Neutral Citation Number: [2021] EWHC 1931 (Comm)

Case No: CL-2021-000228

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

IN THE MATTER OF AN ARBITRATION CLAIM

AND IN THE MATTER OF THE ARBITRATION ACT 1996

IN PUBLIC

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 09/07/2021

Before :

THE HON. MR JUSTICE BRYAN

- -

Between :

MARKEL BERMUDA LIMITED

Claimant/Applicant

-and-

CAESARS ENTERTAINMENT, INC.

Defendant/Respondent

- -
- -

David Scorey QC and **Edward Brown**
(instructed by **Clyde & Co LLP**) for the **Claimant**
Vernon Flynn QC and **Ben Woolgar**
(instructed by **Latham & Watkins (London) LLP**) for the **Defendant**

Hearing date: 5 July 2021
Judgment supplied to the parties in draft on 7 July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BRYAN

MR JUSTICE BRYAN:

A. INTRODUCTION

1. The parties appear before the Court on the expedited trial of a Part 8 claim brought on 19 April 2021 by the Bermudian Claimant Markel Bermuda Limited ("Markel"/the "Insurer"), for a permanent anti-suit injunction ("ASI") restraining the Defendant, Caesars Entertainment Inc. ("CEI"/the "Insured") from prosecuting proceedings commenced against Markel (amongst other insurers) on 19 March 2021 in the District Court of Clark County, Nevada, USA or anywhere else, in breach of what Markel says is a valid and binding London arbitration agreement contained in the contract of insurance between Markel and CEI and/or seeking and/or obtaining an anti-suit injunction restraining Markel from pursuing and/or otherwise enforcing the London arbitration agreement in respect of any dispute between Markel and CEI under the contract of insurance.

2. The claim arises in the context of an underlying dispute between Markel *qua* insurer and CEI *qua* policyholder. CEI is a large casino-entertainment company in the USA which owns, manages and operates numerous properties throughout the United States. These include casinos, hotels, dining and entertainment venues, arenas, retail shops, race tracks, meeting and conference venues, and other locations that host large numbers of people.

3. Markel issued the following two policies to CEI in the underwriting period in question:

    3.1. The "**Eldorado Policy**" was issued by Markel to CEI under its former name, Eldorado Resorts Inc ("Eldorado"). CEI acquired Caesars Entertainment Corp. ("Caesars") in July 2020 and renamed itself. The Eldorado Policy was issued under policy number 1394692-10419-PRMAN-2019 for the policy period 1 May 2019 – 1 May 2020 and provided first-party property cover of US$5 million part of US$50 million xs US$25 million, subject to the terms, conditions, changes and amendments in the Eldorado Policy.

    3.2. The "**Caesars Policy**" was issued by Markel to Caesars under policy number 1406250-11009-PRMAN-2019 for the policy period 1 December 2019 – 1 December 2020 and provided first-party property cover of US$12 million part of US$400 million xs US$100 million subject to the terms, conditions, changes and amendments in the Caesars Policy.

4. The dispute arises in circumstances where CEI claims an indemnity in respect of alleged property damage and business interruption ("BI") losses arising out of COVID-19. As already noted, CEI has sued Markel (along with other excess insurers) in proceedings in the State District Court of Clark County, Nevada in the USA pursuant to a Complaint filed on 19 March 2021 ("the Nevada Proceedings"), in the case of Markel, in relation to the Eldorado Policy.

5. CEI accepts that the Caesars Policy, and policies issued by certain other insurers (specifically, it appears, including certain other Bermudian insurers), contain arbitration agreements and CEI recognises that those disputes stand to be arbitrated but denies that the Eldorado Policy does so. Those other insurers, and Markel in respect of the Caesars

Policy, have not been sued in the Nevada Proceedings. More specifically Latham & Watkins, on behalf of CEI, stated the following in a letter dated 5 May 2021:

> "CEI's business interruption insurance portfolio involves 76 policies across various attachment points. CEI carefully reviewed all of those 76 policies (and all related endorsements) prior to initiating the Nevada Proceedings – in material part to determine whether there was a provision requiring arbitration. That due diligence exercise resulted in the inclusion of 55 policies in the Nevada Proceedings that CEI determined were properly subject to suit in that court. Any policies containing agreements to arbitrate were not included within the scope of the Nevada Proceedings, meaning that insurers that had written those policies are not defendants to the Nevada Proceedings."

6. It appears, therefore, from Latham & Watkins letter, that some 21 of the policies issued to CEI for the relevant period included arbitration agreements. It is also clear who at least some of those other insurers are, and that they include a number of Bermudian insurers. In this regard Marsh informed Eldorado on 30 April 2019 in an email timed at 6.51pm in relation to "the Bermudian insurers" as follows:-

> "Good Evening Ms. Lepori,
> Thank you for the renewal order and your continued support of the Bermuda markets. We have bound the following
> markets and found their terms and conditions to be in accordance with your instructions. We have attached their
> policies along with our overviews for your ease of reference.
> Argo Re Ltd
> Policy No: P136795
> Chubb Bermuda Insurance Ltd
> Policy No: CAPRI01232P10
> Hamilton Re Ltd
> Policy No: PX19-4029-01 / PX19-4029-02
> Liberty Specialty Markets Agency Limited
> Policy No: LSP0005029
> Neon Underwriting Bermuda Ltd
> Policy No: BNPD19AA458A
> Oil Casualty Insurance Ltd
> Policy No: P-101347-0519-00
> XL Bermuda Ltd
> Policy No: XLPRP 1288597 19
> Markel Bermuda Limited
> Policy No: TBD**
> **Please note that Markel have confirmed coverage bound, their policy number and binding documentation will follow either later this evening or tomorrow morning.**"

None of these insurers save Neon Underwriting Bermuda Ltd and Markel have been sued in the Nevada Proceedings, and Markel submits, and I agree, that it is a reasonable inference that these other contracts of insurance with Bermudian insurers included arbitration agreements given the contents of Latham & Watkins' letter. It appears, therefore, that the preference of (at least these) Bermuda insurers is for arbitration. In

relation to CEI, the evidence before me is that it is "*Eldorado's preference to have their policies governed by Nevada law and any disputes litigated in the USA"* (per paragraph 11 of the witness statement of Ms Stephanie Lepori served on behalf of CEI) though it is clear enough from the above that CEI are willing to enter into arbitration agreements as part of their policies with insurers, and did so in respect of a number of Bermudian insurers for the excess coverage of which the Eldorado Policy formed part in the year in question.

7. Indeed, that is precisely what CEI did in relation to Markel itself in respect of policy periods both prior to, and after, the Eldorado Policy that is in issue. So far as the position in relation to Markel is concerned, the policies issued to CEI by Markel in previous and subsequent policy periods contained arbitration provisions. This was done, not by deleting the law and jurisdiction provisions forming part of the policy (which was based on what was supplied by CEI and would still state Nevada or some other US state law and jurisdiction) but by separate endorsement specifying New York law and London arbitration – i.e. the endorsement would override what was stated in the policy in terms of Nevada (or other US state) law and jurisdiction.

8. In this regard, and as is addressed by CEI in its Skeleton Argument and evidenced in the documentation before me, at various times, there have been three relevant entities on the CEI side. These are Isle of Capri Casinos Inc ("Capri"), Caesars Entertainment Corporation (Caesars) and Eldorado Resorts, Inc (Eldorado). Capri was acquired by Eldorado in May 2017. Then in July 2020 Eldorado bought Caesars and renamed itself CEI.

9. Mr Dorsey who served a witness statement on behalf of Markel's evidence is that Markel issued policies to Capri in 2015 and 2016, and to Eldorado and Capri in 2017 all of which included arbitration agreements. In 2018, no policy was issued by Markel to Eldorado or Capri. In 2019, and as already noted, two policies were issued: the Caesars Policy (which contained an arbitration agreement), and the Eldorado Policy that is under consideration (and in relation to which it is in issue whether there was an arbitration agreement). Whilst Markel does not raise any "course of dealing" type argument, Markel points out (as is self-evidently the case and common ground) that CEI has agreed to insurances both before and after the Eldorado Policy that contain London arbitration agreements, and the methodology by which this was achieved was by way of a particular endorsement rather than by amendment of the remainder of the policy wording.

10. By way of illustration of this methodology, the policy issued to Eldorado and Capri for 1 May 2017 to 1 May 2018 (i.e. a policy insuring Eldorado that preceded the Eldorado Policy for the period 1 May 2019 - 1 May 2020) included *"this insurance shall be governed by and construed in accordance with the law of the state of Nevada and each party agrees to submit to the exclusive jurisdiction of the courts of the USA"* but this was trumped by endorsement no.8 (the "Arbitration and Choice of Law Endorsement") which provided that, "notwithstanding anything to the contrary in the Policy" any dispute would be determined by London arbitration under the provisions of the Arbitration Act 1996, and in the same endorsement that any dispute arising out of or in relation to the policy was governed by New York law.

11. However, CEI denies that the parties agreed that the Eldorado Policy was to include, amongst other matters, a London arbitration agreement and New York law clause. The

central issue in this trial is whether the parties have agreed to refer their dispute under the Eldorado Policy to London arbitration (including the related issue of whether the Eldorado Policy should be reformed or rectified accordingly). If the parties had in fact agreed to London arbitration, then CEI accepts that Markel should not have been sued in the Nevada Proceedings and, subject to an argument on "clean hands" on the part of Markel in relation to equitable relief, would be entitled to the relief it seeks.

12. It is common ground that the issues arise in circumstances whereby the Eldorado Policy documentation was issued by Markel to CEI's then broker, Bowring Marsh Bermuda ("Marsh"), on 30 April 2019 under policy number 1394692-10419-PRMAN-2019 ("Eldorado 2019 Documentation"). The Eldorado 2019 Documentation did not attach thereto an endorsement containing an arbitration agreement and/or providing for the applicable law of the Eldorado Policy. Indeed it did not contain any endorsements at all. On Markel's case this was an error and was an obvious omission and did not reflect the intention of the parties. On CEI's case, the Policy was concluded without the relevant endorsement, and represented the contractual terms agreed.

