Overseas Union Insurance Ltd v Turegum Insurance Co
[2001] SGHC 147

Case Number : Suit 1664/1999

Decision Date : 22 June 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Liew Teck Huat (Niru & Co) for the plaintiffs; Jeya Putra and Wendy Leong (Joseph Tan Jude Benny Anne Choo) for the defendants

Parties : Overseas Union Insurance Ltd — Turegum Insurance Co

Conflict of Laws – Choice of law – Contract – Governing law of contract – Applicable tests – Express provision – Implied from intention of parties – System of law with which contract has the most real and close connection – Whether English or Singapore law the governing law

Contract – Contractual terms – Arbitration clause – Whether contracts contained arbitration clause

Contract – Formation – Offer and acceptance – Revocation of offer by counter-offer – Protracted documentary negotiations with modification of terms – Whether binding agreement existing between parties

JUDGMENT:

Cur Adv Vult

Introduction

1. The parties are both in the insurance business. The plaintiff company, Overseas Union Insurance Ltd (OUI), is incorporated in Singapore and carries on business as general insurers and reinsurers. The defendant, Turegum Insurance Co (Turegum), is incorporated in the Canton of Zurich but also has an office in London from where it carries on business in the English insurance market.

2. OUI entered the London reinsurance market as a reinsurer sometime in the 1960s. Doing business through underwriting agents in London, Winchester Fox & Co Ltd (Winchester Fox), OUI entered into reinsurance contracts with various insurers, including Turegum, over many years. OUI was not, however, successful as a reinsurer in the London market and by 1985, it had ceased to accept new business due to the tremendous losses it had sustained. It then commenced run-off of all its business.

3. In 1995, OUI received certain claims relating to the reinsurance contracts which it had written with Turegum. Subsequently it wrote to Turegum to open negotiations on commutation of OUI's liability to Turegum under these contracts. Correspondence ensued but progressed in a rather desultory fashion and it was not until late 1998 that the negotiations really heated up. In March 1999, Turegum made an offer to accept a sum of US$220,000 from OUI to commute OUI's outstanding liability. On 21 October 1999, OUI purported to accept this offer. Turegum then denied that the offer was still available for acceptance and insisted that OUI should go to arbitration with it to establish the outstanding amount due to it.

4. This action was commenced by OUI in November 1999 for the following relief:

> (1) a declaration that the reinsurance contracts between OUI and Turegum contained no agreement for parties to refer any disputes to arbitration whether in London or anywhere else;
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> (2) a declaration that OUI and Turegum entered into a binding and conclusive

commutation agreement on 21 October 1999 under which OUI agreed to pay US$220,000 as full commutation of all business transacted under the reinsurance contracts;

(3) a declaration that pursuant to the commutation agreement, the full liability of OUI to Turegum does not exceed US$220,000; and

(4) an injunction to restrain Turegum from commencing or continuing with arbitration proceedings under the reinsurance contracts.

5. Turegum denied that its claims have been commuted. Additionally, it has filed a counterclaim in which it sets out the details of the five reinsurance contracts that Turegum contends exist between itself and OUI and states that, pursuant to these contracts, OUI owed it US$225,590.61 as of May 2000. Among the reliefs Turegum has asked for are:

(1) a declaration that the five reinsurance contracts are valid and subsisting; and

(2) a declaration that each of the five reinsurance contracts contains a valid and binding arbitration clause for arbitration in London.

6. At the time OUI commenced this action, it also filed an application to obtain an injunction to restrain Turegum from proceeding with arbitration proceedings in London. In January 2000, Turegum filed an application for stay of the action on the ground that the parties had agreed to refer all disputes to arbitration in London. Both applications were heard by me in April 2000. I dismissed them and ordered instead that this action proceed on an expedited basis and that two issues be tried first. These were:

(a) whether the parties have reached a commutation settlement under which OUI is to pay Turegum US$220,000; and

(b) whether the parties have agreed to refer all disputes to arbitration in London.

First issue: Was there a commutation agreement?

The facts

7. On the part of OUI, the commutation negotiations were carried on by Mr Yeo Tian Chu, an assistant general manager, and Mr Andrew Tang Ming Leung, a deputy manager. Mr Peter Yap Kim Kee, OUI's general manager, was not directly involved but he did attend a meeting with Turegum in October 1999.

8. As far as its run-off business is concerned, Turegum has placed this in the hands of Claims Management Corporation Ltd (CMCL), a subsidiary of Zurich Financial Services. All matters relating to Turegum's reinsurance contracts with OUI were, at the material times, handled by CMCL. From time to time, CMCL corresponded with OUI using the letterhead of St James Claims Management (St James), one of its trading divisions. The persons involved were Mr Colin Francis Johnson who is employed as a broker accounts manager by CMCL and his assistant, Ms Tracy Gard. Later, in August 1999, one Mr Diarmuid Brennan, then a solicitor whose firm was handling claims on behalf of Turegum, also became involved in the negotiations with OUI.

