



Neutral Citation Number: [2025] EWHC 367 (Comm)

Case No: CL-2023-000760

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

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

Date: 21/02/2025

Before :

Nigel Cooper KC sitting as a Judge of the High Court

Between :

TYSON INTERNATIONAL COMPANY LIMITED

Claimant

- and -

**GIC RE, INDIA, CORPORATE MEMBER
LIMITED**

Defendant

(sued as the sole corporate member for Syndicate
1947 at Lloyd's of London for the 2021 and 2022
years of account)

TIMOTHY KILLEN and JAMES PARTRIDGE (instructed by **Reed Smith LLP**) for the
Claimant
PETER MACDONALD EGGERS KC and TIM JENNS (instructed by **RPC**) for the
Defendant

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 21st February 2025 by
circulation to the parties or their representatives by e-mail and by release to the National
Archives

Nigel Cooper KC:

Introduction

1. This is my judgment on consequential matters arising from my judgment of 21 January 2025 granting TICL a final anti-suit injunction and refusing GIC’s application for a stay pursuant to s.9 of the Arbitration Act 1996 (“the AA 1996”). There are two matters to be determined by the Court:
 - i) The Defendant’s application for permission to appeal.
 - ii) Costs and other consequential orders.
2. Both matters have been determined on paper. In accordance with the agreed timetable:
 - i) GIC served written submissions on 29 January 2025;
 - ii) TICL served its written submissions on 03 February 2025;
 - iii) GIC served its responsive written submissions on 06 February 2025.

Permission to Appeal

3. GIC seeks permission to appeal on two grounds:
 - i) The Court misconstrued the Confusion Clause in the Facultative Certificate.
 - ii) The Court misconstrued the MRCs and Facultative Certificates in concluding that the English Court did not have auxiliary jurisdiction over New York arbitration.
4. The test which the Court has to apply is whether GIC has a real prospect of success in relation to one or both of the grounds of appeal pursuant to the test for first appeals in CPR 52.6(1)(a). GIC does not otherwise suggest that there is some other compelling reason for the appeal to be heard.
5. As GIC submits, the test is the same as the Court has to apply when considering summary judgment; in other words is there a realistic as opposed to a fanciful prospect of success? If an appeal has no real prospect of success, then the Court should prevent a party from pursuing that appeal. The notes in the White Book nevertheless suggest that there is a practical difference in that more appeals are weeded out by this process than first instance claims or defences; CPR 52.6, note 52.6.2. GIC says that, even so, there is no higher burden on a party seeking permission to appeal on a point of construction. If there is a real and not fanciful prospect of the appellant showing that the judge’s construction is wrong, then permission should be granted. This it seems to me is correct but it is relevant when applying the test that the arguments made before me were essentially the same as those made before Mr. Hancock KC, another experienced commercial practitioner, and which he rejected.

Ground 1 – the Confusion Clause

6. GIC supports its application for permission to appeal on this ground on 5 bases:
- i) The clause is an unusual one and the ‘confusion’ language is novel and has not previously been construed by the Courts and there is, therefore, considerable scope for argument about its meaning.
 - ii) GIC’s construction of the clause is perfectly capable of working as a matter of the language of the clause.
 - iii) GIC’s construction is supported by various factors including the factual matrix and commercial common sense:
 - a) The Facultative Certificates are contractual documents intended to supersede the MRCs not merely administrative documents.
 - b) No meaning is given to the term ‘Required Terms’ in the Facultative Certificates.
 - c) Commercially, TICL’s construction leads to a highly implausible situation, namely that by the Confusion Clause, the parties had overridden a detailed New York arbitration agreement contained in the detailed terms of the Facultative Certificates made 9 days after the MRCs.
 - d) The Court’s construction means that some provisions which would not normally be overridden are overridden, e.g. premium payment and cancellation.
 - iv) In TICL v Partner Re at first instance [2023] EWHC 3243 (Comm), Mr. Houseman KC gave permission to appeal on the basis that some issues addressed in his judgment were novel, in terms of absence of precedent and perhaps not so obvious in terms of final resolution. No authority was identified that resembled the contractual matrix presented in this instance. Mr. Houseman KC’s observations are equally applicable in this case.
 - v) At the consequential issues hearing before Mr. Hancock KC, the Judge held that an appeal on precisely this same ground had a real prospect of success.
7. TICL says in response:
- i) The Court’s construction of the Confusion Clause gives effect to the wording of the whole clause whereas GIC’s construction focuses only on the word ‘confusion’ and, contrary to the wording of the clause, seeks to give precedence to the Facultative Certificates over the MRCs.
 - ii) There are no specific industry practices or other bespoke background facts to alter the meaning of the words used. The question is therefore a binary question of contractual construction, which has already been answered in TICL’s favour on three occasions (before me, before Mr. Hancock KC and on the without notice application made to Foxton J).

