 8264 (D.Utah **1997**) Lloyd's underwriters sought a stay of the complaint in favour of arbitration. The claimant, Thiokol, had entered into two subcontracts with EER Systems Corporation ("EER") to sell to EER rocket motors for use in a NASA funded programme, called "COMET", which aimed to launch into space experimental satellites for commercial purposes. EER purchased an insurance policy from Lloyd's for the benefit of Thiokol, which was the named "*Assured*". This provided that the insurers would pay all sums contractually due from EER to Thiokol for non recurring development costs in the event that NASA cancelled or terminated the COMET project during the policy period. Thiokol said that NASA had cancelled the program during that period and submitted a claim to Lloyd's which Lloyd's refused to pay. Thiokol launched a complaint in court seeking, inter alia, a declaration that sums were due under the policy. Lloyd's sought a stay of the claim for arbitration. The policy contained an LCIA arbitration clause and a Service of Suit clause in NMA 1998 form in favour of .
The Court held that the Service of Suit clause unambiguously required Lloyd's to submit to US jurisdiction, if it had failed to pay the amount requested by Thiokol and Thiokol requested it to do so; and that the arbitration clause equally unambiguously called for all policy disputes to be determined by London arbitration[5]. The judge rejected Lloyd's submission that the reconciliation between the two clauses was to be made by regarding the Service of Suit clause as an aid to arbitration, applicable only if the assured sought to enforce the terms of an award in a Court within the United States. It did so on the basis (a) that the more specific provision in the contract should govern in the case of conflict; (b) that the clause should be construed against the drafter, in that case Lloyd's; (c) that to accept Lloyd's interpretation would subvert the Service of Suit clause; and (d) that a more harmonious interpretation of the policy was that the clause granted Thiokol an explicit right to bypass arbitration by bringing Lloyd's to Court in the United States in the event that Lloyd's failed to pay a claim. That would still give the arbitration clause meaning because arbitration appeared to be the exclusive forum (a) for EER to bring any claims under the policy (because it was not "*the Assured*" but only the purchaser of the policy) and (b) for Thiokol in instances not addressed by the Service of Suit clause. The Court set store by the fact that the policy did not state, nor did any parole evidence attest, that the clause was solely intended as an aid to arbitration.

Three points are to be noted in respect of that case. *Firstly,* the judgment did not refer to, much less follow, *Hart*, notwithstanding that the US Court for the District of Utah is part of the Tenth Circuit so that *Hart* was binding upon it. *Secondly*, the Court distinguished prior counter authority upon the basis that, if the cases were persuasive at all, they were not persuasive in that case, which was said to be "*unique*" in that Thiokol was not the purchaser of the policy, but the named Assured and the Service of Suit clause specifically granted only Thiokol, and not EER, the benefits contained in it. This feature does not arise in the present case. It is also open to question whether the fact that Thiokol was the only beneficiary of the Service of Suit clause determines the issue. That fact supports the conclusion that there was a special agreement in the case of Thiokol. But a logically prior question is whether there was a conflict between the arbitration and Service of Suit clauses which needed recourse to the principle that specific provisions prevail over general ones in order to resolve. *Thirdly*, the Service of Suit clause in this case was insisted on by CMS. Ace had at one stage wished to take it out. So the *contra proferentem* rule is not applicable.

A retreat from Thiokol

In ***NRMA Insurance Ltd v Vesta Fire Ins. Corp***, 2000 U.S.Dist Lexis 8435 (D.Ala.**2000**) NRMA was Vesta Fire's quota reinsurer. Article 20 of the reinsuring agreement provided that it was a condition precedent to any right of action that any dispute or difference of opinion arising with respect to the contract should be admitted to arbitration. Article 21 was an NMA 1998 Service of Suit clause. Vesta filed a motion to compel arbitration. The court granted the motion holding that "*the service of suit clause may reasonably be read as having been designed to guarantee the enforcement of any award rendered under the arbitration clause*...". The judgment refers to *Thiokol* and observes that in *Thiokol* the arbitration clause provided for arbitration in London, whereas in NRMA no place of arbitration was specified. The decision does not indicate that that made any difference or, if so, why[6]. The basis of the decision appears to have been that on similar language the Fifth and Tenth Circuits (in *McDermott* and *Hart* respectively) had held that a Service of Suit clause was not inconsistent with an arbitration article in the same agreement.

In ***Security Life Ins Co v Hannover Life Reassurance Co***, 167 F Supp. 2d 1086 (D.Minn **2001**) the parties to a reinsurance contract agreed that either party could request arbitration to resolve any dispute arising out of the agreement in which case "*the other party must agree to arbitration and such arbitration shall be binding upon both parties ....Arbitration is the sole remedy for disputes arising under this Agreement"*. The contract also contained a Service of Suit clause. The reinsurers moved to dismiss the reinsured's complaint in reliance on the agreement to arbitrate. In granting the motion, the Court described it as:

"well established that... service of suit clauses do not abridge an agreement to arbitrate all disputes arising out of a relationship ...The reason for service of suit clauses is not to limit the arbitrability of claims but to 'obviate potential problems with obtaining jurisdiction over the parties'".

Ochsner/Sisters of Charity, *Continental Casualty*, *Neca*, *Ideal Mutual* and *McDermott* were all cited together with ***Old Dominion Ins Co. v Dependable Reinsurance Co***, 472 So 2d 1365, a decision of the Florida Court of Appeal, First District, and *Phoenix*, 1984 U.S.Dist LEXIS 15258, 1984 WL 602.