9. In following the account of the negotiations hereunder, it is important to be aware that there were two claims made by Turegum that were in issue. The first was Turegum's claim for reimbursement under the reinsurance contracts of amounts which it had paid to its own insureds. As these claims came in and were settled, Turegum entered the amounts which OUI should reimburse it in its ledgers as OUI's outstanding indebtedness. The total outstanding from time to time was referred to as the

ledger debt. Paying the ledger debt would not release OUI from future claims arising under the same reinsurance contracts. For that reason, OUI wanted a settlement of all outstanding and potential liabilities and that is what was meant by commutation.

10. The commutation negotiations started with a letter sent by OUI to Turegum on 30 March 1995 in which OUI indicated that it was 'interested to commute all our past assumed business accepted from Turegum'. No figure was mentioned. Mr Johnson sent a neutral reply on behalf of Turegum indicating that correspondence was being reviewed. There were a couple of meetings and some correspondence over the subsequent two years but matters did not progress very far until 27 November 1998 when OUI made the first move towards reaching a commutation by making an offer to commute at US$100,000. On 1 December 1998, Turegum replied stating that it was unable to accept OUI's proposal due to the substantial amount of the balances involved.

11. Further negotiations followed. On 8 February 1999, OUI put forward a figure of US$160,000. Turegum's response, given on 23 February, was that it was 'unable to accept your offer of US$160,000' and to put to OUI its proposal of US$220,000 for a complete commutation. This was the first time that the figure of US$220,000 was mentioned. No time limit was put on this offer. On 10 March, OUI sent Turegum a short fax that referred to the immediately preceding letters and stated 'We can only ask you (sic) kindly reconsider our offer to commute at US$160,000'.

12. On 15 March, St James wrote to OUI confirming that the latter's offer of US$160,000 for 'a complete cut-off of all past business between Overseas Union and Turegum' was not acceptable. The letter went on to refer to the offer of US$220,000 which Turegum had put forward earlier and stated that this was an extremely generous offer. It was further stated that as OUI was currently able to afford only US$160,000, that amount would be accepted in settlement of the existing ledger debt but not for future liabilities. The last sentence of the letter read 'We await your response on our offer of US$220,000 as a full and final settlement to Overseas Union's liabilities on all Turegum policies or the settlement of US$160,000 for the ledger debt'.

13. OUI replied on 17 March. Its letter mentioned the economic difficulties facing the region and ended as follows:

> 'Although we have genuine intention to commute our liabilities as indicated by our earlier efforts, there is no guarantee that we can hold on to our present offer to you in the weeks ahead as there is no sight of the recession in Singapore and economic crisis in the region ending anytime soon.
>
> Under the present circumstances, we trust you will re-consider our latest offer without delay. If you choose to arbitrate, you also need to consider that your arbitral award would be valueless after spending lengthy time and huge costs over the action in London and enforcement in Singapore.'

14. Turegum's response was immediate. It reiterated its stand that the offers it had received from OUI were not acceptable as the value was not enough for full release. It stated that its willingness to accept US$160,000 in full payment of the ledger debt was a sign of its understanding of the economic crisis since Turegum did not normally allow discounts on paid loss balances. If that payment was made, the question of finality could be revisited when the effects of the economic crisis were known. As an alternative, the parties could continue with the current discussions to see if they could 'complete a commutation that is acceptable to the both parties'. The letter ended by asking OUI to re-examine the recent correspondence to see if it could forward to Turegum 'an offer that will bridge the difference'.

15. OUI wrote again on 23 March. Its letter recapitulated the various offers made by OUI ending with its offer of US$160,000 made on 8 February and stated that OUI generally wanted to settle the issue amicably. The letter did not contain any increased offer.

16. Little happened for the next few months. There was apparently a telephone conversation on the matter between Mr Yeo and the Singapore employee of a company associated with Turegum. Nothing, however, came of that. The next development was a telephone conversation between Mr Johnson and Mr Yeo. Mr Johnson originally stated that this conversation had taken place in early September 1999 but later, after discovering an e-mail which he had written, he revised the date of the conversation to 26

August 1999.

17. The parties give varying accounts of this conversation. According to Mr Johnson who placed the call from London, it was a last ditch attempt to get a sensible response from OUI. His evidence in his first affidavit was that although Turegum at first offered to commute at US$220,000, Mr Yeo continually rejected this offer and stuck to his original counter-offer of US$160,000. Mr Johnson then told Mr Yeo that if that were the case any offer of commutation was withdrawn and he would start legal proceedings to recover the debt. Mr Yeo, in his affidavit, stated that Mr Johnson had reiterated that Turegum's offer to accept US$220,000 was reasonable and he urged Mr Yeo to consider it seriously and accept it to achieve commutation, otherwise Turegum might have to commence recovery proceedings. Mr Yeo asserted that far from withdrawing the offer, Turegum expressly maintained it and he was still hopeful that Turegum would relent and reduce the offer.