13. At a without notice hearing on 20 April 2021, Jacobs J made an interim ASI over to a return date in favour of Markel against CEI on the basis of the existence of a London arbitration agreement. Issues arise as to how Markel's case was presented at that hearing to which I will return in due course. At the return date on 7 May 2021, the Court made case management directions for the determination of the issue by way of a Part 8 trial and CEI gave undertakings over to trial.

14. The issue directed for trial is whether the parties agreed that the Eldorado Policy should include an exclusive arbitration provision (the "Arbitration Agreement"), which requires disputes to be referred to binding arbitration in London. Markel also contends that the parties' agreement extended to include a choice of law provision, namely New York law.

15. If Markel is correct that the parties were *ad idem* as to the Arbitration Agreement, Markel's standard relevant endorsement (as issued in respect of the Caesars Policy and to CEI in prior and subsequent policy periods) provides amongst other matters that, *"Any dispute, controversy or claim arising out of or relating to this Policy, or the breach, cancellation, termination or validity of this Policy shall be finally and fully determined in London, England under the provisions of the Arbitration Act of 1996 ("Act") and/or any statutory modifications or amendments thereto, for the first time being in force, by a Board composed of three arbitrators"* with the endorsement then setting out how those arbitrators are to be chosen, before addressing the hearing, when the Board's decision was to be rendered, with both parties waiving any right to appeal in accordance with the terms of the Arbitration Agreement.

16. The same endorsement (reflecting what Markel contends was agreed on behalf of CEI) contains an agreement for the governing law, namely New York law (as varied and/or amended) pursuant to the ubiquitous law of construction and interpretation clause, as follows:

> "Any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the substantive internal law (i.e., excluding procedural and choice-of-law rules) of the State

> of New York, except insofar as such Law (1) may prohibit payment in respects of punitive damages hereunder; (2) pertain to regulation under New York Insurance Law, or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insured entities situated in the State of New York; or (3) are inconsistent with any provision of this Policy; provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to construed in an evenhanded fashion as between the Insured and the Company where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Company or reference to the "reasonable expectations" of either thereof or to contra proferentem and without reference to parol or other extrinsic, evidence). Insofar as the substantive internal law of New York is applicable [sic] as provided herein or otherwise, and as respects arbitration procedure, the internal laws of England and Wales apply."

17. Pursuant to the Order of Jacobs J of 7 May 2021 Markel has served a pleading dated 21 May 2021 (the "Markel Pleading"), CEI has served a responsive pleading dated 15 June 2021 (the "CEI Pleading"), and Markel has served a reply pleading dated 24 June 2021 (the "Markel Reply Pleading"), and the parties have served witness statements the purpose of which is stated in the Order of Jacobs J, as being to set out the parties, *"full and complete evidence as to the circumstances surrounding the conclusion of the alleged arbitration agreement".*

18. For Markel, witness statements have been served from Steven Dorsey ("Dorsey1") who is the individual who generally handled CEI's relationship with Markel, and the First and Second Witness Statements of Natasha Clipper ("Clipper1" and "Clipper2"), who was Mr Dorsey's subordinate but handled matters leading up to the issuing of the relevant policy on 30 April 2019.

19. For CEI a witness statement has been served from Stephanie Lepori, who is the Chief Administrative and Accounting Officer of CEI who states that she oversees the placement of CEI's insurance policies. She was not involved, however, in the placing of the Eldorado Policy. As she fairly states at paragraph 9 of her statement:-

> "I do not explain, in this witness statement, how the Eldorado Policy and its Endorsements were brokered. This is because I was not involved in that process (which was handled by Marsh, which is no longer our broker for Property Insurance Policies). I rely on the written policies executed and signed by the parties and delivered to Eldorado."

20. CEI have not served evidence from Ms Kara Gibbons of Marsh, who placed the insurance on behalf of CEI as their broker, nor from anyone else within Marsh who

may have received any instructions from CEI in relation to the placement or formation of the insurance. Nor has CEI served any evidence from anyone within its organisation responsible for providing instructions to Marsh and/or Ms Gibbons. As already noted, Marsh are no longer CEI's broker having been replaced by Aon Bermuda. The position is therefore that CEI has not led any positive evidence as to what was agreed between the parties, or as to whether the Defendant instructed Marsh to agree or object to London arbitration. In essence CEI stands on the correspondence passing between the parties in terms of what was agreed (as largely do Markel, albeit Markel uses witness evidence to supplement the correspondence as to what, if anything, occurred between particular items of correspondence).

21. In circumstances where the claim has been issued as a Part 8 claim, under CPR r.8.6(2), permission is required if a party wishes to give oral evidence at this trial. In the event the parties have agreed that neither party will apply for cross-examination, and accordingly the case falls to be determined on the basis of the documents, supplemented, so far as admissible and relevant, by the witness evidence. Whilst I have given careful consideration to the witness evidence that has been served, the reality, so far as the central issue of whether the parties have agreed to refer their dispute under the Eldorado Policy to London arbitration, is that both parties focus upon the correspondence between Ms Natasha Clipper of Markel and Ms Kara Gibbons of Marsh on behalf of CEI in support of their respective positions.

22. It is Markel's case that the Eldorado 2019 Documentation was incomplete and/or deficient. It submits that the exchanges between Ms Natasha Clipper of Markel and Ms Kara Gibbons of Marsh demonstrate that the risk was underwritten on the basis of the "Special Conditions" contained in the quotation sent to Marsh which contained the Arbitration Agreement and adopted New York law as the governing law. It is said that these were to be expected in the Bermuda market and received no further discussion, still less any dissent from CEI or its broker. However, when it came to issuing the policy wording, Ms Clipper failed to include the relevant endorsement (or any endorsements at all), Ms Clipper's evidence being that the Eldorado 2019 Documentation was issued in a hurry with Ms Clipper's evidence explaining how this mistake happened by omission, it being said that the Eldorado 2019 Documentation did not accurately record and/or reflect the agreement in fact reached between the parties.

23. In contrast CEI relies upon the e-mail from Ms Clipper of Markel to Ms Gibbons of Marsh at 7.38pm on 30 April 2019 attaching a document described as the "signed policy" which consisted of a 2 page document entitled "Declarations" which had numbered paragraphs under "Special Conditions" and "Standard Conditions", (which CEI refers to as the "Issued Declarations") and a policy wording (which CEI refers to as the "Issued Wording") which provided, amongst other matters as follows as to law and jurisdiction (the "US Jurisdiction Clause"):-

> "**Choice of Law and Jurisdiction**
>
> This insurance shall be governed by and construed in accordance with the law of the State of Nevada and each party agrees to submit to the exclusive jurisdiction of the courts of the USA."

24. Ultimately, and as both parties accept, there is no substitute for a detailed consideration of the correspondence passing between the parties together with the evidence before the Court, to which I will turn after first identifying the applicable legal principles (which are common ground).

B. APPLICABLE PRINCIPLES

B.1 CONSTRUCTION

25. It is common ground that the law applicable to the question as to whether the parties agreed New York law to govern the Eldorado Policy and/or agreed Special Condition No.1 is governed by the ordinary rules of English law relating to the construction of contracts: see, for example, *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ("*Enka*") at [29]. It is equally common ground that the law applicable to the question as to whether the agreement to London arbitration and/or Special Condition No.2 is valid and binding is governed by the putative law applicable to the said agreement to arbitrate: see, for example, *Enka* at [31].

26. As to principles of construction in relation to contract formation, these are well established and require no elaboration (the requisite elements being offer, acceptance, consideration and intention to enter into legal relations). In relation to contract formation CEI also refers to what was said by Sir Ross Cranston, in *Jamp Pharma Corporation v Unichem Laboratories Limited* [2021] EWHC 1712 (Comm) at [53] and following:

> "53. First, an offer may be conditioned on its acceptance being expressed or communicated in a prescribed way and, in those circumstances, it can generally be accepted only in that way: *Chitty on Contracts,* 33rd ed, paragraphs 2-064 to 2-068. It is a matter of construction whether an offer requires an acceptance to be expressed or communicated in a specified way. Merely because the agreement envisages a signature by both parties, and leaves space for those signatures, does not of itself constitute a prescribed mode of acceptance: *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334; [2010] 2 All ER (Comm) 788, [16], per Longmore LJ.
>
> 54. Secondly, whether parties intend to create legal relations and there is a binding contract is conditional not upon their subjective state of mind but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they objectively regarded or the law required as essential for legally binding relations: *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753, [45], per Lord Clarke. In *Barbudev v Eurocom Cable Management Bulgaria* [2012] EWCA Civ 548, Aikens LJ acknowledged *RTS Flexible Systems* as the leading case on the intention to create legal relations, although he cautioned that in a commercial contract the onus of demonstrating that there was a lack of intention to create legal relations lay on the party asserting it and that it was a heavy one: [30].
>
> …

> 57. The third body of legal principle concerns the well-known principles for the interpretation of documents contained in authorities such as *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. In brief, the inquiry in construing a contract concerns what the parties using the words they have against the relevant background would reasonably have been understood to mean. As regards determining contractual intention and whether a particular mode of acceptance had been prescribed, Longmore LJ said in *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334, [2010] 2 All ER (Comm) that the entire course of correspondence had to be considered: [17].
>
> 58. Fourthly, as I put it in the Court of Appeal in *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, drawing on a passage in *Chitty on Contracts*, 32nd ed, 2015, para 13-129, "the subsequent conduct of the parties is admissible to prove the existence of a contract, and its terms, although not as an aid to its interpretation": [41]. Elias and Underhill LJJ agreed. To similar effect is the recent decision of Coulson LJ in *Farrar v Rylatt* [2019] EWCA Civ 1864, who held that the fact that while the project was up and running one party had made repeated attempts to have a profit sharing agreement drawn up was one of the factors for concluding that there was no binding agreement in place: [84]. There is further support for the principle in Christopher Clarke J's judgment in *MSM Consulting Ltd v Tanzania* [2009] EWHC 121 (QB), 123 Con LR 154, where he considered that the subsequent dispatch of a new set of terms was difficult to reconcile with the acceptance of the earlier terms: [113]. "

27. Markel say that the Eldorado Policy was formed by the instruction from Marsh (for CEI) to bind cover on the quoted terms offered by Markel and in the way described in *Axa Corporate Solutions SA v National Westminster Bank plc* [2011] Lloyd's Rep IR 438.