The Court held that, even if principles of contract interpretation allowed the Service of Suit

clause to be read as meaning that suits for failure to pay any amount claimed were to be litigated in court, such principles, even if correct, were inapplicable because:
"they are displaced in this context by the more specific rule requiring that 'any doubts concerning the scope of arbitrable issues be resolved in favour of arbitration".
Thiokol was distinguished on the ground that the plaintiff opposing forced arbitration, i.e. *Thiokol,* was not a party to the arbitration agreement but a third party. This is not easy to follow. Thikol was, indeed the "*Assured*" in whose favour alone the Service of Suit clause applied. But it was also bound by the arbitration clause for everything except money claims by it.
The latest case at Federal District Court level appears to be ***Credit General. Insurance. Co v John Hancock Mut. Life Ins. Co.,*** 200 U.S. Dist Lexis 9009 (N.D.Ohio **2000**) where quota share reinsurers secured the dismissal of the action brought by the reinsured on the grounds that Article XVIII of the Quota Share Treaty required arbitration as a precedent to any right of action. The Service of Suit clause was in NMA 1998 terms. Relying on *Thiokol* and ***Transit Casualty Company v Certain Underwriters at Lloyd's of London***, 963 S.W. 2d 392 (Mo.Ct. App 1998)[7] the reinsured argued that that clause fell to be applied whenever there was a failure to pay a claim under the Treaty on the part of the reinsurers.
The Court rejected the *Thiokol* and *Transit* analysis. Firstly, in neither of those cases was there a provision that arbitration was a "*precedent to any right of action hereunder*" – a term which showed that arbitration took precedence over any right of action. Secondly, the Court regarded the courts in *Transit* and *Thiokol* as having ignored a primary rule of statutory construction that "*where two seemingly conflicting contract provisions can be reconciled, a court is required to do so and give both effect".* A court, it held, cannot proceed to the rules of construction dealing with conflicting clauses, including the rules that the specific governs over the general and that the contract should be construed against the drafter, until it decides whether the clauses in fact conflict. The judgment goes on to record that
"Applying this rule of construction, courts have consistently held arbitration clauses, even those without specific language stating that arbitration is a precedent to any right of action, to be enforceable despite the presence of a Service of Suit clause elsewhere in the contract".
Several cases, including *Hart* and *McDermott*, are then cited in support. The judgment continues:
"These cases generally hold that the Arbitration clause and the Service of Suit clause do not conflict. All of the above cases found that the Service of Suit clause is intended to enforce an arbitration award, since an arbitration award is not self-enforcing… Neither clause conflicts, and each clause has an effect. Interpreting each clause according to its plain meaning, "(1) absent a waiver of arbitration, all disputes falling within the scope of the Arbitration clause would be arbitrated; and (2) [John Hancock] will submit to the jurisdiction of any court of competent jurisdiction chosen by [Credit General] in any lawsuit, whether it be to determine the arbitrable nature of the dispute, to confirm an arbitration award, to compel arbitration …. or to resolve on the merits a claim not subject to arbitration." See Travelers Insurance Company v Keeling, 1993 US Dist. LEXIS 491, 1993 WL 18909 (S.D.N.Y 1993).
Considering both the weight of authority and the logic and simplicity of the cases that hold that both the Arbitration clause and the Service of Suit clause can co-exist, with each given its plain meaning and effect, the Court finds that Credit General's claims are subject to arbitration, and, under the Federal Arbitration Act, John Hancock is

entitled to a stay of litigation. The Court further finds, since all of the claims pursued are subject to arbitration, and, thus, nothing is left to litigate, that this claim may be dismissed without prejudice".

State Courts

There are several State appellate court decisions, which resolve the tension between an arbitration and a Service of Suit clause in the same manner as in *Hart*. Among these are ***Old Dominion*** (cited in paragraph 40 above), where in 1985 the Court of Appeal of Florida, reversing the refusal of a stay by the lower court declared that that Court:

"departed from the essential requirements of law by interpreting the provisions of the agreement in a manner which is contrary to the language of the agreement, the usage of the trade, the law's liberal policy favoring arbitration, and respondent's own actions in seeking arbitration of the claims it now seeks to litigate without arbitration".

In ***Geldermann Inc v Strathis*** 177 Ill App 3d 414 (Ill App **1988**) the Court of Appeal of Illinois reached a similar decision. In that case, which was not an insurance case, the arbitration agreement was contained in the incorporated rules of the Chicago Board Options Exchange. The forum selection clause provided that the "*This Agreement shall be construed and enforced in accordance with the laws of the State of Illinois. The parties agree that venue for any action shall lie exclusively with any State of [sic] Federal court of competent jurisdiction situated in Cook County, Illinois*". The Court referred to the principle that waiver of a contractual right to arbitration was not lightly to be inferred; to the strong presumption under federal law in favour of arbitration; and to the unenforceability of a forum selection clause where enforcement would contravene a strong public policy. It held that:

"There is no irreconcilable inconsistency between the [forum selection] clause and the [arbitration clause] ... Both can be given effect, since arbitration awards are not self-enforceable. Once arbitration is completed, therefore, the forum selection clause reasonably can be interpreted as dictating the location of any action that might be necessary to enforce the award …… [the forum selection clause] did not constitute an "opting out" or waiver of the right to arbitration".