18. In early October 1999, OUI received a letter of demand dated 5 October from Diarmuid Brennan & Co, solicitors for Turegum. Attached to the letter was a schedule containing details of the contracts pursuant to which Turegum considered OUI to be indebted to it together with the relative balances then due and payable. Five contracts were mentioned and the total balance outstanding for these as at 30 September 1999 came up to US$236,780.14. OUI was given notice that unless payment in full was received by Turegum by 18 October it would commence arbitration proceedings.

19. On 7 October, OUI sent St James a fax proposing a meeting between the parties in London on 15 October 1999. St James agreed and the meeting duly took place. OUI was represented by Mr Peter Yap, Mr Yeo and Mr Tang while Ms Gard and Mr Johnson attended on behalf of Turegum. Mr Brennan was also there, at Mr Johnson's request. The parties have diametrically opposite versions of certain salient events that occurred at the meeting.

20. Mr Yeo's version is that he had suggested the meeting as OUI was making a visit to some business associates in Europe and considered it would be a good idea to have a final discussion with Turegum in London. Mr Yeo's hope was to persuade Turegum to reduce its existing offer. He said that Turegum's approach was that if OUI did not accept its offer of US$220,000 and reach a settlement it would commence arbitration proceedings. It was not prepared to consider the various alternative proposals OUI had made including its offer of US$160,000. It was clear to him that if OUI did not agree to commute at US$220,000, it ran the real risk of facing legal proceedings. Turegum certainly did not withdraw its offer to commute at the meeting.

21. According to Mr Johnson, at the meeting he told Mr Yap that Turegum was not prepared to commute for US$160,000 and that Turegum's offer of US$220,000 had been withdrawn in the recent telephone conversation with Mr Yeo and that the previously threatened arbitration proceedings would follow. Mr Yap, according to Mr Johnson, seemed surprised at this news and said more than once that he thought it a great pity that the offer had been withdrawn and that he wished he had the opportunity to re-negotiate with Turegum. Mr Johnson requested that OUI settle its debt. Mr Yap's response was that he was only empowered to commute the OUI book of business and to make one settlement with cedants. Mr Johnson told Mr Yap that if OUI paid a substantial portion of its ledger debt, Turegum would be prepared to re-evaluate a commutation price. The meeting ended with no agreement in place.

22. Turegum's deadline for payment expired on 18 October. On 20 October two things happened. First, Mr Yeo sent a letter to Diarmuid Brennan & Co regarding Turegum's claims. In it he stated that as he had just returned from an overseas trip and his colleagues would only return the next day, OUI needed time to look into Diarmuid Brennan & Co's letter of 5 October 1999. He went on to say that Turegum's claims were then being looked into and that OUI expected to complete its task in three weeks' time. Secondly, Diarmuid Brennan & Co sent OUI a letter giving it written notice that as no payment had been received, Turegum was commencing arbitration proceedings against OUI in respect of the contracts of reinsurance. Both letters of 20 October were transmitted by fax.

23. On 21 October, OUI sent a fax directly to St James which read:

> 'Commutation Proposal
>
> We refer to the above in respect of which we have given much thought.

> Having regard to the fact that this matter has taken some time and the actual difference between our respective positions is not significant, and in view of the relationship, we have decided to accept your offer contained in your open fax of 15 March 1999 of US$220,000 in full and final settlement of all Overseas Union Insurance's liabilities on Turegum's contracts. By this fax, we confirm acceptance of that offer.'

In court, Mr Yeo maintained that at the time he sent out the above letter, he had not seen Diarmuid Brennan & Co's notice of arbitration of 20 October.

24. Mr Johnson responded immediately to OUI stating that it was aware that Turegum's offer to commute for US$220,000 'was withdrawn as Overseas Union continually maintained that they were unable, due to their financial situation, to increase their offer of US$160,000 despite our efforts to compromise'. OUI's reply, sent six days later, was that as far as it was concerned, the offer to commute at US$220,000 remained capable of acceptance which was what OUI did on 21 October 1999. By virtue of OUI's acceptance there was a concluded agreement. This letter was signed by Mr Yap.

25. The above position was reiterated by OUI when it came to file its Statement of Claim in these proceedings. In para 5 OUI averred that by an open facsimile message dated 15 March 1999 sent to it by St James as agents of Turegum, Turegum made or maintained an offer of commutation of US$220,000. In para 6 OUI contended that by its letter of 21 October 1999 sent to St James it had accepted the commutation offer as set out in the open facsimile message of 15 March 1999.