28. Markel say that the contract was formed by negotiation and agreement of the essential terms, such terms to be incorporated into written agreements issued subsequently which, it is said, accords with ordinary and familiar commercial practice in the context of the formation of insurance policies. Applying such English principles of contractual construction as to the formation of a contract, and on the basis of the correspondence passing between the parties, and the evidence before the Court, Markel submits that the parties agreed to Special Conditions Nos. 1 (New York law) & 2 (London arbitration) as part of the Eldorado Policy.

29. For its part CEI say that *Axa* was a case concerned whether a terrorism exclusion in a fax setting out renewal terms had been negotiated out of the policy (see [37] and [90]), and that it was not a case where full written wording was produced subsequently, and so it is submitted that it is not apt in the present case. Further the Judge's lengthy consideration of whether the relevant exclusion had been removed from the policy serves only to show that the inquiry is a fact-specific one ([97]-[116]) (as is clearly right).

30. CEI also referred (it is said "for completeness") to the well-known case of *L'Estrange v Gracoub* [1934] 2 KB 394 for the proposition that where a party has signed a document containing contractual terms, they are bound by that contract (absent rescission), and it is immaterial whether the party has read it or not. This point was not advanced with any enthusiasm by CEI in its oral submissions, and I do not consider it assists when the issues include whether there was already a prior concluded contract of insurance, and in circumstances where there is a claim for reformation and rectification on the basis that the policy document does not accurately record the contractual bargain entered into.

31. CEI also asserts that even if there was a binding contract of insurance including Special Conditions 1 & 2 providing for London arbitration and New York law these were superseded by the Eldorado policy wording (without prior negotiation or discussion after a contract of insurance had already come into existence on this hypothesis), to produce Nevada law and jurisdiction. This surprising proposition, and the associated authorities relied upon by way of analogy by CEI, are more conveniently addressed in Section D below, when addressing CEI's arguments in this regard.

B.2 SEPARABILITY OF ARBITRATION AGREEMENTS

32. Both parties accepted the principle of separability of an arbitration agreement - see *Fiona Trust v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep. 254 at [17]-[18] where Lord Hoffmann stressed that an arbitration agreement is a "distinct agreement" from the contract (or putative contract) with which it is associated (here the contract of insurance).

B.3 REFORMATION UNDER NEW YORK LAW

33. Markel's case is that to the extent that the Eldorado 2019 Documentation does not reflect the Arbitration Agreement, the policy should be reformed by reason of a mutual mistake. Markel say that that issue is governed by New York law as the putative applicable law of the Eldorado Policy: see *Enka* at [31]. The parties agree that reformation as a matter of New York Law is analogous to the English law principle of rectification.

34. It has been directed that issues of New York law are to be dealt with by way of submission rather than expert evidence (see the Order of Jacobs J at [7]). Fortunately, the parties are, in the event, in agreement as to the applicable principles of New York law.

35. The New York law principles applicable to cases of mutual mistake were set out in Clyde & Co's letter of 9 June 2021, as follows:-

> "1. Such a mistake occurs when both parties to a contract shared the same erroneous belief as to a material fact, and their acts did not in fact accomplish their mutual intent: see *Rekis v. Lake Minnewaska Mountain Houses, Inc.*, 573 N.Y.S.2d 331, 335 (N.Y. App. Div. 3d Dep't 1991); *Turner v. Mutual Benefit Health & Accident Ass'n*, 160 N.Y.S.2d 883, 890–91 (Sup.Ct.1957); 21 N.Y.Jur.2d Contracts § 121, at 528 (1982). "[A] petitioning party has to show in no uncertain terms, not only that mistake ... exists, but exactly what was

really agreed upon between the parties." *George Backer Mgmt. Corp.* v . *Acme Quilting Co.*, 385 N.E.2d 1062, 1066 (N.Y. 1978); accord *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc*., 973 N.Y.S.2d 187, 194 (1st Dep't 2013).
"[P]roof of mutual mistake must be of the highest order, and must show clearly and
beyond doubt that there has been a [mutual] mistake." *Asset Mgmt. & Capital Co. v.*
Nugent, 925 N.Y.S.2d 653, 654 (2d Dep't 2011) (internal quotation marks and citations omitted); accord *Weir v. Guardian Life Ins. Co. of Am.*, 351 F. App'x 492, 493 (2d Cir. 2009) (summary order) (under New York law, "proof of the variance between the meeting of the minds and its expression in the writing must be clear.")

2. A contract entered into under a mutual mistake of fact is subject to reformation or
rescission: see, *e.g.*, 22 N.Y. Jur. 2d Contracts §116.

3. Where there is a mutual mistake by the parties, this will be corrected by way of reforming the contract to reflect the true agreement: see *Nash v. Kornblum*, 186 N.E.2d 551 (N.Y. 1962).

4. Thus, reformation is an equitable remedy for use when the contract, as written, does not embody the true agreement as mutually intended. In the context of mutual mistake, it applies where there is no mistake about the agreement but it is alleged that a mistake occurred in the reduction of that agreement to writing. Such a mistake of the scrivener, or of either party, no matter how it occurred, may be corrected by reforming the contract: see *Nash v. Kornblum*, 186 N.E.2d 551 (N.Y. 1962); *Pacwest, Ltd. v. R.T.C.*, No. 94 CIV. 2498 (AGS), 1996 WL 325647, at *4 (S.D.N.Y. June 11, 1996), aff'd sub nom. *PacWest, Ltd. v. Resol. Tr. Corp.*, 108 F.3d 1370 (2d Cir. 1997).

5. No fraud needs to be shown or established when there is mutual mistake based upon a scrivener's error."

36. These principles of New York law are accepted by CEI (in CEI's Skeleton Argument), CEI identifying the following key points (with which Markel does not disagree):-

(1) A mutual mistake occurs where both parties to a contract shared the same erroneous belief as to a material fact, and their acts do not in fact accomplish their mutual intent.

(2) If a contract is entered into under a mutual mistake of fact, then it may be corrected by reforming the contract to reflect the true agreement.

(3) The doctrine applies where there is no mistake about the content of the agreement but a mistake occurred in reducing that agreement to writing. This is sometimes called a "scrivener's error".

37. To the above three principles CEI adds only that New York law requires "clear, positive and convincing evidence" or a "high level of proof" that the parties were similarly

mistaken (which is also common ground). A similar standard of "convincing proof" applies in English law (see Chitty on Contracts (33rd ed.) at para 3-089).

38. The principles set out in Clyde & Co's letter were elaborated upon in Markel's Skeleton Argument in terms which I do not understand to be controversial, and which I bear in mind.

B.4 RECTIFICATION UNDER ENGLISH LAW

39. Equally if English law applies the test for rectification has recently been clarified by the Court of Appeal in *FSHC Holdings v GLAS Trust* [2020] Ch 365, and is summarised at [176] (as quoted and relied upon by both Markel and CEI):

> *"We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an outward expression of accord meaning that, as a result of communication between them, the parties understood each other to share that intention."*

40. *FSHC Holdings* at [80] – [87] makes it clear that the concept of an "*outward expression of accord*" does not require that the parties' common intention should be declared in express terms. As explained by Jacobs J in *Global Display Solutions Ltd & Ors v NCR Financial Solutions Group Ltd & Anor* [2021] EWHC 1119 (Comm) at [373]:

> *"The shared understanding may therefore be tacit. It may therefore include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words. The Court of Appeal [in FSHC Holdings] emphasised, however, that the court is concerned with what the parties actually communicated to each other, and not with identifying their presumed intention by means of an 'officious bystander' test: see [87]. The concept of a tacit agreement is to be contrasted with uncommunicated intentions which happen, without the parties knowing it, to coincide. It is therefore 'fundamental that contractual rights and obligations should be based on mutual assent which the parties have manifested to each other'."*

41. The intention of the parties is to be assessed subjectively: see *FSHC Holdings* at [374].

42. Delay may be a sufficient basis to refuse rectification, where *"the subsequent delay in pursuing the claim renders it 'practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were otherwise to be asserted*": *KPMG*, supra, at [197].

43. Markel submits that there is "convincing proof" that the Eldorado 2019 Documentation was not in accordance with the parties' mutual intention, by reason of the failure to include the endorsements (*Joscelyne v Nissen* [1970] 2 Q.B. 86) and that the said policy documentation does not accord with the parties' intention. Markel submits that on the balance of probabilities, having regard to all of the circumstances (including the rush to issue the policy documentation), it is more likely than not that the parties' intention was incorrectly captured in the issued Eldorado 2019 Documentation.

B.5 CLEAN HANDS

44. In both systems, it is common ground that, because reformation/rectification is an equitable remedy, it may be refused where a party has not acted with clean hands. In English law, the Court has a residual discretion to refuse to grant rectification: *KPMG LLP v Network Rail Infrastructure* [2006] All E.R. (D) 247 (Jan) at [193].

45. In the context of the "clean hands" doctrine, in *CF Partners (UK) LLP v Barclays Bank Plc* [2014] EWHC 3049 (Ch), and having identified the principles underlying the "clean hands" doctrine which were examined by Andrew Smith J in *Fiona Trust & Holding Corp v Privalov* [2008] EWHC 1748 at [17] to [20], Hildyard J stated at [1133] that:

> "The maxim does not, in my view, enforce manners, or require apology; it is reserved for exceptional cases where those seeking to invoke it have put themselves beyond the pale by reason of serious immoral and deliberate misconduct such that the overall result of equitable intervention would not be an exercise but a denial of equity."