See also ***Underwriting Members of Lloyd's v United Home Life Ins.Co***. 569 N.E.2d 67 (Ct App.Ind. **1990**);

In ***Brooke Group Ltd v JCH Syndicate*** *488*, 87 N.Y. 2d 530 (**1996**) the Court of Appeals of New York dismissed an appeal from a decision of the Appellate Division of the Supreme Court confirming an order of the lower court granting the defendant insurers' motion to dismiss the complaint on the ground of forum conveniens in favour of arbitration. A Lloyd's policy, which was expressly subject to English law, contained a broad LCIA arbitration clause and a Service of Suit clause. These appear to have been in the same, or substantially the same, form as clauses (a) and (c). The Court held that a Service of Suit clause:

"... generally provides no more than a consent to jurisdiction. It does not bind the parties to litigate in a particular forum, or give the insured the exclusive right to choose a forum unrelated to the dispute".

It held that the plain meaning of the words of the Service of Suit clause did not manifest an intention to limit jurisdiction to a particular forum and that the clause, being permissive, did not require the defendants to litigate the dispute under the policy in New York.

It is not apparent why the defendants' motion was for a forum conveniens stay as opposed to a stay to compel arbitration. Mr Steven Berry. QC, for CMS, submits that this approach accurately recognised that there was no breach of contract on the part of the insured in suing in New York and that there is no such breach here. But, as it seems to me, the Court's conclusion, even if reached on forum conveniens grounds, proceeds on the basis that the insured had agreed to LCIA arbitration and was bound by that agreement

In ***Transit Casualty Company v Certain Underwriters at Lloyd's of London***, (see paragraph 42) the Court of Appeals of Missouri, Western District, dismissed an appeal from an order denying the defendant reinsurers' motion to stay litigation brought by the insured pending arbitration. The relevant agreements contained an "*all disputes*" arbitration clause and a Service of Suit clause in the following form:

"In the event of the failure of the reinsurer to pay an amount claimed to be due hereunder, the reinsurer will, at the request of the reinsured, submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

……

In any suit instituted against the reinsurers under this agreement the Reinsurer will abide by the final decision of such court or any reviewing court".

The Court held that the Service of Suit clause was clear and could not pertain only to the enforcement of an arbitration award. It did not refer to arbitration. Moreover the reinsurers' interpretation would render the words "*amount claimed to be due*" meaningless and would change the contract to read "*amounts awarded by an arbitration panel*", which was not what the clause said. The arbitration clause clearly covered a dispute over a claimed failure to pay. There was thus an inconsistency between the two clauses. Since the Service of Suit clause was the more specific clause (because it dealt with the single issue of a failure to pay amounts claimed to be due under the reinsurance agreements) it must be taken *pro tanto* to nullify the more general arbitration clause. Further the clause was drafted by the reinsurers. They could have provided that it should only apply to suits to enforce arbitration awards. They did not do so and the clause should be interpreted against them. If a dispute involving a "*failure to pay*" had to be arbitrated the first paragraph of the clause was void and meaningless because the provision would then only apply to amounts actually due as determined by an arbitration panel. The clause must be given its plain and ordinary meaning which was to permit the reinsured to litigate when it claimed that the reinsurers had failed to pay an amount due. The conflicting clauses could be harmonized by holding that all disputes other than those involving claims by the reinsured of failure to pay were subject to arbitration. Claims of failure to pay would be subject to arbitration if the reinsured so elected.

Somewhat surprisingly the Court said that the case was one "o*f first impression in Missouri and there is sparse authority elsewhere*." The Court relied on a long line of authority, beginning with *General Phoenix Corp.v Malyon*, 88F Supp. 502 (S.D.N.Y. 1949) that a Service of Suit clause in the form at issue in that case disentitled the reinsurer to remove the case to Federal court, once the reinsured had chosen a State court: cf *McDermott*. The assertion that the clause was merely an agreement to submit to personal jurisdiction had been rejected in those cases and should be rejected in the present one.

The Court referred to *Brooke Group* and *McDermott* (and two other cases) cited by the reinsurers. It distinguished *Brooke Group* on the ground (a) that in that case there was no mandatory language binding the parties to a particular forum, whereas in the instant case there was mandatory language requiring the parties to abide by the final decision of the court chosen by the reinsured and (b) because the Court found itself unpersuaded by the *Brooke Group* reasoning, which it regarded as rewriting the contract by adding a new clause to the agreement that rendered the service of suit clause a mere "aid" to execution. It made a similar criticism of *McDermott*. The Court found compelling support from *Transit* and *Thiokol.*
It is to be noted that in *Transit* the Service of Suit clause provided not only that:
"*the reinsurer will, at the request of the reinsured, submit to the jurisdiction of any court of competent jurisdiction within the United States*".
but also that it:
"*will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such cour*t".
In other words there was an express agreement that the relevant court should determine any dispute upon the merits.
In ***Safety National Casualty Co v Cinergy Corp***, 829 N.E. 2d 1986 (Ct.App. Ind **2005**) the Court of Appeals of Indiana allowed an appeal from an order denying the plaintiff's motion to stay litigation and compel arbitration. Here too an Article in the relevant policies provided that it was a condition precedent to any right of action under the policy that the dispute should have been submitted to arbitration, and there was a Service of Suit clause in similar form to that cited in the first indented paragraph in paragraph 49 above. The Court held that the plain language of the arbitration clause indicated that arbitration should be performed before a party had a right of suit and that, since the entire contract must be read together and given meaning if possible, the Service of Suit clause could be regarded as addressing jurisdiction and service of process and not as demonstrating an "*affirmative intention*" to undo the required arbitration. The trial court was wrong to hold that the Service of Suit endorsements overrode the arbitration clauses. It referred to the fact that the Supreme Court of Indiana had noted in an earlier case that it was not uncommon to find both arbitration and forum selection clauses in the same agreement and that several considerations might lead to the inclusion of both. One of these was that "*arbitration may be waived by the parties. If they choose they may prefer to litigate but be required to do so in a designated forum"*.
In ***Boghos v Certain Underwriters at Lloyd's***, 36 Cal. 4th 495 (**2005**) the Supreme Court of California allowed an appeal from an order denying the defendant underwriters motion to stay litigation and compel arbitration. In that case the arbitration clause provided that, "*notwithstanding any other item set forth herein"*, any dispute was to be settled by binding arbitration. The court held that that phrase clearly indicated that the parties intended the arbitration clause to apply according to its terms. But it also referred to the fact that courts in other jurisdictions had generally enforced arbitration clauses in contracts that have also included Service of Suit clauses:
"*rejecting the argument that consent to service creates an ambiguity or waives the right to compel arbitration. These courts have reasoned that the two clauses do not conflict because the service of suit clause should be interpreted, in view of the presumption favoring arbitration, as intended to facilitate enforcement of the*