- iii) As to the linguistic arguments advanced by GIC:
 - a) The word ‘confusion’ is not obscure and the Court was easily able to arrive at the ordinary and natural meaning of the word.
 - b) In context, it is clear that the clause is referring to confusion between the terms of the MRC and the Facultative Certificates.
 - c) The meaning of the clause is clear and questions of commerciality do not change the natural and ordinary meaning of the words used.
- iv) So far as the background factual matrix is concerned:
 - a) The Court recognised that the finding that the Facultative Certificates were contractual documents superseding the MRCs was subject to the effect of the Confusion Clause.
 - b) The application of commercial common sense supports TICL’s position not that of GIC. Many of the specifically negotiated agreed provisions of cover in the MRCs would be lost if GIC were correct as to the construction of the Confusion Clause.
- v) GIC’s reliance on Mr. Houseman KC’s reasons for giving permission to appeal in TICL v Partner Re is misplaced because (i) there was no hierarchy clause under consideration in that case and (ii) the Court of Appeal has now given judgment in that case and, even if obiter, expressed the view that where there is a hierarchy clause a jurisdiction clause in an MRC will prevail over any arbitration agreement in a Facultative Certificate.
- vi) The position is not the same as before Mr. Hancock KC because the same arguments have been heard and rejected again and because before Mr. Hancock, GIC raised the possibility of further evidence on market practice.

8. In response, GIC submits that:

- i) It does not make any difference to the application of the test that the issues of construction have already been considered by two Commercial Court judges and not one.
- ii) TICL’s submissions on contractual construction are largely a repetition of their arguments made at the hearing but do not establish that an appeal has no reasonable prospect of success.
- iii) Mr. Hancock KC was robustly of the view that GIC had a real prospect of persuading the Court of Appeal that his construction of the Confusion Clause was wrong and this view was not influenced by the prospect that further evidence may have been forthcoming.

Discussion

9. While I acknowledge that Mr. Hancock KC may have previously expressed the view that he would grant permission to appeal on ground 1, I do not consider that, in the

circumstances which now prevail, GIC does have realistic prospects of success of persuading the Court of Appeal that this Court was wrong in its construction of the Confusion Clause. I reach this conclusion for a number of reasons. In summary:

- i) It is not submitted that I have erred in relation to the principles of contractual construction which I have applied in reaching my conclusion as to the meaning of the Confusion Clause.
- ii) I accept that GIC's construction of the Confusion Clause is possible but even so I do not consider that it can be said that GIC's construction is sufficiently arguable that it has a realistic prospect of success in persuading the Court of Appeal that the construction reached by this Court was wrong. In this regard, I agree with TICL that GIC's construction of the clause does not give proper effect to the wording of the clause as a whole and also unnecessarily restricts the meaning of the word 'confusion'. While the use of the word 'confusion' may be uncommon in the context of a hierarchy clause, it does not follow that this is in itself a reason to give permission to appeal or that there is any particular difficulty in giving effect to the meaning of the word in the context of the clause as a whole.
- iii) For the reasons outlined in the Judgment at [104] to [108], the arguments based on commercial common sense and context do not provide any reason to give a different construction to the Confusion Clause.
- iv) The comments of Mr. Houseman KC in TICL v Partner Re regarding permission to appeal and the apparent view of Mr. Hancock KC on this ground 1 at the February 2024 Consequentials hearing have both been overtaken by the judgment of the Court of Appeal in TICL v Partner Re [2024] EWCA Civ 363 which settled the contractual status of the Facultative Certificate and also provided at least obiter guidance as to the effect of a hierarchy clause. That judgment was, of course, not available to Mr. Hancock KC at the February 2024 Consequentials hearing because it was only handed down in April 2024.
- v) Although of limited weight, it does seem to me relevant to the question of whether to grant permission to appeal that three experienced Commercial Court judges have now accepted the construction of the Confusion Clause put forward by TICL. In taking this view, I have taken into account that Foxton J. was considering the arguments at a without notice hearing and that the judgment of Mr. Hancock KC was made in relation to interim relief whereas I have granted final relief.