C. DID THE PARTIES AGREE TO REFER DISPUTES UNDER THE ELDORADO POLICY TO LONDON ARBITRATION?

46. On 1 April 2019, Kara Gibbons of Marsh (as CEI's broker) emailed Markel stating, *"We are pleased to present you with the May 1, 2019 – May 1, 2020 property renewal submission for Eldorado Resorts, Inc / Isle of Capri",* seeking quotes for a variety of different policy layers it being stated that the submission was broken down into four components, namely, *"Statement of Values", "Proposed Policy Form – All changes from expiring have been redlined" "Loss History"* and *"Engineering File".* This was not technically a renewal as Markel did not insure CEI for the 1 May 2018 – 1 May 2019 policy period, and so the redlined policy simply related to the previous year's insurance on which Markel did not participate. However, CEI was insured for prior periods and those policies contained London arbitration agreements (on the basis of the methodology already identified).

47. The presentation of the risk was premised on the "Proposed Policy Form" which was (at least says Markel) a template underlying policy wording which, subject to different attachment points, limits and other endorsements issued by individual insurers, would be "followed" by the participants in CEI's insurance programme (referred to, for ease of reference only as "the Followed Policy"). The Followed

Policy contained, amongst other matters, the following language (which was identical to the US Jurisdiction ultimately set out in the Eldorado Policy):-

> "29. Service of Suit
>
> It is agreed that in the event of the failure of the Insurers hereon to pay any amount claimed to be due hereunder, the Insurers hereon, at the request of the Insured (or Reinsured), 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 Insurers rights 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…
>
> …
>
> "2) The following clause is added to and forms part of this policy:
>
> Choice of Law and Jurisdiction
>
> This insurance shall be governed by and construed in accordance with the law of the State of Nevada and each party agrees to submit to the exclusive jurisdiction of the courts of the USA."

48. In response to this presentation, Mr Robin Woolridge of Markel, emailed Kara Gibbons on 12 April 2019 with Markel's quotation (i.e. the terms on which Markel was willing to quote for an insurance of CEI) , with a subject line, *"Quote for Eldorado Resorts, Inc 2019"* stating, *"Please find attached Markel's Quote for the Eldorado Resorts, Inc., 2019 account. If you have any questions please do not hesitate to contact me"* and attaching Markel's quote for property insurance for the period 1 May 2019 to 1 May 2020 (the "12 April Quote").

49. The 12 April Quote provided, amongst other matters as follows:

> "**Special Conditions**
>
> 1. Coverage shall be construed in accordance with the internal laws of the State of New York.
> 2. All disputes, including claims disputes, are subject to London Arbitration.
>
> …
>
> 10. Final Policy form to be agreed prior to binding.
>
> …
>
> **Standard Conditions**
>
> …
>
> **COMMENTS**
>
> Please note that this quote cannot be bound without completion and satisfactory review of all the Special Conditions noted above.
>
> …

> Further, the terms and conditions outlined in this quote are based on applicable underwriting information received as of the date of the application. Markel Bermuda Limited maintains the right to adjust the terms and conditions, in the event conflicting information is received subsequent to this date."

50. Special Conditions 1 and 2 were included as Declarations to various property insurance policies issued to Isle of Capri and Eldorado before 2019, as an Endorsement to the Caesars Policy in 2019, and as Declarations to a subsequent 2020 property insurance policy to Eldorado and Isle of Capri for the period 1 May 2020 to 1 May 2021 (all as addressed by Mr Dorsey in his witness statement). Mr Dorsey in his witness statement further states:

> "11. Markel Bermuda provides property, casualty, and speciality (re)insurance products to the broker market. It is my understanding that the large majority, if not all, property policies issued by Markel Bermuda are subject to a dispute resolution provision for a London arbitration and governed by New York law (as varied and/or amended). I personally cannot recall any risks that I have underwritten for Markel Bermuda which did not contain an arbitration clause and/or were not governed by New York law (as varied and/or amended)."

51. The 12 April Quote accordingly provided for New York governing law and London arbitration. The 12 April Quote at Special Condition 10 also stated that *"Final policy form to be agreed prior to binding"*. Ms Clipper's evidence is that this meant that Markel wanted to review the "followed policy" and review it for changes / endorsements prior to binding. CEI suggests that it is referring to sight and agreement of the final policy wording between the parties before cover would be bound. Either way the consequence was that it was not a quote capable of acceptance by CEI without Markel agreeing to be bound (given Special Condition 10). Precisely what was being referred to may not ultimately matter as an insurer can always agree to be bound at any time, and whether an agreement has been reached is a matter of construction of the correspondence that passes between the parties. Even if this is a reference to the policy wording, Markel says that the risk can be bound before provision of the final policy wording and that, in any event, the law and arbitration provisions would be by way of an endorsement or declaration (as per the normal methodology adopted in relation to previous and subsequent policies) which would override any inconstancies in the Followed Policy.

52. Following discussions which, per the evidence before me, did not relate to either Special Conditions 1 and 2 (or any other) Special Conditions, Robin Woolridge of Markel issued a revised quotation to Marsh/CEI on 18 April 2019 which replaced and superseded the original quotation dated 12 April 2019, and was signed by Mr Dorsey (the "18 April Quote"). The 18 April Quote offered two options (Options 1 and 2 with different deductibles), contained the identical Special Conditions 1 and 2 as to governing law and London Arbitration, and Special Condition 11 stated that *"this quotation replaces and supersedes our original quote dated April 12th 2019"* and

what was now Special Condition 12 provided *"Final policy form to be agreed prior to binding"*. It also contained the "COMMENTS" in identical terms.

53. On 30 April 2019 Mr Dorsey was at an industry conference (RIMS) in Boston, USA. His direct report, Ms Natasha Clipper, acted as underwriter on his accounts in Bermuda during his absence.

54. Ms Clipper was contacted by telephone by Ms Gibbons of Marsh on 30 April 2019 seeking to bind cover that date (as the previous year's programme was about to expire and cover was needed effective from 00.00hrs on 1 May 2019). Ms Gibbons requested a reduction in the premium quoted in the 18 April Quote, but **did not** otherwise query any other terms of the 18 April Quote including Special Conditions Nos. 1 & 2 (the 12 April Quote and the 18 April Quote being the only quotes that Markel had ever quoted to insure CEI on the basis of).

55. Then at 10:09 am on 30 April 2019, Ms Gibbons sent Ms Clipper an email stating, *"Per our conversation, can you agree to a price of $2.5M NET (**as per Option** 2 quoted deductibles)?"* (emphasis added). It is clear, therefore, that the price related (as did Ms Gibbons' email) to the 18 April Quote (hence the reference to "*as per Option 2 quoted deductibles"* which was embedded within the 18 April Quote), a fact that Mr Flynn QC on behalf of CEI accepted during the course of his oral submissions. This was the **only** change to the 18 April Quote that was being asked about and I am satisfied that Marsh on behalf of CEI was agreeing to the terms in the 18 April Quote (including New York law and London arbitration) – if this was not the case then Ms Gibbons would have needed to say so (to change/counter-offer terms). The only basis on which Markel had quoted was the 18 April Quote, superseding the 12 April Quote, both of which included New York Law and London Arbitration as Special Conditions. I do not consider that there can be any doubt about this. CEI itself acknowledges that apart from the conversation about reduction in premium, *"there is no evidence from Ms Clipper or in subsequent emails that any other terms were discussed"* – CEI Skeleton para 30. If there had been any doubt about this, however, it would, in any event, have been immediately removed by Markel's response as addressed below.

56. Ms Clipper responded to that email on the same day at 10:54 am stating:

> "Hi Kara
>
> Thanks for the call re the below.
>
> I confirm we are willing to reduce our price to $2.5m net. **All other terms and conditions as per previously agreed**.
>
> I look forward to receiving notice of the firm order."
>
> (emphasis added)

57. The words *"All other terms and conditions as per previously agreed"* can, I am satisfied, only be a reference to the 18 April Quote and its terms including Special Conditions 1 and 2 (as that is the only quote that Markel has ever given, and Ms

Gibbons was in any event responding to that quote (as shown by *"as per option 2 quoted deductibles").* CEI's property renewal submission is simply not a viable candidate given that the premium reduction was expressly made by reference to the 18 April Quote and Option 2. It therefore could not be clearer that the insurance (in respect of which "notice of firm order" was sought) was on such terms. There is no evidence whatsoever (in any of the communications, by telephone or email), that Ms Gibbons ever requested Special Conditions Nos. 1 and/or 2 be removed.

58. Yet further, in stating *"I look forward to receiving notice of a **firm** order"* Ms Clipper was indicating that Markel would be prepared to bind at that time (and therefore without any further review of the Followed Policy or policy wording in the context of Special Condition 12) – or at least that was the obvious inference of what she was saying, and it was clearly understood as such from CEI's response, as addressed next below.

59. The following email is, I am satisfied, the crucial email, and determinative of the central issue that arises for determination as to whether the parties agreed to London arbitration. It is an email from Ms Gibbons to Ms Clipper only 32 minutes later on 30 April 2019. Its subject is stated as "5/1 – Eldorado – **BIND COVER** – MARKEL BDA" (emphasis added). The words "BIND COVER" show, I am satisfied, an intention to bind cover – i.e. to place Markel on risk and enter into the contract. The email provides, amongst other matters, as follows,

"Tash/Steve,

Please **proceed with binding** the following:

- Carrier – Markel Bermuda Limited
- Participation – 10.00% or 5,000,000 USD p/o 50,000,000 USD, excess of 25,000,000 USD and the underlying policy deductibles.
- Premium – 2,500,000 USD Annual Layer or 250,000 USD for share
- TRIA – Excluded
- Brokerage Nil"

(emphasis added)

60. I am satisfied that a binding contract of insurance was entered into on Markel's receipt of this email. Markel had sought *"notice of firm order"* on the basis of *"all other terms and conditions as previously agreed"* – i.e. those in the 18 April 2018 Quote and CEI had responded "BIND COVER" and "proceed with binding" – clear and unequivocal acceptance on the part of CEI. Markel were thereby placed on risk and a contact of insurance was concluded.