26. In its defence, Turegum strenuously denied that its commutation offer of 15 March 1999 was still open for acceptance on 21 October that year. It gave particulars of several alternative dates when the offer had been rejected by OUI and/or withdrawn by Turegum. These dates as indicated at para 15 of the re-amended defence are:

> (1) 17 March 1999 – the allegation is that by its fax of that date to St James, OUI rejected the offer contained in the 15 March fax from St James and that St James' fax of the same day was a counter-offer to settle the ledger debt only at US$160,000.
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> (2) 23 March 1999 - the allegation is that by repeating its previous offer to commute at US$160,000, OUI rejected Turegum's offer to settle the ledger debt at that sum and therefore the only outstanding offer on this date was OUI's.
>
> (3) September 1999 - the allegation is that during the telephone conversation between Mr Johnson and Mr Yeo, any offer to commute was withdrawn by Mr Johnson on Turegum's behalf (NB: in evidence the date of this conversation was changed to 26 August).
>
> (4) 5 October 1999 - the allegation is that by causing its solicitors to send the letter asking OUI for payment of the ledger balance due, Turegum had impliedly withdrawn any alleged commutation offer.
>
> (5) 15 October 1999 - the allegation is that at the meeting between the parties that day, any alleged offer to commute was expressly withdrawn by Mr Johnson.
>
> (6) 20 October 1999 - the allegation is that the notice of arbitration sent out by Turegum's solicitors was an implied withdrawal of any alleged offer to commute that then existed.

27. On the above facts, the sub-issues that arise are as follows:

(1) what was the status of Turegum's offer of 15 March 1999 as at end March 1999;

(2) what happened during the telephone conversation of 26 August 1999 and what was the situation as at 5 October 1999;

(3) what happened at the meeting of 15 October 1999; and

(4) on 21 October 1999, was there an offer for US$220,000 by Turegum which was capable of acceptance by OUI?

Analysis of the correspondence between 8 February and 23 March 1999

28. The legal principles to be applied when one is construing the effect of negotiations between parties are reasonably well established. They are set out in well known texts such as Treitel, The Law of Contract (10th Ed) and Cheshire, Fifoot and Furmstons' Law of Contract (2nd Singapore and Malaysian Ed by Professor Andrew Phang). There is also a useful discussion on the principles applicable to protracted negotiations in the recent case of Projection Pte Ltd v The Tai Ping Insurance Co Ltd [2001] 2 SLR 399. The test for determining whether the parties have reached agreement is usually to ask whether an offer has been made by one party and whether that specific offer has been accepted by the other. Alternatively, in a situation where there have been protracted documentary negotiations with much modification of terms, it may be more useful to look at the whole correspondence and decide whether, on its true construction the parties had agreed to the same terms (see the Projection Pte Ltd case). In either case, an objective test is applied to decide whether the parties have reached agreement. This means that an apparent intention to be bound may suffice, that is to say, a party may be bound if his conduct is such as to induce a reasonable person to believe that he intends to be bound even though he actually has no such intention. If, however, the offeree is aware that the offeror did not have an intention to be bound then an acceptance by the offeree will not bind the offeror.

29. An offer, once made, may be terminated in various ways. One of these ways is by rejection. As Treitel states (at p 41) an offeree who attempts to accept an offer on new terms, not contained in the original offer, may be rejecting the original offer and instead making a counter-offer. Such offeree cannot later accept the original offer. To accept an offer, the offeree must, as Professor Phang states (at p 96), 'unreservedly assent to the exact terms proposed by the offeror. If, while purporting to accept the offer as a whole, he introduces a new term which the offeror has not had a chance of examining, he is in fact making a counter-offer.' When such a counter-offer is made, no contract will result unless the counter-offer is accepted by the offeror.

30. In the present case, just prior to 8 February 1999, the situation was that Turegum had made it clear that it would not commute at OUI's price of US$100,000. This prompted OUI to increase its offer to US$160,000 on 8 February. That even this increased amount was unacceptable was made plain by Turegum on 23 February when it put forward its proposal of US$220,000 for a complete commutation. OUI's reply letter of 10 March stating that it could only ask Turegum to re-consider the offer of US$160,000 was in effect a counter-offer which had the effect of rejecting the US$220,000 offer.

31. The vital letter of 15 March was Turegum's response to OUI's counter-offer. It expressly rejected OUI's counter-offer but went on to put forward two alternative counter-proposals. These were:

(1) that OUI could settle the ledger debt by paying US$160,000; or

(2) that OUI could commute by paying US$220,000.

32. As of 17 March, when OUI responded, the above offers were the ones on the table. This letter is set out in para 13 above and the issue that arises is whether on its true construction the letter was a rejection of the 15 March offer. OUI's position is that it was not. It says that its conduct amounted to a 'request for information' in the sense used in Stevenson v McLean [1880] 5 QBD

346.