arbitration clause. The only Californian case on point is consistent with the general rule".

Summary of US cases

As is apparent from the above, the bulk of US authority, particularly at the highest level, treats an arbitration clause and a Service of Suit clause as not inconsistent with each other, interpreting the latter as intended to ensure that the insurer/reinsurer is subject to personal jurisdiction in any one of the States for the purpose of, inter alia, enforcement of the award: see *Hart*; *McDermott*; *Neca*; *Ideal Mutual*; *Continental Casualty*; *Ochsner/Sisters; NRMA; Security Life; Credit General.* The first two are decisions of the 10th and 5th Circuit. The others are from district Courts in New York (Southern District), Illinois, California, Louisiana, Utah, Minnesota, and Ohio. In some of the cases (*NRMA, Credit General)* the conclusion was fortified by the fact that arbitration was a condition precedent to any right of action. But, as *Credit General* indicates, this feature was not treated as essential to the conclusion. In *Security Life* there was provision that arbitration was to be the sole remedy for disputes, although the fact of such wording does not appear to have been treated as critical.

State appellate courts in Florida, Indiana, New York, and California, have made similar decisions: see *Old Dominion; Geldermann; Lloyd's v United Home; Brooke Group; Safety National* (where arbitration was a condition precedent to any right of action); and *Bogho*s (where the clause applied notwithstanding any other item).

This corpus of authority is subject to the significant exceptions of *Thiokol* and *Transit*. The former was, however, decided without reference to binding authority in the shape of *Hart,* and was distinguished by the same Court (the District Court for the District of Utah, Northern Division) in *NRMA*, which followed *Hart* and *McDermott. Thiokol* and *Transit* were again distinguished in *Security Life,* and, also, in *Credit General*.

The English cases

Service of Suit clause and no arbitration clause

In ***American International v Abbott Laboratories*** [2004] 1 Lloyd's 814 Creswell, J was concerned with a policy, the first endorsement of which contained a service of suit clause in NMA 1998 form. He held, following ***Excess Insurance Co Ltd v Allendale Mutual Insurance Co*** [2001] Lloyd's Rep IR 524 and ***Ace Insurance SA-NV v Zurich Insurance Co*** [2001] Lloyd's Rep IR 104 that the Service of Suit clause was not an exclusive jurisdiction clause, but simply one giving certain procedural rights to the Assured and the Underwriter, and that either party could sue the other wherever it had the right to do so.

A question arose as to whether a particular arbitration clause was incorporated. If it was incorporated, a second question also arose. Endorsement No 1, as well as containing the Service of Suit clause provided that:

"This endorsement deletes and replaces any substantially similar clause contained in the policy".

American asserted that the arbitration clause was incorporated and sought an anti-suit injunction to prevent proceedings in Illinois. It contended that the deletion and replacement provision in Endorsement No 1 had no effect on the arbitration clause because Endorsement No 1 was not "*substantially similar*" to the arbitration clause. That was said to be because Endorsement 1 gave

rights to Abbott which it was only entitled to use when there had been an award or judgment in Abbott's favour. Thus, it was said, there was nothing in Endorsement 1 that could affect American's right to arbitrate a claim.

Abbott asserted that the two clauses were substantially similar because both had as their purpose (a) the determination of the place where, and forum in which, jurisdiction to deal with disputes would exist, and (b) the procedures whereby such disputes and their determination in the forum identified were to be instituted. Accordingly the arbitration clause was deleted and replaced by Endorsement No 1.

Cresswell, J held that he was not satisfied to a sufficiently high degree of probability (a) that the policy included an arbitration clause, and (b) that, even if it did, Endorsement No 1 did not delete and replace it. He must therefore have been unpersuaded that Endorsement 1 was not substantially similar to the arbitration clause. Accordingly he discharged an anti-suit injunction that had been granted restraining the assured from pursuing its claim in Illinois and giving permission to serve out.

Since the asserted ground of dissimilarity between the arbitration clause and the Service of Suit clause was that the former dealt only with enforcement of any award, Cresswell, J's interlocutory decision may be regarded as treating the service of suit clause as not demonstrably so limited. *American v Abbott* was, however, a case in which the Court did not have to address the construction of a policy in which there are included not only a mandatory "*all disputes*" arbitration clause, but also a clause in the form of clause (b). In consequence none of the US authorities appear to have been cited.