61. By the same token I am satisfied that at this stage, at the latest, a binding arbitration agreement was entered into between Markel and CEI. I say "at the latest" due to the fact that an arbitration agreement is a distinct agreement separate from any associated contract (see *Fiona Trust v Privalov*, supra, at [17]-[18]) and it possible (indeed quite common) for an arbitration agreement to be concluded before the associated contract is finalised/concluded. In this case Markel had quoted in the 18 April Quote on the basis of *"**all disputes** including claims disputes, are subject to London Arbitration"*

(emphasis added), and Ms Gibbons had not proposed any different terms when she responded orally asking for a reduction in the premium to which Markel agreed (Ms Clipper having been authorised to agree that by Mr Dorsey). Accordingly either in the conversation (by not proposing any different terms), or when Ms Clipper confirmed *"we are willing to reduce our price to $2.5m net. All other terms and conditions as per previously agreed"* or, at the very latest, when Ms Gibbons responded "BIND ORDER" and "Please proceed with binding the following" a binding arbitration agreement was entered into.

62. However CEI denies that there was any binding contract of insurance (or, it would appear, any binding agreement to arbitrate) at this stage, saying that this was not, as Mr Flynn QC put it, a "snap moment", and that it was "at most a counter offer" seemingly on the basis of what follows in that same email. The email continues:

> "Attached I have included the following:
>
> 1. 2019 ER IOC – Submission – 2 – Proposed Policy Form – Redlined (4.29.19) – I have highlighted in blue the only changes to the policy form from the time of the submission…
>
> 2. 2019 ER IOC – Policy for Issuance – I have taken off all the redlines and highlights, and have populated the participation page with the applicable carrier information highlighted in green. Please review and populate your policy number upon issuance.
>
> Let us know if you have any questions/concerns."

63. This (lower down) part of the email cannot, I am satisfied, be read, as qualifying the "BIND ORDER" or the instruction "proceed with binding **the** following" (which as a matter of language, and from its place within the email, relates to the part of the email that is above this section i.e. the five bullet points).

64. As for the changes to the Followed Policy it is common ground that these are immaterial (and for that matter uncontroversial). In such circumstances the email cannot possibly be construed, or understood as a "counter-offer" in relation to the contract of insurance. This is not, in any event a "battle of forms" type case given that the Following Policy wording had always been in circulation since the 1 April 2019 property renewal submission. Marsh are simply identifying some (immaterial) red-line changes by way of assistance when drawing up the issued wording thereafter. Put another way (as Mr Scorey QC points out on behalf of Markel) Marsh could equally well (and to like effect) have said *"Bind. The wording is as we sent on 1st April".* Either way the Nevada jurisdiction clause has always been in the Followed Policy wording, but it is, and has always been, trumped by Special Conditions 1 & 2 embedded within the 30 April Quote, which is what is being accepted (and is the only basis on which Markel has ever quoted).

65. In the insurance world you do not "bind cover", and at the same time make a counter-offer (though you might engage in the finalisation of the subsequently issued policy which I am satisfied is what this is, at most, about). The *"Attached I have included the*

following" cannot possibly trump the terms of the 18 April Quote including Special Conditions 1 and 2 which have never been rejected (and which in any event would prevail by way of Declaration/Endorsement over the Followed Policy).

66. It is perhaps at this point that the separability of any arbitration agreement is in sharp focus and illustrates the difference between a binding arbitration agreement and a binding contract of insurance, albeit on the facts of this case there is a binding arbitration agreement **and** a binding contract of insurance at the time Markel receives this "BIND ORDER". But to illustrate the distinction assume a hypothetical scenario where the proposed redlined changes were substantive changes that were not agreed, or there was a dispute as to whether they were agreed, and an issue arose as to whether, in such circumstances, there was a binding contract of insurance with one party (e.g. Markel) saying there was no insurance and the other party (e.g. CEI) saying there was. I am satisfied that any such dispute or disputes would be subject to arbitration, as such arbitration agreement came into existence (at the latest as addressed above) upon receipt of the 30 April 2019 email by Markel. Thus any (or indeed this very) dispute as to the terms of the Eldorado Policy is already subject to the arbitration agreement.

67. I am, however, satisfied that the 30 April 2019 email is an acceptance of the 30 April Quote and that a binding contract of insurance (incorporating a binding arbitration agreement) came into existence at this time on the basis of the proposed Followed Policy wording subject to the terms of Markel's 18 April Quote including the Special Conditions 1 & 2 which would be reflected in endorsements to the Followed Policy. This is entirely consistent with Markel's evidence that the Followed Policy remains constant for all layers and all insurers but is subject to Special Conditions agreed with each insurer which override all inconsistent provisions, including the jurisdiction provision - i.e. the wording of the Followed Policy would never change and, consistent with the methodology adopted in previous policies and subsequent policies, the Followed Policy wording would continue to refer to Nevada law, but would be trumped by Special Conditions 1 & 2, as reflected in endorsements to the Followed Policy, providing for London arbitration and New York law.

68. Throughout the course of the remainder of 30 April 2019, and as addressed below, due to the urgency in getting the risk bound and documentation issued, Ms Gibbons followed up several times over email with Ms Clipper on the status of issuing the policy. There is no suggestion whatsoever that Ms Gibbons ever queried the applicability of Special Conditions Nos. 1 & 2 or expressed any disagreement with those provisions, either before, or if relevant after, the 11.26 am 30 April email.

69. The subsequent email exchanges are informative and I am satisfied that they show that the parties considered that the insurance was already bound (as I have found it was). Ms Clipper was handling an extremely high volume of work on behalf of colleagues who were "off island". In circumstances where CEI's existing insurance coverage ended on 30 April 2019, and the new insurance programme incepted on 1 May 2019 Marsh were clearly keen to obtain final policy wordings from all the insurers and report the same back to their client CEI. This led Ms Gibbons of Marsh to enter into a series of email exchanges with Ms Clipper to obtain the same, throughout which it is clear that she (rightly) considered that the risk had already been bound, and that all that was outstanding was issuance of the policy.

70. In this regard, at 5.08pm on 30 April Ms Gibbons emailed Ms Clipper (under the same "BIND ORDER" header):

"I know your probably swamped – just wanted to make sure there **were** no issues on this one. We look forward to receipt of your policy today"

(emphasis added)

71. Notwithstanding Mr Flynn's valiant denial that this tells one anything, I am satisfied that Ms Gibbons use of the past tense shows that she is proceeding on the basis (rightly as I have found) that the insurer is on risk i.e. that there is already a binding contract of insurance.

72. Two minutes later at 5.10pm Ms Clipper responds to Ms Gibbons, "*No issues. Will send it before day is done".* Again this is only consistent with there already being a binding contract of insurance and all that is now being addressed is sending "it" (the policy) before the day is done. Somewhat out of the blue, in the course of his oral submissions, Mr Flynn said that by saying "no issues" this was an acceptance by Markel of what Mr Flynn QC characterised as CEI's "counter-offer" at 11.26am. This was not CEI's pleaded case nor had it been suggested in CEI's Skeleton Argument. The email cannot bear that weight, and it is not responding to the 11.26am email at all (which is not, in any event, a "counter offer" for the reasons I have already addressed above). Also if a binding contract of insurance only came into existence at this point, the policy wording had not yet been issued so again the contract of insurance can only be on the terms of the 30 April Quote.

73. Marsh are clearly keen to report back to CEI with the policy documentation and so at 6.12pm (so one hour and two minutes later) Ms Gibbons' assistant Samantha Astwood emails Ms Clipper, *"Just checking in on the ETA? Please advise when you can, Thanks!"* It is clear this email is simply about the ETA of receiving the policy, as CEI accepted, which is again consistent with the insurance itself already being in place.

74. At 6.34pm (no response having been received from Markel) Ms Gibbons emails Ms Clipper and others within Markel:-

"Hi guys,

Sorry for the persistence – we've called and haven't gotten any answer. Can you confirm you're working on this and give us an ETA please?

Thanks!"

The "*working on this"* again relates to the issuance of the policy.

75. Ms Clipper responds two minutes later at 6.36pm, *"I'll get to you within the hour".* It is clear that Ms Gibbons is now getting concerned about the delay and replies one minute later in these terms:-

"Tash,

Please confirm cover bound in the meantime with policy number. We need to send documents to the client"

76. This again shows that Ms Gibbons considered that cover had already been bound and Markel were on risk before Markel had reverted with the policy wording. This email assumed greater significance in the course of oral submissions, as it is CEI's pleaded case at paragraph 42.4 of CEI's Pleading that *"There was no binding contract until 7.38[pm]"* (the twelfth and final email as addressed in due course below). However when I pressed Mr Flynn QC as to whether CEI accepted that at this point there is a binding contract of insurance with insurers being on risk (given that Ms Gibbons was saying "Please confirm cover bound" i.e. please confirm that you are on risk) Mr Flynn QC accepted that there **was** a binding contract of insurance at this point – but, logically, this can only be on the basis that there was (as I have found) a binding contract of insurance at 11.26am when Ms Gibbons gave her "BIND ORDER" and "Please proceed with binding", and for the reasons already given that can only be on the basis of the 30 April Quote and Special Conditions 1 and 2 with London arbitration and New York law.

77. The response to Ms Gibbons' email at 6.37pm followed two minutes later at 18.39hrs:-

> "I confirm cover is bound as per email below. Will send policy number shortly once created"

78. The *"email below"* is clearly the email directly below that in the chain at 6.37pm asking *"Please confirm cover is bound"*. This is all entirely consistent with cover having already been bound ever since 11.26am that morning (when Ms Gibbons placed the "BIND ORDER"), as I have found, and on the terms of the 30 April Quote for the reasons that I have given. In what I can only characterise as an act of desperation as CEI's case crumbled when subjected to an email by email examination, it was then suggested orally (having never been suggested before in CEI's Pleading or Skeleton Argument) that the "email below" was not the email below at all, but the email at 11.26am to be found a long way down the chain with many intervening emails. This submission is, with the greatest of respect, hopeless. But even if it had not been, the email at 11.26am is, for the reasons I have given, clearly an acceptance of the 30 April Quote Option 2 which, of course, includes London arbitration and New York law.