33. In the Stevenson case, the defendant made an offer to sell iron to the plaintiffs at 40s per ton nett cash on Saturday, which offer was open until the following Monday. On Monday morning, the plaintiffs telegraphed the defendant: 'Please wire whether you would accept 40 for delivery over two months, or if not, longest limit you would give.' The defendant contended that this telegram was a rejection of his offer and a new proposal on the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation. The court held that the telegram ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that consequently the defendant's offer was still open when the plaintiffs accepted it before the close of day on Monday. Lush J observed that the sender had testified that he had sent the telegram as an inquiry, expecting an answer for his guidance and that this was the sense in which the defendant ought to have regarded it. He noted that there was no counter-proposal, nothing specific by way of offer or rejection but a mere inquiry which should have been answered and not treated as a rejection of the offer.

34. In our case, there is nothing in OUI's letter of 17 March which can be construed as an inquiry. Instead it was a reiteration of OUI's previous offer of US$160,000 and an indication that in view of the economic crisis in the region, OUI might not be able to hold on to that offer in the coming weeks. The letter went on to ask Turegum to 're-consider' OUI's offer without delay. OUI was not asking for guidance. What it wanted was for Turegum to settle on its terms. It was not prepared to settle on Turegum's terms. In my judgment, this fax was a rejection of the offer of 15 March and a counter-offer of OUI's proposal.

35. OUI submitted that notwithstanding the tenor of OUI's letter of 17 March, Turegum continued to treat its offer of 15 March as being open. In this respect, OUI relied on St James' reply of 17 March. That letter did not expressly repeat the commutation offer of US$220,000 although it repeated the offer to accept US$160,000 as full payment for the ledger debt. OUI, however, relies on the sentence which stated that 'we believe that Turegum has already allowed concessions to Overseas Union that are not given to other reinsurers as we have commenced a commutation evaluation without receiving any ledger debt and we are giving you 66% discount on the case reserved and 54% on the projected price'. It pointed out that this sentence justified the offer of US$220,000 in the present, continuous tense and submitted that such language was consistent only with the offer remaining open for acceptance.

36. The final paragraph of the letter is also significant. In this, St James suggested that the parties continued with their then current discussions to see if they could reach a commutation that would be acceptable to both of them and went on to ask OUI to re-examine all the recent correspondence between the two companies to see if it could forward to Turegum 'an offer that will bridge the difference'. By referring to 'the difference', St James could only have been referring to the gap between the US$160,000 put forward by OUI and the US$220,000 which Turegum wanted for a full commutation. There are two possible interpretations to the suggestion regarding bridging the difference: on the one hand St James could mean a figure in between the ones already on the table but, on the other, it could mean the figure of US$220,000 itself. I incline to the latter view since St James had gone to some trouble in the previous paragraphs to explain how by suggesting US$220,000 Turegum had already given OUI an exceptional concession and had also observed that the parties were close to a solution 'but for a small shortfall in the price required'. This being the case, I construe the final paragraph of the letter as being a renewal of the offer of US$220,000.

37. I must now consider the effect of OUI's reply of 23 March. The material portions of this letter are, in my view, the following:

> 'To recapitulate, our commutation offer of US$100,000 was made to you on 27 November 1998 and it was increased to US$130,000 on 20 January 1999. On 8 February 1999, our offer has been increased further to US$160,000 or 160% over our initial offer. You should understand that OUI is genuine to settle the issue amicably.
>
> Please also bear in mind that our run off position and affordability to pay are made worse in the current recession in Singapore and the current regional economic crisis. The Singapore Dollar has depreciated significantly against US Dollar and the British Pound. In these circumstances, we have stretched our

> efforts even further as mentioned above and you should appreciate that this gesture is a big step taken by us to reach a final settlement.'

38. What emerges very strongly from the foregoing is OUI's unwillingness at that time to budge by even a dollar. It adhered to its position. It did not increase its offer at all. Instead, it wanted Turegum to appreciate its previous steps of jumping from US$100,000 to US$130,000 to US$160,000 and to show this appreciation by accepting that offer. In my judgment, OUI was plainly rejecting Turegum's position and reiterating its own. As such, as at 23 March, Turegum's renewed offer had been terminated by rejection. On any construction of the situation, it was clear that no agreement had been reached as of that date.

The telephone conversation and subsequent events

39. The next development was the telephone conversation between Mr Yeo and Mr Johnson. At the beginning of that conversation there was, as I have found, no offer on the table from Turegum. Thus, Mr Johnson's evidence that he offered to commute at US$220,000 is evidence of a new offer put forward orally by Turegum at that time. The issue here is whether that new offer was withdrawn during the course of the conversation, as Mr Johnson averred, or whether it remained open thereafter, which was Mr Yeo's position.