Ground 2 - The Court misconstrued the MRCs and Facultative Certificates in concluding that the English Court did not have auxiliary jurisdiction over New York arbitration

10. GIC submits that the Court's conclusions on this question were wrong because:

- i) The Court failed to give appropriate weight to the principles that:
 - a) There should be no predisposition to find or not find a conflict between the two clauses and that the Court should strive to give effect to the

arbitration clause because of the strong policy in favour of arbitration even if it would deprive the jurisdiction clause of virtually all purposes.

- b) The Facultative Certificates were intended to take effect as a contractual variation and supersede the terms of the earlier MRCs.
- ii) The Court failed in its reasoning at paragraph 114 to refer to and give effect of the decision of the High Court and Court of Appeal in Sul America [2012] EWHC 42 (Comm) and [2012] EWCA Civ 638.
- iii) There are a plethora of cases in which the Courts have read apparently conflicting jurisdiction provisions as providing that the Court has supervisory or auxiliary jurisdiction.
- iv) There is no authority in which rival provisions have appeared in separate contracts or in a contractual variation to the earlier contract.
- v) The Court's conclusion on this question was driven by its conclusion as to the meaning of the Confusion Clause and GIC has real prospects of persuading the Court of Appeal that this Court was wrong on that issue.
- vi) At the February 2024 Consequentials hearing, Mr. Hancock KC reached the clear conclusion that an appeal on precisely the same ground had a real prospect of success.

11. TICL submits in response:

- i) The Confusion Clause is a complete and obvious answer to the second ground of appeal.
- ii) In any event, as a matter of language the competing forum selection provisions are wholly irreconcilable.
- iii) GIC's reliance on Sul America and Surrey CC [2021] EWHC 2015 (TCC) is misconceived.
 - a) On the contrary, the principles laid down in Surrey CC mean that one should not strive to reconcile competing jurisdiction and arbitration clauses when considering the construction and effect of a hierarchy clause.
 - b) GIC's argument base on contractual variation ignores the fact that the variation in question, namely the Facultative Certificate, included a hierarchy clause.
- iv) There is a distinction between the present case and Sul America because there was no hierarchy clause in Sul America. Further, the arbitration agreement in Sul America applied English law to the arbitration agreement only whereas in the instant case the arbitration agreement applies New York law as the substantive law of the contract as a whole.

- v) The present case does not raise a novel factual matrix and so far as the view of Mr. Hancock KC on permission to appeal is concerned, it is notable that in his judgment on interim relief, he concluded that in light of the Confusion Clause GIC's arguments were 'really not sensibly arguable'.
12. In reply, GIC maintains its position that the Court has failed to apply properly the principles in Surrey CC because it has failed to give sufficient weight to the principle that where possible the Court should strive to give effect to an arbitration clause in the presence of a competing jurisdiction clause. It is not therefore a relevant distinction that the contracts in Sul America did not contain an inconsistency clause.