79. Ms Gibbons responds one minute later to Ms Clipper at 6.40pm *"Thanks Tash. I know you're swamped so appreciate it".* Yet again this shows that Ms Gibbons is proceeding on the basis that Markel and CEI are bound by this time (contrary to CEI's pleaded case, though now seemingly conceded).

80. It is abundantly clear that this was Ms Gibbons view as it will be recalled that very shortly thereafter she informed Eldorado in an email timed at 6.51pm (11 minutes later as follows:-

> "Good Evening Ms. Lepori,
> **Thank you for the renewal order and your continued support of the Bermuda markets. We have bound the following**

markets and found their terms and conditions to be in accordance with your instructions. We have attached their
policies along with our overviews for your ease of reference.
Argo Re Ltd
Policy No: P136795
Chubb Bermuda Insurance Ltd
Policy No: CAPRI01232P10
Hamilton Re Ltd
Policy No: PX19-4029-01 / PX19-4029-02
Liberty Specialty Markets Agency Limited
Policy No: LSP0005029
Neon Underwriting Bermuda Ltd
Policy No: BNPD19AA458A
Oil Casualty Insurance Ltd
Policy No: P-101347-0519-00
XL Bermuda Ltd
Policy No: XLPRP 1288597 19
Markel Bermuda Limited
Policy No: TBD**
****Please note that Markel have confirmed coverage bound, their policy number and binding documentation will follow either later this evening or tomorrow morning.****"**

(emphasis added)

81. And only thereafter, at 7.38pm was the twelfth email (the one that CEI relies upon in its pleaded case and Skeleton Argument as the point at which a contract of insurance came into being) from Ms Clipper to Ms Gibbons stating:-

"Hi Kara,

My apologies for the delay in getting the signed policy to you. Please find the document attached. Thank you for the firm order – great to have another piece of business with Marsh!"

82. The evidence before me is that Ms Clipper was handling an extremely high volume of work on behalf of colleagues who were "off island" and in normal circumstances, a binder would be issued reflecting the final agreed terms, with the policy wording to follow thereafter. Ms Clipper did prepare a binder which reflected what Markel says was the agreement with Ms Gibbons, namely binding the risk subject to the Special Conditions, including Special Conditions Nos.1& 2 (London arbitration and New York law). However, due to the pressure from Ms Gibbons on 30 April 2019, Ms Clipper did not issue this binder to the broker but, instead, sought to assist Ms Gibbons by issuing the final policy wording.

83. To that end, Ms Clipper provided the Eldorado 2019 Documentation to Ms Gibbons attached to this email. However, in the hurry to get the policy issued, Ms Clipper issued the policy in the form provided in Ms Gibbons' earlier email at 11:26 am, namely the Followed Policy but mistakenly failed to ensure that the issued wording gave effect to the contract of insurance that had been entered into as reflected in the binder she had prepared, namely endorsements reflecting Special Conditions Nos. 1

& 2 (London arbitration and New York law) forming part of the accepted 18 April Quote which had been agreed, by mistake omitting those Special Conditions from the Declaration accompanying the Following Policy, which at Special Condition 2 simply stated, *"All other terms and conditions per the policy wording received 4/30/2019".* In short, as it was colloquially put during the course of oral submissions, there was a "cock-up".

84. On the basis of the correspondence that I have addressed, and for the reasons that I have given, I am satisfied, and find, that Markel and CEI entered into a binding contract of insurance at 11.26am on 30 April 2019 on the terms of the 18 April Quote including Special Conditions 1 & 2 (London arbitration and New York law), with the agreed adjustment to premium based on Option 2, and accordingly also entered into a binding arbitration agreement at that time. The policy documentation subsequently issued at 7.38pm on 30 April 2019 failed accurately to record the terms of the parties' agreement in that respect.

85. Accordingly, to the extent necessary (and it may not be necessary given my above finding that CEI is subject to a binding arbitration agreement) Markel say that this is a classic case for reformation under New York law or (if English law applies) rectification under English law so that the Eldorado 2019 Documentation accords with the parties' contractual bargain as to London arbitration and New York law.

86. However, CEI submits first, that even if (as I have found) the terms of the contract of insurance included London arbitration and New York law, such terms were superseded by the terms of the issued Followed Policy which referred to Nevada law and jurisdiction, and secondly even if that is wrong then I ought not to grant equitable relief in the form of reformation or rectification on the basis that it is said that Markel does not have "clean hands" (though bad faith is not pleaded). I will address each of these points in turn in the sections that follow.

D. DID THE ELDORADO POLICY SUPERSEDE THE EXISTING CONTRACT OF INSURANCE?

87. In support of CEIs submission that if, as I have found, the terms of the contract of insurance included London arbitration and New York law, such terms were superseded by the terms of the issued Followed Policy which referred to Nevada law and jurisdiction, CEI seeks to rely, by way of analogy, with the context of a slip policy followed by a full policy and what was said in that context (albeit obiter) in *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyds Rep 127 at 133 (per Staughton J) and 141 (per Beldam LJ). It is then submitted, by analogy, that even if there was a prior agreement concluded in emails between the parties it was replaced by the subsequent Eldorado 2019 Documentation.

88. In this regard it is submitted that there are strong commercial reasons to infer that, where there is full issued policy wording, that is the basis of the contract between the parties on the basis that where a subsequent policy follows a prior agreement, it will usually be the intention of the parties to supersede the earlier one, and an earlier contract (in particular, a slip) will set out the agreement in shorthand and so it is unlikely to be useful to look to the earlier agreement to establish the terms of the policy – referring to *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Company* [2001] EWCA Civ 735.

89. The short answer to such submissions, and the associated authorities relied upon by CEI, is that they are simply not in point in the present case for at least three reasons:-

(1) Firstly, because this is not a case where there were general terms in a slip (in the context of North America and Bermuda a binder, which performs the same role) – for example "London arbitration and New York law" to be expanded upon in detailed wording in the issued policy which supersedes what is stated in a slip in that regard by the more detailed wording – though if the binder had been issued it would have included Special Conditions 1 and 2 (as per the internal binder and the 18 April Quote) which then would have had to be carried into effect in the issued policy by the more detailed London arbitration and New York law wording already quoted above (as it appeared in prior and subsequent policies between Markel and CEI).

(2) Secondly, what CEI is referring to as the "issued policy" includes the Followed Policy wording that long preceded (as opposed to superseded) the only quotes of Markel (the 12 April Quote and the 18 April Quote) which was then mistakenly issued as the policy wording without (in the accompanying Declaration) inclusion of what had been agreed as part of the contract of insurance, namely Special Conditions 1 & 2, which again would have been in the binder had it been issued (and were in the internal binder), and which would and should have been included in the issued policy wording, and if they were not there would be no question of them being superseded, rather it was a case of mutual mistake (as addressed below) giving rise to a claim for reformation/rectification.

(3) Thirdly, the Followed Policy was never intended by the parties to contain the contractual wording as to law and jurisdiction, as the methodology adopted in previous policies and subsequent policies was that the policy wording would still refer to Nevada law and jurisdiction, but would be trumped by the London arbitration and English law endorsement. Again the mistake here, for mistake it was, was that the Eldorado 2019 Documentation that was issued failed to include as part of the Declaration and detailed endorsement the agreed terms as to London arbitration and New York law.

90. In any event, there is nothing in the authorities relied upon by CEI that would support the (bizarre) conclusion that despite the parties contractually agreeing London arbitration and New York law, this was superseded, without discussion or negotiation or agreement, between the parties with an entirely different jurisdictional and law regime (Nevada), a regime that Markel had never quoted on the basis of, and that was inconsistent with London arbitration and New York law that had not only been quoted, but had been contractually agreed.

91. CEI relies upon two passages in *Youell v Bland Welch*. The first is where Staughton LJ says this at page 133:

> "It can be argued that an insurance slip is different from negotiations for the formation of a contract. It contains a concluded agreement between the parties, albeit one which they may expect, and even agree, to replace by different wording in a formal contract. The nature of the problem which then arises is clearly illustrated by the present case."

This simply raises the question as to what the parties may have contemplated in the context of a slip policy and its replacement. In that case it was common ground that the slip was superseded by the formal policy (see *HIH Casualty* per Rix LJ at [73]). The case is not in point in the present case for the reasons identified above, and the situation is in any event not "analogous" as CEI suggests.

92. The second is the following passage in the judgment of Beldam LJ at page 143 which was directed as whether the slip was admissible as an aid to the construction of the reinsurance contract and which does (contrary to CEI's case) make clear that a slip would be admissible if (as in this case) a case of rectification is advanced. Indeed it supports Markel's position and Markel's claim for reformation/rectification of the Eldorado 2019 Documentation:-

> "Although the slip initialled by underwriters records the original agreement between the parties, if it contains words showing an intention that the terms will subsequently be incorporated into a policy form, when the policy has been issued it is the policy and not the slip which constitutes the contract or agreement between the parties. **Reinsurers who invited the learned Judge to have regard to the wording of the slip as an aid to the interpretation of the contract did not seek rectification. The slip is clearly admissible in evidence for some purposes.**
> …
> **If reinsurers had sought rectification because the policy omitted a term contained in the slip and intended to be incorporated into the subsequent policy, no doubt the Court would have looked at the slip as a document in which the parties had originally recorded their agreement.**"
>
> (emphasis added)

93. Whether a particular slip policy was superseded by a policy wording was considered by the Court of Appeal in *HIH Casualty* (albeit what was said was itself *obiter* as a decision on a previous question made in unnecessary to determine it, as the court noted – at [69] per Rix LJ).