Service of Suit clause and UK law and jurisdiction clause

In ***Catlin Syndicate Ltd v Adams Land & Cattle*** [2007] 1 Lloyd's Rep 96 the slip provided for "*UK law and jurisdiction*". A form incorporated into the slip contained a Service of Suit clause in NMA 1998 terms. Cooke J held that the service of suit clause gave the insured the right to require the underwriters to submit to the jurisdiction of a court of competent jurisdiction anywhere in the United States but did not prevent the insurers from bringing proceedings elsewhere. So the insurers' suit in which they claimed negative declaratory relief was not a breach of the agreement. The "*UK law and jurisdiction*" provision was a general agreement to English jurisdiction. But the parties had also given the assured a specific right of election for an US court, which had been exercised by the assured bringing proceedings in Nebraska. The question of *forum conveniens* was concluded by the agreement to the foreign forum on the election of the assured, and accordingly Nebraska was a better place to determine all the issues, notwithstanding that the policy was governed by English law. The application for permission to serve out of the jurisdiction would be set aside.

Mr Berry submits that this case shows that the difference between a general clause, such as the UK jurisdiction clause, and the specific option granted by the Service of Suit clause to sue in the United States has effects at two levels. Firstly, it enables the Court to harmonise the two clauses by treating the specific as an exception to the general. Secondly, it practically dictates the outcome of any forum conveniens dispute. In the present case the general arbitration clause must give way to the specific option contained in the Service of Suit clause.

It is to be noted, however, that by the time of the hearing in *Catlin* it was common ground that there was no basis for the anti suit-injunction that had been granted because there was no breach

of any exclusive jurisdiction clause, i.e. the "*UK law and jurisdiction clause*" was not treated as being, in that case, an agreement to exclusive jurisdiction[8]. Nor was there any mandatory arbitration clause. The case does not therefore, address the position if an agreement contains a Service of Suit clause and what is undoubtedly a mandatory arbitration clause.

Mandatory arbitration and exclusive English jurisdiction clauses

Paul Smith v H & S International Holding Inc [1991] 2 Lloyd's Rep 127 a licencing agreement contained, in Clause 13, a mandatory ICC arbitration clause in respect of "*any dispute or difference ... concerning the construction of this Agreement or the rights or liabilities of either party hereunder*". It also provided, in clause 14, that the Agreement should be interpreted according to English law and the English Courts should have exclusive jurisdiction "over it". Steyn, J., as he then was, rejected an interpretation that would have confined clause 14 to cases falling outside the scope of clause 13 on the basis that that would mean reading the relevant sentence of clause 14 as providing "*subject to clause 13..*", and that "*the linguistic manipulation required and the unbusinesslike spectre of some disputes going to court and some to arbitration militate strongly against this interpretation*". He resolved the problem by interpreting clause 13 as a self-contained agreement providing for the resolution of disputes by arbitration and clause 14 as specifying the lex arbitrii or curial law governing the arbitration and determining, inter alia, the extent of the court's supervisory jurisdiction. He did so even though the language of clause 14 (in particular the words "*over it*") was infelicitous. In ***Axa Re v Ace Global Markets Ltd*** [2006] 1 Lloyd's Rep 682 Gloster J reached a similar conclusion in a case where the jurisdiction clause was not exclusive.

In ***Shell International Plc v Coral Oil Co Ltd*** [1999] 1 Lloyd's Rep 127 the agreement contained, in Article 13, a provision that it should be governed and construed in accordance with English law and that "*any dispute under this provision*" should be referred to the jurisdiction of the English Court. Article 14 provided that any dispute in connection with the agreement should be settled by LCIA arbitration. Moore-Bick, J, as he then was, reconciled the two articles by reading Article 13 as requiring any dispute about the proper law to be referred to the English court with all other substantive disputes to be referred to arbitration. He declined to decide *in vacuo* whether any particular dispute would fall within the ambit of article 13 or 14.

These cases all illustrate the principle that the contract must be read as a whole and every effort should be made to give effect to all of its clauses[9]. The meaning of one clause may be affected by the content of other clauses in the agreement. A clause should not be rejected unless manifestly inconsistent with or repugnant to the rest of the agreement. It is only if this cannot successfully be done that the Court will treat a clause that has been specifically agreed as prevailing over an incorporated standard term: see also ***Chitty*** *Vol 1* 12-078; ***Pagnan Spa v Tradax Ocean Transportation SA*** [1987] 2 Lloyd's Rep 342; ***Indian Oil Corporation v Vanol Inc*** [1991] 2 Lloyd's Rep 634.

CMS' submissions

Mr Berry submits that the critical feature of Article VI is that it does not preclude CMS from bringing suit in Michigan and that, in the absence of any such prohibition, there can be no grounds for an anti-suit injunction. The parties may have agreed upon arbitration but they have also agreed that that shall *in no way* infringe on any rights accorded in the Service of Suit clause. That clause gives CMS a right to require the underwriters to submit to the jurisdiction of any court of competent jurisdiction within the Unites States if, as here, Underwriters fail to pay any