Discussion

13. I refuse permission to appeal on Ground 2 for the following reasons:
- i) As is clear from the Judgment, I had the principles of contractual construction applicable both generally and in relation to competing jurisdiction and arbitration clauses in mind when determining whether the jurisdiction provisions in the MRCs and the arbitration agreement in the Facultative Certificates were irreconcilable and the consequent effect of the Confusion Clause and applied those principles; see paragraphs [64] to [70] and [110] to [115], including the relevant passages from the judgment of Cooke J. in Sul America and of Mr. Alexander Nissen QC in Surrey CC.
- ii) Where the law and jurisdiction provisions in the MRCs provide for the proper law of the contract to be English law and for the courts of England & Wales to have exclusive jurisdiction over the parties for all matters relating to the reinsurance and the arbitration agreement in the Facultative Certificates provides for arbitration in New York and for the arbitrators to apply New York law as the proper law of the contract, there is no sensible or realistic way to read the two clauses together.
- iii) For reasons given above, I have refused permission on Ground 1. Properly construed, the Confusion Clause expresses the parties' intention that in the event of confusion or a conflict the terms of the MRCs, including the jurisdiction provisions, should prevail.
- iv) The Confusion Clause is a relevant distinction between the facts of the present case and the facts of the Sul America decision. Further, in Sul America, while English law was the law of the arbitration agreement, Brazilian law was the proper law of the contract. In the present case the competing dispute resolution provisions each purport to fix the proper law of the contract. There is therefore an irreconcilable conflict not only as to forum but also as to proper law of the contract.
- v) More generally, I do not consider that the reasons put forward by GIC suggest a realistic prospect of overturning my judgment on ground 2 for the reasons set out at paragraph 114 of the Judgment.
- vi) I have not been referred to a transcript of what Mr. Hancock KC may have said in relation to permission to appeal on Ground 2 but in his judgment at [108] to

[110], he rejected GIC's arguments based on there being a *Scott v Avery* clause or the court having a supervisory jurisdiction briefly and in trenchant terms.

14. In relation to ground 2, I have considered separately whether notwithstanding my view that there is no realistic prospect of success, the arguments raised are sufficiently novel that I should nevertheless grant permission to appeal. I have decided that they are not. My decision flows from the application of established principles to the particular contracts before me. It is not suggested that any new point of legal principle arises for consideration.

Conclusion on Permission to Appeal

15. For the reasons set out above, I refuse permission to appeal on both grounds 1 and 2.

Costs

16. TICL seeks its costs assessed on the standard basis of:
- i) The Interim ASI Application and the hearing on 23 October 2023;
 - ii) The First ASI Application and the hearing on 06 December 2023;
 - iii) The consequential hearing on 19 February 2024;
 - iv) Responding to the Set Aside Application;
 - v) Responding to the Stay Application; and
 - vi) The Second ASI Application and the hearing on 18 July 2024.
17. TICL also seeks an interim payment on account of costs in the sum of £310,000.
18. GIC accepts that TICL, as the successful party overall, is entitled to costs on the standard basis and to a reasonable sum by way of an interim payment on account under CPR r.44.2(8). But GIC submits that:
- i) TICL should not recover its costs of the first ASI Application and this is best reflected by awarding TICL 70% of its total costs of the Set Aside Application, the First ASI Application and hearing on 06 December 2023;
 - ii) TICL should recover only 30% of its costs of the consequential hearing on 19 February 2024; and
 - iii) A reasonable sum for an interim payment on account is £180,000 rather than £310,000.
19. The basis on which GIC challenges TICL's recovery of its costs of the First ASI Application and the hearing on 06 December 2023 is that the application in question was for a Permanent Anti-Suit Injunction with associated orders which were only appropriate if the relief granted was final rather than interim. GIC estimates that 20% of the time spent in preparation for and attendance at the 06 December 2023 hearing was spent on the application for final relief. TICL says in response that Mr. Hancock

KC expressly recorded at [1] in his judgment that the application for relief was made on the basis that the interim relief already granted should be made final or should be continued pending the result of any jurisdiction challenge that may be brought by GIC. Second, TICL says that the Order of Mr. Hancock KC expressly provided for the injunction to be final in the absence of GIC applying for a stay under s.9 of the AA 1996. TICL also challenged the reasonableness of GIC's conduct in its approach to the proceedings and disputed that any significant time had been spent in preparation for or at the 06 December hearing on the question of whether relief should be final or interim.