94. The possible interaction of a slip and policy document were addressed by Rix LJ at [70] in the context of an argument that in that case the policy wording superseded the slip (ultimately the court concluded that whilst it was not necessary to decide the issue it did not – see at [95]):-

> "70. The importance of the question for present purposes is that if the policy wording did not supersede the original slip policy, then the two documents would have to be read together, and in such a case there would be no reason to regard the term of the original slip policy considered under question (i) above as having been excised by anything said in the policy wording. On the contrary, the original slip policy might even have to be regarded as the primary document, and the policy wording as wording which was to be incorporated in it and which, where inconsistent, had to make way for the text of the incorporating document. Even if, on the contrary, the original slip policy was the document which had to

give way in the face of anything inconsistent in the policy wording, there would be no reason why the general principle, that one tries to read both documents together, if possible, should not be given effect."

95. Rix LJ then undertook a comprehensive review of previous authorities and considered whether there was a rule of law which made it inadmissible where a slip contract had been followed by a policy to consider the terms of the prior contract, and concluded that there was no such rule of law, at [81]-[84]

> "81. In my judgment, there is nothing in these citations which binds this court to rule that where a prior contract has been followed by a further contract, or where in an insurance context a slip contract has been followed by a policy, there is a rule of law which makes it inadmissible to consider the terms of the prior contract, or that the parol evidence rule has the same effect. That is because all passages in prior cases in this court are only obiter dicta. Moreover, in Youell v. Bland Welch and Punjab National Bank v. de Boinville it was common ground that the policies in question were intended to supersede the slips. Where it is common ground that one contract has been intended to supersede an earlier contract, it must follow that the parties' contract must be found exclusively in the later contract. Thus the earlier contract cannot be used to add to, or modify, the later contract.
>
> 82. But does it follow that the earlier contract cannot even be looked at for the purposes of construing the later contract?
>
> 83. In principle, it would seem to me that it is always admissible to look at a prior *contract* as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later contract is intended to *supersede* the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law.
>
> 84. Where, however, it is not even common ground that the later contract is intended to supersede the earlier contract, I do not see how it can ever be permissible to exclude reference to the earlier contract…"

96. Rix LJ then considered whether the insurance context was different, and considered counsel's ultimate submission in favour of the suppression of the slip by a policy as a rebuttable presumption, and concluded as follows at [93]-[95]

> "93. Even Mr Flaux came to put his submission in favour of the supersession of slip by policy as a matter of a rebuttable presumption of fact. Having begun by favouring a rule of law, he no longer did so by the end of his submissions. However, I am doubtful about his presumption of fact. **I would prefer to say that it is a question of construction which depends in part, as all such questions do, on the surrounding circumstances.** In the insurance market, however, it may well by now be possible to talk of a general presumption that a policy is intended to supersede a slip.
>
> 94. **In the present case, however, it is not common ground that the policy wording superseded the original slip policy. On the contrary the issue is precisely whether the policy wording was intended to supersede the original slip policy**. As part of that issue it is also debated whether the policy wording is a self-contained policy and whether it matters whether the slip policy is called a slip or a slip policy.
>
> 95. **It is unnecessary to decide this issue of whether the slip policy was superseded by the policy wording, but I do not think it was…**"
>
> (emphasis added)

97. Rix LJ then set out the factual features in that case that had led him to such conclusion. The present case is also one where it is not common ground as to whether the Eldorado 2019 Documentation superseded the prior concluded contract of insurance. I do not consider that that was the parties' objective common intention. The intention was that the issued documentation would accurately reflect the already concluded contact of insurance, and in that regard I am satisfied that it is admissible to look at the 18 April Quote and the correspondence leading up to the concluded contract of insurance. Those show that the parties had agreed London arbitration and New York law and therefore (objectively) intended that any policy wording subsequently issued (and that was contemplated) would reflect such terms. Thus, as I have already concluded and found, I am satisfied that the parties did agree London arbitration and New York law, and that at all times remained their contractual bargain. That contractual agreement is not superseded or trumped by the Eldorado 2019 Documentation.

98. In any event, the debate is a somewhat sterile one for, as acknowledged in *Youell v Bland Welch*, where there is a claim for rectification, the terms of the 18 April Quote and subsequent correspondence leading to the conclusion of a contract of insurance, are admissible in any event in the context of the claim for reformation/rectification, as the Eldorado 2019 Documentation failed accurately to record the concluded contractual agreement to London arbitration and New York law, a claim to which I will now turn.

E. REFORMATION OR RECTIFICATION

E.1 APPLICATION OF THE PRINCIPLES

99. In Section C above, I have found that Markel and CEI entered into a binding contract of insurance at 11.26am on 30 April 2019 on the terms of the 18 April Quote (with the agreed adjustment to premium based on Option 2) and accordingly also entered into a binding arbitration agreement at that time, also providing for New York law to govern the contract of insurance. The policy documentation subsequently issued at 7.38pm on 30 April 2019 failed accurately to record the terms of the parties' agreement in that respect.

100. Accordingly, to the extent necessary (and it may not be necessary given my finding that CEI is subject to a binding arbitration agreement) Markel say that this is a classic case for reformation under New York law or (if English law applies) rectification under English law so that the Eldorado 2019 Documentation accords with the parties' contractual bargain as to London arbitration and New York law.

101. I have already set out the relevant principles in Section B above. The first issue that arises is whether the matter is to be determined as a matter of New York law (reformation) or English law (rectification). Ultimately it does not matter as neither party suggests that there are any material differences in the context of the facts of the present case.

102. Markel submits that the claim is governed by New York law as that is the law applicable to the contact of insurance of which the London arbitration cause forms part (and so is a claim in "reformation"), whereas CEI submits that the claim is governed by English law as the putative law of any arbitration agreement, and so is a claim for rectification. The law applicable to the contract of insurance is, as I have found, New York law and the Eldorado 2019 Documentation does not reflect the terms of that contract of insurance, and so such documentation stands to be reformed – with the result that the matter is to be addressed by reference to New York law. However, if English law were to be applicable it would be a question of rectification, and similar principles apply. I address the matter below both as a matter of New York law and as a matter of English law.

103. In the light of my factual findings as to the parties' agreement upon London arbitration and New York law, I am in no doubt whatsoever that the Eldorado 2019 Documentation does not embody the true agreement of the parties as mutually intended. There was no mistake about the agreement as to London arbitration and New York law but a mistake occurred as a result of a scrivener's error by way of omission to include endorsements corresponding to Special Conditions 1 and 2 as stated in the 18 April Quote (and agreed to by CEI as I have found).

104. CEI submits that it is not possible to establish any sufficiently clear join intention to reform the Eldorado 2019 Documentation, but that is essentially predicated on *"the evidence [not making] good that the parties agreed to include a London arbitration clause"* (CEI's Skeleton Argument paragraph 65), and the evidence does make that good, and I have found that the objective common intention of the parties was to enter into a contract of insurance including a London arbitration clause and they did so – the 2019 Eldorado Documentation simply failed to include such clause by way of endorsement. I am satisfied that the parties shared (objectively and subjectively) the

same intention to include a London arbitration clause and New York law, as reflected in the correspondence with the 18 April Quote and CEI's "BIND ORDER" in response.

105. I am satisfied that there is nothing in CEI's suggestion that CEI had a subjective intent to agree Nevada law. First, there is nothing in Ms Lepori's evidence which tells upon CEI's subjective intention immediately before binding, and no evidence has been adduced in that regard by CEI, with Ms Lepori acknowledging that she had no contemporaneous involvement in that process (and so can give no relevant evidence in that regard). Secondly, Ms Lepori's evidence as to CEI's "preference" is no more than that on the evidence before me (and CEI agreed to arbitration clauses on this very tower placement) and is, in any event, to be viewed in the light of the correspondence subsequent to the 1 April 2019 renewal submission and what CEI did agree. Thirdly, and fundamentally, Ms Gibbons responding on behalf of CEI to the 18 April Quote containing the London arbitration clause and New York law (in Special Conditions 1 and 2) with "BIND ORDER" is consistent only with CEI having a subjective intention to agree the terms of the 18 April Quote including Special Conditions 1 and 2 as to London arbitration and New York law.

106. Applying the principles of New York law that I have identified, I am satisfied and find, subject only to a consideration of the "clean hands" doctrine, that the requirements for reformation under New York law are met, and that it would therefore be appropriate to order reformation of the Eldorado 2019 Documentation to include endorsements corresponding to Special Conditions 1 & 2 as stated in the 18 April Quote, the failure to include endorsements being a "scrivener's error" by way of omission in failing to reflect the mutual intention of Markel and CEI.

107. Equally, if English law is applicable, applying the English law principles in relation to rectification that I have already identified in Section B, and again subject to a consideration of the "clean hands" doctrine, I am satisfied that this is a classic case for rectification, the requirements for rectification being met, there being convincing proof that the Eldorado 2019 Documentation was not in accordance with the parties' mutual intention by reason of the failure to include endorsements corresponding with Special Conditions 1 and 2. The 2019 Eldorado Documentation failed to give effect to the prior concluded contract of insurance which I have found, and equally when the 2019 Eldorado Documentation was issued, the parties had a common intention in relation to the inclusion of endorsements corresponding with Special Conditions 1 and 2 as to London arbitration and New York law, which by mistake, the 2019 Eldorado Documentation did not accurately record, and there was an outward expression of accord (with the 18 April Quote and "BIND ORDER" in response) meaning that, as a result of communication between them, the parties understood each other to share that intention.

E.2 SUBSEQUENT EVENTS AND CLEAN HANDS

108. CEI submits that no relief should be granted because Markel does not have "clean hands" (see CEI's Pleading at paragraph 49.5). In February 2020 Markel provided to CEI's new broker (Aon Bermuda) documentation evidencing the Eldorado Policy which included, amongst other matters, an Endorsement No.9 which reflected Special Conditions Nos.1 & 2 ("the Eldorado 2020 Documentation"). Markel did not refer to the fact that Endorsement No.9 had not been included in the Eldorado 2019 Documentation and had been drawn up in February 2021 to reflect Markel's

understanding of the parties' contemporaneous contractual agreement (and which I have found did represent the parties' contemporaneous contractual agreement in respect of London arbitration and New York law).