40. Before dealing with the contents of the conversation, I must deal with the submission of OUI that the evidence given by Turegum's witnesses as to the withdrawal of the offer on 26 August cannot be admitted because it was not pleaded. In the defence, the date of the telephone conversation and consequently of the withdrawal was stated to be 5 September 1999. This date was not a source of dispute. OUI accepted that there was a conversation between Mr Yeo and Mr Johnson and, in its reply and defence to counterclaim, also referred to this conversation as having taken place in September 1999. When, in the course of trial, Mr Johnson retrieved an e-mail message that he had sent to his superiors on 26 August 1999 referring to the conversation with Mr Yeo, and therefore adjusted the date of the conversation, OUI did not put forward any other evidence of its own to suggest that the adjustment of the date was incorrect. Nor did it suggest that there had been more than one conversation between the parties during that period. As far as I am concerned, the exact date of the conversation is not material since it was not in dispute and whether it took place in August or September it occurred prior to the important events of October 1999. What was material and what was clearly in issue by reason of the pleadings was what happened during the conversation. I must therefore reject the submission as to the inadmissibility of the evidence on this latter issue simply because the pleaded date was 5 September 1999 and not 26 August 1999.

41. Mr Yeo's affidavit evidence was that during the telephone conversation Mr Johnson had reiterated that Turegum's offer to accept US$220,000 was reasonable and he urged Mr Yeo to consider it seriously and to accept it to achieve a commutation. Otherwise, he might have to commence recovery proceedings. Mr Yeo stated that far from withdrawing the offer, Turegum had expressly maintained it. Under cross-examination, Mr Yeo said that during the conversation he had repeated OUI's offer of US$160,000 and asked Mr Johnson to reduce Turegum's figure. Mr Johnson had responded by stating that he would refer the matter to his board of directors. Mr Yeo agreed that this fact had not been mentioned in his affidavit.

42. Counsel for Turegum made much of the fact that Mr Yeo had stated in court, for the first time, that Mr Johnson had agreed to refer the matter to his directors. Counsel submitted that it was odd that Mr Yeo had mentioned that OUI remained hopeful that Turegum would relent and reduce its offer but omitted evidence as to the reason as to why it was hopeful ie that it was hopeful because Mr Johnson had said that he would talk to his board about reduction of Turegum's offer. Counsel further submitted that since it was OUI's case that Turegum's offer to commute at US$220,000 subsisted all the way from March 1999 to October 1999, if Mr Johnson had indeed said in August 1999 that he would refer to the board about reducing this offer, this evidence would have been included in Mr Yeo's affidavit. These are valid points and it may be that Mr Yeo was, by mentioning the reference to a board meeting, trying to embellish his evidence. That does not, however, make all of Mr Yeo's evidence on the contents of the conversation untrue.

43. On the other hand, there is also some doubt about the evidence by Mr Johnson in that having, in a last ditch attempt to

settle the matter, renewed the US$220,000 offer over the telephone, he had then withdrawn it when Mr Yeo stuck to his original counter-offer of US$160,000. What was interesting here was that in his first affidavit, at the time when Mr Johnson placed the conversation in September, he had stated that by September he had obtained certain information which convinced him that OUI had misled Turegum about its financial status. Mr Johnson said that armed with this knowledge, he was determined to recover all outstanding debts from OUI. He was angry that Turegum had been misled and had nearly entered a commutation that would not have been to its benefit. The negotiations from then on were aimed at getting all Turegum's money back, and certainly not at completing a commutation. This evidence, it seemed to me, was included in the affidavit to bolster his assertion that he categorically withdrew the oral offer immediately it was rejected.

44. During the course of the evidence, however, it became clear that in August 1999 Mr Johnson had not had the financial information to which he referred in his affidavit. When he called Mr Yeo therefore, there was no reason for him to be angry with OUI. Accordingly, it is unlikely that his attitude when he spoke with Mr Yeo was that Turegum should get all its money back from OUI and to accept anything less would mean that OUI had fooled Turegum. There is further support for this conclusion from the e-mail that Mr Johnson sent to his superiors on the commutation negotiations on the same day as the conversation took place. In that he said:

> 'I have now spoken to Overseas Union (today) in a final attempt to negotiate a commutation within the price range (US$170,000 – 255,000) as previously agreed by the TMM. I have spoken to Diarmuid Brennan and we will send a letter to Overseas Union (again) rejecting their offer of US$160,000 and reiterating our final offer of US$220,000 which is available for the next 7 days, otherwise we stop negotiating for a commutation settlement and commence arbitration proceedings.'