amount claimed and are then requested to submit to the jurisdiction of such a court.
Further, it is perfectly possible to give effect to the totality of the Article and to avoid inconsistency. Prima facie any disputes will be the subject of arbitration. But, by way of exception, the assured may, if the underwriters fail to pay any amount claimed, opt for US court jurisdiction. That does not leave the arbitration clause without any or any substantial subject matter (as would have been the alternative outcome in *Paul Smith*). If the option is never invoked it will continue to apply. It will also apply if the relevant dispute is not the result of a failure by Underwriters to pay an amount claimed to be due. This would cover disputes about the premium, claims that the policy had or had not been validly cancelled or avoided or had or had not expired, or a claim for a declaration of liability or non liability where there is as yet no monetary claim. Such a conclusion (a) gives effect to all of the clauses of Article VI; (b) avoids what would otherwise be an infringement of the rights afforded by the Service of Suit clause; and (c) avoids the linguistic gymnastics which are needed to interpret the words "*pay any amount claimed*" in clause (c) as if they said "*pay any amount awarded*" or to read into Article VI the unexpressed proposition that clause (c) is there only as an aid to arbitration.
Reliance on US authority should not lead to any other conclusion. Firstly, it is not binding. Secondly, it concerned clauses which differed both from case to case and from the clauses in suit. Thirdly, it is not uniform in result; and, when the policies were written in 1999, the latest cases were *Thiokol* and *Transit*[10]. Fourthly, an English Court interpreting an English law contract should not be constrained to follow the bulk of US authority, however often repeated or followed, unless persuaded that the construction adopted in that authority is correct. In fact it is not. The majority US decisions have purported to achieve consistency between the Service of Suit clause and arbitration clauses by treating the former as directed to enforcement of awards obtained under the latter. There is, however, no need to do so. Consistency can be obtained by adopting the construction set out in paragraph 72 above, in a manner which does not involve adding an impermissible gloss to the clear wording of the service of suit clause. *Thiokol* and *Transit* exposed the fallacy in the other Courts' reasoning. Once that fallacy has been exposed the English Court should feel no reluctance in declining to follow the majority.

Discussion

There are, in my judgment, four important factors bearing on the interpretation of Article VI.

Factor 1
The *first* is that that Article was agreed in the context of a strong legal policy on both sides of the Atlantic in favour of arbitration. The US federal policy is referred to at paragraph 31 above.
In *Premium Nafta* Lord Hoffman expressed the view that the construction of an arbitration course should start from the assumption that "*the parties as rational business men are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal"*.
Lord Hope observed that the proposition that any jurisdiction or arbitration clause in an international commercial contact should be liberally construed promoted legal certainty. He referred with approval to what was said by Bingham, LJ in *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488, 517, namely that one should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings.

Lord Hope referred to:

"... the golden rule that, if the parties wish to have issues as to the validity of the contract decided by one tribunal, and issues as to meaning or performance decided by another, they must say so expressly. Otherwise, they will be taken to have agreed on a single tribunal for the resolution of all such disputes".

In the present case, if CMS are right, any issue may, at the option of the insured, be tried in any of the States of the Union, if there is a money claim whereas, when there is no such claim, they must be arbitrated.

Lord Hope accepted the correctness of the decision of the Court of Appeal that a liberal approach to the words chosen by the parties in their arbitration clause must now be accepted as part of our law, it being already firmly embedded as part of the law of international commerce. He cited with approval the decision of the US Supreme Court in *AT & T Technologies Inc V Communications Workers of America*, 475 US 643 (1986), 650 that in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration could prevail.

Whilst *Premium Nafta* had not been decided when the policies in suit were written, English law was already moving in that direction. Lord Justice Bingham's observations in *Ashville* antedate the policies by ten years and Steyn, J's observations in *Paul Smith* by eight. In any event the principles expounded in *Premium Nafta* now form part of English law and are applicable to the interpretation of Article VI that I have to make.

The arbitration clause in the present case does not exclude any particular grievances from arbitration. On the contrary it provides that *all* disputes arising under, out of, or in relation to the policy shall be arbitrated. In those circumstances the law's policy in favour of arbitration provides a strong impetus (i) not to read the Service of Suit clause as removing from the scope of arbitration, at the option of the assured, the sort of disputed claim most likely to arise under a policy, i.e. for payment; and (ii) to confine the clause so as to not to give the assured an option to have determined in any court of the Union the merits of disputes which the parties agreed to have determined by LCIA arbitration.

Such an interpretation still leaves the Service of Suit clause with meaningful scope. It enables the assured to found jurisdiction in any US Court, including its home court, to declare the arbitrable nature of the dispute, to compel arbitration, to declare the validity of an award, to enforce an award, or to confirm the jurisdiction of US courts on the merits in the event that the parties agree to dispense with arbitration. Use of the clause for those purposes would not detract from the arbitration clause. The fact that the New York Convention should mean that there ought to be little difficulty in enforcing a London award in the United States does not mean that there is no benefit in having an acceptance of personal jurisdiction by Ace in each State of the Union.

It is true that in *Premium Nafta* the House was concerned with the question whether an arbitration clause covered an issue of bribery, whereas here there is no dispute but that CMS' claim falls within the scope of the arbitration clause. But the principle of liberal interpretation in favour of arbitration encourages, as it seems to me, not only an expansive reading of what an arbitration clause includes but also a restrictive reading of any other clause which is said, notwithstanding an arbitration clause providing for *all* disputes to be referred to arbitration, to exclude particular disputes from arbitration (either generally or at one party's option), without expressly saying so. I note that in *Moses H.Cone Memorial Hospital* the US Supreme Court took a similar approach, I do not regard this approach as inappropriate because parties may validly