109. It is submitted by CEI that Markel has unclean hands in two respects:-

(1) It is submitted that having become aware of the alleged mistake, Markel should have raised it with CEI, but instead (i) behaved disreputably in trying to induce Aon to believe that there was a London arbitration clause in the Policy, but (ii) failed to do so because it did not properly raise the alleged mistake, and instead permitted CEI to sue it in Nevada on the basis of the Issued Wording. Had Markel acted promptly in seeking rectification (and on the assumption that it is entitled to reformation/rectification, which CEI does not accept), it is said CEI would not have sued Markel in Nevada, and therefore would not have been subject to these proceedings.

(2) It is submitted that Markel then presented its application for the Interim ASI on an entirely false basis. First, it is said that it did not properly investigate the underlying facts, consistent with its duty of fair presentation, with the result that it put an incomplete account of how the Policy was concluded and on what terms before the Court. Secondly, Markel submitted that there was a high degree of probability of an arbitration clause so as to justify the Interim ASI, when in fact on the basis of the facts it has subsequently pleaded, there would have been sufficient doubt in the Court's mind that the Interim ASI would not or may not have been granted. Thirdly, in assessing whether Markel has clean hands so as to justify an equitable remedy, it is also relevant that it secured the Interim ASI, as a continuation of the same conduct described above, on a false and/or incomplete basis.

110. Mr Dorsey explains how Endorsement No.9 came about in his witness statement. When he returned to Bermuda from the RMIS conference in May 2019 he did not check the Eldorado 2019 Documentation and so did not realise that Special Conditions 1 & 2 (as would be reflected in an Endorsement) agreed with Marsh by Marsh's acceptance of the 18 April Quote were not included in the Eldorado 2019 Documentation. Thereafter, with effect from 16 February 2020, Eldorado appointed Aon Commercial Risk Solutions as its exclusive broker/agent of record in relation to various insurance policies, including the Eldorado Policy. On 25 February 2020 he received a request from Ryan Davidge of Aon Bermuda, the new broker of record replacing Marsh, for a copy of the executed Eldorado Policy along with the submission documents from the 2019 renewal. Mr Woolridge obtained the requested documents and updated the Eldorado Policy to include Endorsement 9 (dated 30 April 2019 with an effective date of 1 May 2019) which had been inadvertently omitted when the Eldorado 2019 Documentation had been issued on 30 April 2019, and which it is likely Mr Dorsey signed on 25 February 2020 with the complete policy being sent that day to Aon by Mr Woolridge.

111. I accept that evidence, and I am satisfied that those acting on behalf of Markel believed that this was no more than an update of the documentation to include an endorsement which had been inadvertently omitted in order to reflect Special Conditions 1 and 2 to which CEI had agreed (as I have found they had so that such belief was correct). CEI do not plead either bad faith or a lack of good faith, and rightly so as such a serious allegation would not be justified, and could not properly be advanced in a pleading signed by counsel. I reject the suggestion that Markel was acting disreputably or was

trying to induce Aon to believe that there was a London arbitration clause when there was not (there was). It appears that Aon failed to transmit what they had been provided with to CEI. Ignorant of such (correct) documentation CEI proceeded to sue in Nevada. However given CEI's vigorous, but erroneous, denial in these proceedings of the very fact that they had ever agreed London arbitration I consider it less than credible to submit that Markel would have acted any differently had they had sight of the Eldorado 2020 Documentation or had they been told of the need for such an endorsement.

112. I reject the suggestion that Markel had unclean hands as a result of events in February 2020. It cannot be said (and if said ought not to have been said) that Markel had, in the circumstances I have identified, committed serious immoral or deliberate misconduct. Rather I am satisfied that Markel acted honestly in issuing the endorsement that was (rightly) considered to reflect that which had been agreed. Even if it were considered, with hindsight, that it might have been prudent to drawn attention to what had been done, I am satisfied that that would not begin to come close to militating against the granting of equitable relief.

113. As for the application for an interim application for an ASI before Jacobs J, and associated supporting evidence and skeleton argument, it is absolutely plain that all concerned proceeded on the (erroneous) basis that the Eldorado 2020 Documentation with Endorsement No.9 was the relevant contractual documentation, and on that basis everything submitted to the Court is readily understandable. To suggest otherwise would have involved a very serious (and unjustified) allegation of deliberate wrongdoing. In the event the gravamen of what was being submitted to the Court was correct – there is a binding London arbitration agreement as I have found.

114. I reject the suggestion that Markel has unclean hands as a result of the manner in which matters were presented before Jacobs J. Even if it were considered that there should have been greater care taken in investigating the underlying facts, this would, at most, be an error that would not begin to militate against the granting of equitable relief.

115. Nor do I consider that relief should be refused on the basis of alleged delay in not seeking rectification earlier. I am satisfied that Markel's case was advanced when it was reasonably apparent to it, and no inequity arises on the facts of the present case. Markel has always believed the parties had agreed London arbitration, and the Eldorado 2020 Documentation reflecting that was provided to CEI's broker Aon Bermuda before any dispute arose. CEI's stance on the present application makes it clear that CEI's position would be, as it has been, to deny that there was every an agreement to London arbitration.

116. Accordingly, for the reasons that I have given, I am satisfied that it is appropriate to order reformation (or if relevant rectification) of the Eldorado 2019 Documentation to include endorsements corresponding to Special Conditions 1 & 2 as stated in the 18 April Quote, and I so order.

F. FINAL INJUNCTIONS

117. I do not understand CEI to dispute (subject to its repetition of its "unclean hands" submission) that it would be appropriate, on well-established principles, and in the exercise of the Court's discretion, for Markel to be granted final injunctions in the terms

sought. For completeness I will, however, briefly outline the relevant principles which are well-established.

118. The Court has jurisdiction under section 37 of the Senior Courts Act 1981 to make a final injunction to enforce the terms of the Arbitration Agreement *"in all cases in which it appears to the court to be just and convenient to do so"*: see *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889 (UKSC) at [41], [48], [50].

119. The relevant legal principles applicable in an application for an anti-suit injunction are well settled. Where proceedings are commenced in breach of a valid and binding arbitration clause, the presumption is that an injunction will normally be granted unless the other party can show *"strong reasons"* why an injunction should not be granted: see *The Epsilon Rosa* [2003] 2 Lloyd's Rep 509 at 518L *per* Tuckey LJ. As explained by Jacobs J in *Catlin Syndicate Ltd v AMEC Foster Wheeler USA Corp* [2020] EWHC 2530 (Comm) at [36] the "*starting point is that the court will ordinarily act to protect the integrity of a contractual bargain reached between the parties.*"

120. The English court should feel no diffidence in granting an injunction restraining a defendant from pursuing proceedings commenced in breach of an arbitration agreement. As stated by Millett LJ in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96L:

> *"In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution."*

121. Millett LJ continued at 96R:

> *"In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause ... The justification for the grant of an injunction in either case is that without out it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in a given case."*

122. In this regard, an anti-suit injunction is not granted out of fear that a foreign court or tribunal (in this case, the Nevada Court) will wrongly assume jurisdiction (although this can provide a reason why the applicant will be prejudiced if an injunction is not granted) but on the surer basis that the insureds under the Policy promised to resolve disputes only by way of arbitration governed by English law and that damages are likely to be an inadequate remedy: see Steyn LJ in *Continental Bank v Aekos* [1994] 1 WLR 588 at 598.

123. In *The Angelic Grace*, the court was urged not to issue an anti-suit injunction until the Italian court had decided whether or not to accept jurisdiction. Millett LJ held at 96R:

> *"We should, it was submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the plaintiff's application to the Italian Court to stay those proceedings, and all on the ground that it can be safely left to the Italian Court to grant the plaintiff's application. I find that proposition unattractive. It is also somewhat lacking in logic, for if an injunction is granted it is not granted for fear that the foreign Court may wrongly assume jurisdiction despite the plaintiffs, but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign Court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, while to refrain from granting it at this stage would deprive the plaintiff of its contractual rights altogether."*

124. It therefore matters not that Markel could apply to the Nevada Court to decline jurisdiction and/or remove the proceedings to federal court.

125. Although Millett LJ in *The Angelic Grace* said that an anti-suit injunction should be granted unless *"good reason"* is shown why not, Stuart-Smith LJ in *Donohue v Armco* [2000] 1 Lloyd's Rep 579 at [34] (in the context of exclusive jurisdiction agreements) stated that the test is whether *"strong cause"* or a *"strong reason"* is shown not to grant an injunction and *The Angelic Grace* should not be read as detracting from this.

126. Therefore, in circumstances where, as I am satisfied, the Arbitration Agreement is binding, Markel is entitled to an anti-suit injunction unless CEI can show strong reasons to the contrary: see *Donohue v Armco per* Stuart-Smith LJ at [35]. The same sentiments were echoed by Lord Bingham in the House of Lords ([2002] 1 Lloyd's Rep 425) albeit reversing the Court of Appeal on a different point. He stated at [24]:

> *"If contracting parties agree to give a particular Court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in forum other than that which the parties have agreed, the English Court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suiting in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction claim effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it."*

See also Lord Hobhouse at [45]; and Lord Scott at [53].

127. I am satisfied that there is a valid binding London arbitration agreement for the reasons that I have given, and neither strong cause nor strong reason has been shown by CEI as to why I should not grant the relief sought. Whilst the matter is in my discretion, and I accept that conceptually "clean hands" is relevant at this stage, I do not consider that Markel's conduct (as already addressed above) is such as to disentitle them to the relief sought, or render it inappropriate, in the exercise of my discretion, to grant the relief sought. Accordingly I order final injunctive relief in the terms sought by Markel.

128. I trust that the parties will be able to reach agreement on a draft Order for my approval reflecting my judgment and the relief granted, together with any associated matters including costs. Any outstanding matters can be addressed at or following the hand-down of judgment.