In the event no further letter was sent to OUI because the next day Mr Johnson's superiors informed him that commutation negotiations should cease and Turegum should go to arbitration. The tone of the e-mail is, however, telling. It is not the tone of an angry man. It is a tone of a man who is trying to achieve a settlement and who is still willing to accept the earlier figure which had been proposed on the basis of Turegum's belief in the financial difficulties that OUI had said it was facing. In court, Mr Johnson admitted that he had had authority to settle the matter at US$220,000 from March 1999 right up to 27 August 1999. The e-mail shows that he was still prepared to use that authority. It does not show that the offer was no longer acceptable or that it had been categorically withdrawn.

45. It is also significant that the correspondence from Turegum after OUI's acceptance of 21 October did not mention the oral withdrawal. Whilst there was an assertion that the offer had been withdrawn in Mr Johnson's letter of 21 October, there was no mention in that letter of the telephone conversation of 26 August nor any assertion that the withdrawal had been communicated during that conversation. A month later, a letter was written by Diarmuid Brennan & Co to OUI's solicitors in which various dates were asserted on which the offer was said to be withdrawn. The alleged oral withdrawal during the telephone conversation was not mentioned. Instead, the only oral withdrawal referred to was that allegedly made during the meeting of 15 October. Further, in Mr Brennan's affidavit of evidence in chief, he was silent on any oral withdrawal which allegedly took place in August or September 1999 although he testified as to having been informed about it contemporaneously by Mr Johnson. Mr Brennan did agree that the oral withdrawal was an important event. His explanation for not mentioning it was that Mr Johnson was giving an affidavit about it.

46. OUI's submission was that Mr Johnson's evidence on the withdrawal of the offer was unreliable because he was trying to work out what happened backwards. Counsel pointed to the fact that he had thought that the conversation was in September and his evidence suggested that the report he had obtained on OUI (referred to as the DTI report) was ready by then. Putting the two together he claimed in para 27 of his affidavit that 'Armed with this knowledge (from the DTI report) …' he had called Mr Yeo. In truth, however, it was submitted that he did not remember and therefore could not claim that he withdrew the offer on 26 August. Having located the e-mail after making the affidavit, he realised that his mandate to negotiate expired on 27 August and therefore assumed subsequently that he must have withdrawn the offer on 26 August.

47. This submission seems to me to be a reasonable interpretation of the course of events. I think that having renewed the offer, Mr Johnson warned Mr Yeo that if it was not accepted Turegum would start arbitration proceedings but that he did not expressly withdraw it during the course of the conversation. Since he wanted to move things along, he suggested to his superiors thereafter that a letter be written with a specific time frame for acceptance of the offer so that at the end of that time period, Turegum would know where it stood and would be able to act accordingly. He did not do anything further after being told that his superiors no longer wanted to commute but must have had some doubt as to whether his offer was in existence. He therefore took care to assert at the meeting in October that he had previously made it absolutely plain that the US$220,000 offer no longer stood.

48. The finding as to the continued existence of Turegum's offer after 26 August leads on to the next issue which is whether that offer was impliedly withdrawn by the notice which Diarmuid Brennan & Co issued on 5 October 1999 telling OUI that unless payment of the balance due on five contracts was made in full by 18 October 1999, arbitration proceedings would be commenced. Turegum pointed out that this letter had to be contrasted with the previous negotiations wherein the parties had been negotiating to settle all past business between them which included the five contracts mentioned in the demand letter. It submitted that the letter of demand was entirely inconsistent with a continuing intention to enter into an agreement on the terms previously proffered and that after it was made, OUI could not, objectively, have believed that the offer was still in existence to be accepted. In any event, by causing this letter of demand to be sent, Turegum had withdrawn and/or revoked any existing offer to commute.

49. I accept the above submission. The maker of an offer is free to withdraw it at any time before it is accepted. Notice of the withdrawal must be given and must be actually reach the offeree to be effective. It is not necessary, however, that the notice of withdrawal be explicit. It is enough if the offeree is given information which would show that the offeror has changed his mind and no longer wants to proceed with the offer. This information need not even come directly from the offeror. In this case, the instructions which Turegum gave its solicitors to make a formal demand for the balance due and to give notice that arbitration proceedings would be commenced if that demand was not met were clear evidence that Turegum no longer wished to settle its claim. This intention was communicated to OUI by Diarmuid Brennan & Co's letter. OUI received the letter and although its officers stated that they did not regard the letter as a revocation of the offer but simply as an attempt to put pressure on them to settle, this assertion was belied by their reaction which was to immediately arrange a meeting with Turegum. Mr Tang admitted that OUI's letter to Turegum of 7 October was the first time that OUI had shown an interest in meeting Turegum on its proposed visit to Europe. I consider that OUI had been content to wait on events until it received the letter of demand. It then realised that matters had reached a serious point and that drastic action had to be taken to prevent arbitration. Even if I am wrong in my analysis of the belief held by OUI's officers, I consider that an objective person would have realised from the letter that Turegum was no longer minded to settle the claim on the terms previously put forward.