contract on terms that give one or other or both of them a choice as to where their disputes are to be heard.
Such an interpretation would avoid the situation which could otherwise arise whereby the forum for determination of a particular issue could change from arbitration to court (with or without a jury) and back again – something that reasonable businessmen are not likely to have intended. This could happen if there was a non-monetary claim by CMS, e.g. that there had been a valid cancellation or avoidance by Ace, or that the insurance covered certain types of event, followed, during the course of the arbitration, by a monetary claim the outcome of which depended on the resolution of the issue currently in arbitration. CMS could then claim in court. Ace would have to raise the relevant issue by way of defence. If the monetary claim was settled without prejudice to the underlying issue, which remained for future determination because of its relevance to any future claim, the resolution of that issue would become subject to mandatory arbitration, but at the risk of it having to be determined in court if CMS had a new monetary claim and sought to assert it in court. It would also avoid a situation in which the insured had a claim which did not relate to a failure to pay, e.g. that it had been overcharged premium and, also, a monetary claim, both arising out of the same contract, one of which had to be determined by arbitration and one in court. Mr Berry submits that there is nothing untoward in these postulated scenarios. They are the natural consequence of the option given to CMS under the policy. It does not, however, seem to me that businessmen, who agreed an "*all disputes*" arbitration clause and expressed their reliance on the speedy resolution of their disputes by arbitration would readily contemplate that they could fall to be dealt with in such a split way.
Lastly, Mr Berry told me that it was no necessary part of his submissions that, if CMS availed themselves of the option of suing in Michigan, Ace could not arbitrate the issue as to whether it was bound to pay CMS' claim in London; and, in the end, he accepted that Ace could do so. If that be so, there would, potentially be a race to see who could get a judgment or award first, which could only be averted if either the Michigan court or the arbitrators gave way to the other proceedings[11]. The approach that I favour would avoid that situation also.
It is true, that this approach envisages a two stage process of arbitration on the merits and resort to court for enforcement. But this is a much more readily acceptable split, not least because, since arbitration is not self enforcing (*Geldermann)*, resort to the court will always be necessary in the event of a determined refusal to pay.

Factor 2
The *second* factor is the background of US case law which interprets the service of suit clause in the manner suggested in paragraph 56. The effect of that is that the parties can be taken to have realised (or been in a position to realise) that there was a very strong body of US judicial opinion in favour of the construction referred to in paragraph 56, which would be highly likely to be determinative in a US court, if it applied the relevant US law, and influential in an English Court.

Factor 3
The *third* factor is clause (b). Clause (b) is a one-off clause designed to say something about the relationship between clause (a) and clause (c). This is not a feature of any of the cases to which I have been referred. If the parties had wanted to make clear that, if the underwriters failed to pay any amount claimed, then the arbitration clause would, at the option of the assured (exercisable by requesting the underwriters to submit to the jurisdiction of a court within the United States) be

inapplicable to any dispute about the claim, they could easily have done so.
What they in fact did was to state in clause (b) how important the speedy resolution of "*any disputes*" by arbitration was to them, and that the arbitration clause was a mutual and material inducement, and to describe the effect of the Service of Suit clause as being to:
"provide without waiver of any defence an ultimate assurance of the amenability of Underwriters to process of certain courts".
That phraseology is significant for two reasons. Firstly, "*without waiver of any defence*" signifies that the Service of Suit clause is not to operate as a waiver of the defence available to the Underwriters in the US Courts that any action brought under the policy is the subject of mandatory arbitration. The concept of arbitration as a defence to an action is a US one: see, for instance, *Hart*, *Ideal*, and *Credit General.* In the latter two cases the claim was stayed, or dismissed without prejudice, on account of the defence that the claim was subject to arbitration. An action may be dismissed if it is apparent that the entire claim falls to be arbitrated: *Credit General*. It is common ground that the Underwriters have not contracted out of any right to secure a forum non conveniens dismissal in Michigan (another form of defence); and, the same applies to a defence of arbitration.
I do not think it matters for these purposes that, in English law, a requirement to arbitrate is not, strictly speaking, a defence (as opposed to ground for a stay) unless the arbitration clause is in *Scott v Avery* form, i.e. provides that one party shall have no right of action on a claim unless he has taken it to arbitration. Whilst the policies are governed by English law and the arbitration clause is not in English law a contractual defence, the question of what is a defence to a US suit is a procedural matter for the US Court. Further, the "*without waiver of any defence*" wording, which was clearly drafted for a US context, manifests an intention, to which the English court can properly give effect as a matter of construction, that the Service of Suit clause shall not operate so as to exclude from arbitration any monetary claim.
Secondly, in stating that the service of suit clause provided an *ultimate* assurance of the amenability of Underwriters to the process of certain courts, clause (b) expounded the interpretation of the service of suit clause adopted in the majority US decisions, namely that the purpose of such a clause is, inter alia, to ease any difficulty that might arise in establishing personal jurisdiction for the purposes of enforcement. It is possible to interpret "*ultimate*" as meaning no more than that it is ultimately for the assured to decide whether it wishes to pursue a claim by arbitration or in court or that the assurance given is a fundamental one. But the more natural meaning in context is that "*ultimate*" refers to the end of the process of getting payment from Ace, namely when the insured has to execute, and not the beginning when it seeks to establish the validity of its claim. I find it difficult to believe that the clause was intended to reassure CMS that, if it really did not like the arbitration which it had declared to be a material inducement to its agreeing Article VI, it always had the option to litigate on the merits. Further that more natural meaning aptly ties clause (c) in with the closing words of clause (a) which refer to the award being "*enforceable by any court having jurisdiction*", and makes the position of clause (c) , following (a) and (b), appropriate. Clause (c) specifies that *any* US Court will have jurisdiction to enforce if, ultimately, that is required.