20. I find that TICL should recover its costs of the First ASI Application.
- i) There is no evidence before me to suggest that any significant time was spent either in preparation for or at the hearing on 06 December 2023 on the question of whether the injunction should be final or continued on an interim basis.
 - ii) As Mr. Hancock KC records in his judgment, the application for continued anti-suit relief before him was run on the basis that the relief should be permanent or in the alternative continued on an interim basis pending any jurisdictional challenge brought by GIC.
 - iii) In any event, it is clear that the arguments before Mr. Hancock KC were materially the same as the arguments run before me and his principal reasons for not making a final injunction at that hearing were (i) the intention of GIC to apply for a stay under s.9 of the AA 1996 and (ii) the possibility that there might be expert evidence of market practice which was relevant to the proper construction of the Confusion Clause.
 - iv) I, therefore, conclude that there is no basis on which to refuse TICL recovery of the costs of the First ASI Application.
21. GIC says that TICL should only recover 30% of the costs of the consequential hearing on 19 February 2024 because, it says, the majority of the work done in preparation for that hearing and of the time at the hearing was spent on a jurisdictional challenge by TICL to GIC's application for permission to appeal. TICL disputes GIC's position and says that had GIC engaged properly in correspondence with whether an application for permission to appeal was appropriate in circumstances where the relief was interim and GIC intended to make a further application under s.9 of the AA 1996 no hearing would have been necessary.
22. I find that TICL is entitled to its costs of the consequential hearing on 19 February 2024. The principal issue before Mr. Hancock KC was whether GIC should have permission to appeal and TICL lost on this issue. It may be that time was spent on a jurisdictional question on which Mr. Hancock KC was against TICL but (i) the fact that a party loses on a particular question is not a good reason on its own to deprive that party of costs if they are successful overall and (ii) in any event I have no good evidence before me on which to assess what if any time or cost was incurred on the jurisdictional question.

Interim payment on account

23. TICL claims to have incurred costs in the sum of £508,082 as set out in four Statements of Costs and seeks an interim payment of £310,000, which is about 61% of the total costs said to have been incurred. TICL submits that this is a reasonable sum and less than the sum which is likely to be awarded by the costs judge after detailed assessment. Determining the appropriate amount for an interim payment will depend on the circumstances of the case, including an element of uncertainty arising out of the absence of a detailed assessment, the imminence of the assessment and any difficulty the paying party may face in recovering an overpayment.
24. In circumstances, where I have rejected GIC's challenges to the overall recoverability of TICL's costs in principle, GIC's remaining challenges to the level of interim payment sought by TICL are that:
- i) A typical starting point for payment of an interim payment is 50% of the claimed costs.
 - ii) The rates claimed by TICL in respect of time costs are significantly in excess of London 1 rates designed for 'heavy commercial work'.
 - iii) The gearing of TICL's legal team is unreasonably weighted to the use of Grade A fee earners and there is evidence of duplication between the work done by counsel and the work being done by their instructing solicitors.
 - iv) Various other detailed points of concern over the Statements of Costs
25. It is not my function at this stage to engage in any detailed analysis of TICL's Statements of Costs beyond accepting that it is reasonably likely that there will be deductions from TICL's claimed costs upon detailed assessment and considering whether the costs reveal an approach to the litigation which justifies a particular level of caution on my part as to the costs claimed and the amount of any payment on account; see Argus Media Ltd v Halim [2020] EWHC 1062.
26. So as TICL's costs are concerned, it does seem to me at this stage I should be cautious as to whether TICL will on detailed assessment be able to persuade the costs judge that it is entitled to recover its time costs on the basis of hourly rates which are significantly above the Guideline Rates for London 1. This is particularly the case given the recent guidance from the Court of Appeal emphasising that if a rate in excess of the London 1 Guideline Rate is to be charged to the paying party, there must be clear and compelling justification; see per Males LJ in Samsung Electronics Co. Ltd v LG Display Co. Ltd [2022] EWCA Civ 466 at [4] – [6]. It may well be that on detailed assessment, TICL is found to be entitled to recover its costs on the basis of rates in excess of the London 1 Guideline Rate, (and nothing I say now should be taken as expressing even a provisional view on that question), but in circumstances where TICL seeks a payment on account based on Statements of Costs using such rates, that is a matter which justifies caution on my part as to the level of the payment on account.
27. Taking into account the points discussed above and applying an appropriate degree of caution in reaching my conclusion as to an appropriate figure, I am going to order a

payment on account of £265,000, which is approximately 52% of the costs, which TICL says it has incurred and which is within an appropriate range for a payment on account.

28. So far as when interest at the judgment rate should run on TICL's costs, I accept that this rate should only run from a date three months after the date of my Order to allow time for TICL to produce and GIC to consider TICL's detailed bill of costs; see Involnert Management Ltd v Aprilgrange Ltd [2015] EWHC 2834 (Comm).
29. I am grateful to the parties for their written submissions and have amended the draft Order provided to me in line with the decisions reached in this judgment.