Factor 4
The *fourth* factor is that the Service of Suit clause does not contain any undertaking, as it did in ***King v Brandywine Reinsurance Co*** *[2004] Lloyd's IR 554* and in *Transit,* that all matters in

dispute shall be determined in accordance with the law and practice of the relevant court, whereas the arbitration clause is an agreement that the merits shall be determined by arbitration[12]. Further, if the arbitration clause is treated as requiring disputes to be dealt with by arbitration, the Service of Suit clause is not left without relevant content: see paragraph 79 above.

Conclusions

Taking into account the combined effect of all four factors I conclude that clause (c) does not operate so as to exclude from arbitration a money claim whenever CMS requests the underwriters to submit to the jurisdiction of a competent US Court. I recognise that such a construction renders the use of the words "*in the event of a failure to pay the amount claimed*" and "*that in any suit instituted against any one of them upon this policy*" infelicitous since any claim to enforce an award will arise on a failure to pay the amount awarded and will be a suit instituted to give effect to the award. That said, a claim to enforce an award will arise following, and in that sense in the event of, a failure to pay the amount claimed, and may be treated as a suit to give effect to and, therefore, upon the policy (since the arbitration clause in the policy carries with it the obligation to honour the award). Further a claim to enforce arbitration or for a judgment on the merits, following any agreement that there shall be no arbitration, will arise in the event of a failure to pay the amount claimed and upon the policy, and before any award.

I do not regard such infelicity as there may, which seems to me no greater than that which applied in *Paul Smith*, as dictating a contrary conclusion, especially when the consequence of not doing so is to regard the arbitration clause, insofar as it relates to money claims by the insured as being, at the insured's option, *pro non scripto*. I also do not forget that the clause contains an undertaking by Underwriters to abide by the final determination of the court. But that is not (particularly given the presence of a mandatory "*all disputes*" arbitration clause) an undertaking to ensure that the US court will, if the assured wishes, determine the merits, or to accept that it will do so.

Nor do I forget that, in other circumstances, and without any accompanying arbitration or exclusive jurisdiction clause, the Service of Suit clause will serve to fulfil its original purpose of ensuring that the underwriters could be sued on the merits in the US[13]. But the clause has to be interpreted in its current setting, which includes both clauses (a) and (b), and against the background to which I have referred. The same clause may mean different things according to the context in which it is to be found: *McDermott.*

Accordingly, as I hold, the claims which CMS has sought to raise in Michigan are claims which under the policies the parties have agreed shall be submitted to arbitration at the London Court of International Arbitration. The Service of Suit clause does not absolve CMS from its contractual obligation to underwriters to arbitrate all disputes. In commencing, continuing and threatening to continue the Michigan proceedings with a view to securing a judgment on the merits CMS was and is acting in breach of that obligation: see *The "Angelic Grace"* [1995] 1 Lloyd's Rep 87. No good or sufficient reason has been advanced which would justify them in doing so and, accordingly, I propose to grant Ace a permanent injunction, the precise terms of which I shall discuss with Counsel, restraining CMS from continuing those proceedings. In granting that injunction I do not, of course, intend any disrespect to the Michigan Court. I do no more than hold CMS to the obligation which, in my judgment they accepted under these English law policies.

Note 1 The wording of the second sentence ("*Nothing in this clause*…") was introduced in order to make clear that the Service of Suit clause did not amount to a waiver of the rights of underwriters to remove an action from a State to a Federal court or to seek a transfer of a case to a more appropriate forum. [Back]

Note 2 In which States they have nominated Attorneys-in-Fact, currently Lloyd's Illinois Inc and Lloyd's Kentucky Inc. [Back]

Note 3 The report does not indicate the full terms of condition 14. [Back]

Note 4 In which, however, the Service of Suit clause only applied "*In the event of a judgment entered against [the insurer] on an award".* [Back]

Note 5 The District Judge took judicial notice "*that London is not within the United States, at least not since the Revolutionary War".* [Back]

Note 6 CMS suggests that the difference may lie in the fact that in the case of a London arbitration there would be no question of the US court exercising a supervisory jurisdiction; and the New York Convention would provide a ready means of enforcement. But, as *Ideal* shows, the US Court regards itself as able to compel London arbitration: see paragraph 35. [Back]

Note 7 See paragraph 49 below. [Back]

Note 8 It was not necessary to decide, and the judgment does not decide, whether the UK jurisdiction clause would have been an exclusive jurisdiction clause, absent the Service of Suit clause. [Back]

Note 9 In *King v Brandywine Reinsurance Co (UK) Ltd* [2004] Lloyd's IR 554 the Court was concerned with a clause giving the assured an option to select New York jurisdiction, in two sections of a policy, and any US court, in a third section, together with an unenforceable agreement to arbitrate in the first two sections and an enforceable agreement to arbitrate in the third. The Court did not, however, have to decide on the interrelationship between the two. The issue was as to the law of the policy. [Back]

Note 10 The contracts were originally placed in 1997 and then renewed in 1999. In 1997 *Thiokol* had been decided but *Transit* had not. [Back]

Note 11 An arbitrator is entitled to refuse to decide any issue which overlaps with English High Court proceedings: *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175; and I see no reason why he should not be able to do so if there is an overlap with non-English High Court proceedings. But difficult questions would arise as to how any such discretion should be exercised when each party asserts, from the beginning, a wish to pursue its own chosen route. [Back]

Note 12 In *Ideal* there was such an undertaking and, even then there was held to be no waiver. Since such an undertaking is absent from the present clause it is unnecessary to decide what the result would be if it was there. [Back]

Note 13 The existence of such clauses was regarded by Lloyd's as a selling point for Lloyd's American policies since it enabled the Assured to sue in his local court.