The 15th October meeting

50. My finding is that at the start of the meeting on 15 October, no offer existed. OUI did not take that view. Mr Yeo's evidence-in-chief was that Turegum's approach at the meeting was that if OUI did not accept the offer of US$220,000 and reach a settlement, it would commence arbitration proceedings. Turegum may have been rather doubtful as to the situation at the start of the meeting as, according to the evidence of its three witnesses who were present, Mr Johnson felt it necessary to state explicitly during the meeting that the offer of US$220,000 was off the table entirely.

51. Mr Brennan gave evidence that Mr Peter Yap did most of the talking on behalf of OUI during the meeting. Mr Yap who started talking first proceeded to recapitulate the negotiations and noted what he thought was each party's respective position: that Turegum had offered US$220,000 and that OUI had offered US$160,000, and asked where parties should progress to. It was at this point that Mr Johnson told Mr Yap about the telephone conversation and said that Turegum's offer to commute was off the table. He then told OUI that it had to pay the ledger debt first, before any further negotiations to commute could take place. It appeared to Mr Brennan that Mr Johnson's assertion that the offer to commute had been withdrawn caused concern to OUI and that Mr Yap was surprised to hear it. Mr Yap subsequently informed Turegum that he was not authorised to do anything

except to commute, that is to say, he had no authority to settle the ledger debt. Mr Yap then expressed regret at not having accepted the offer to commute at US$220,000. Mr Brennan's evidence was that the meeting ended with no agreement having been reached and with no commutation offer in existence.

52. I am inclined to accept Mr Brennan's account of the meeting. In the first place, it is consistent with the evidence given by Mr Johnson and Ms Gard. Secondly and more importantly, it is substantiated by hand written notes that Mr Brennan took during the course of the discussion. I accept those notes as being contemporaneous and see no reason to doubt their contents. Those notes are also supported by an 'Arbitration Report' prepared by Mr Brennan on 19 October in which he referred to the 15 October meeting and stated that OUI's representatives 'made no meaningful offer to pay beyond their original offer of US$160,000 though it was apparent that they wished they had accepted the US$220,000 that had been on offer'.

53. I should state that I am not as convinced of the accuracy of the typed written memorandum prepared by Ms Gard some months after the meeting and which purported to be a sequential account of what occurred. In my view, that memorandum was a reconstruction of what Ms Gard thought, after discussion, had happened at the meeting. It was prepared after it was clear that the events of the meeting were hotly disputed. At this stage, it is difficult to de-construct the memorandum so as to ascertain what part of it was written from her actual memories.

54. Thirdly, the evidence that Mr Johnson stated that the offer of US$220,000 was off the table was consistent with the documentary evidence produced by Turegum showing that after 26 August 1999, Mr Johnson's authority to commute was withdrawn and that his superiors wanted to proceed with arbitration and thought that they should get much more than US$220,000 from OUI. All Turegum's actions thereafter were aimed at this result. When the meeting started Mr Johnson knew the attitude of his superiors. By that time, he had also seen the DTI report and therefore would have believed that OUI was in a stronger financial position than he had thought earlier. There was no reason for him to maintain the offer of US$220,000 and every reason for him to make it clear to OUI that Turegum wanted more.

55. Overall, I found the evidence given by Turegum's witnesses as to the contents of the meeting to be coherent and convincing. The evidence given by OUI's witnesses on the same issue, however, was not as persuasive. When asked the crucial question of whether Mr Johnson had confirmed at the meeting that the commutation offer was withdrawn, Mr Yeo's response was equivocal. He said 'I did not recall that there was such a confirmation'. Why could he not have given a straight answer in the negative since that was OUI's position? As it stands, it is not Mr Yeo's evidence that Mr Johnson did not confirm at the meeting that the offer was withdrawn. This lapse in memory contrasted with his seemingly flawless recollection of other matters that occurred at the meeting for example, that Mr Johnson had stated that OUI's final offer of US$160,000 was rejected; and that Mr Yap did not respond that OUI had lost a court action and what was stated in its audit accounts was not a true reflection on recovery.

56. There were other implausibilities in Mr Yeo's evidence. He had testified that in asking for the meeting OUI was making a last ditch attempt to resolve the matter. Having said that he then stated that none of OUI's representatives attending the meeting had had any prior discussion amongst themselves on the strategy to be adopted for the meeting. It is extremely difficult to believe that they were prepared to attend the meeting and have final discussions without any previously worked out plan of action. There must have been such a plan since Mr Yeo, as he admitted, knew after the telephone conversation that US$160,000 would never be accepted by Turegum.

57. Mr Yeo also testified that he had no figure in mind that he hoped to persuade Turegum to agree to when he went for the meeting. However, he then said that at the back of his mind, he had been considering a figure of US$190,000 in order to close the gap. Yet, he wanted me to believe that despite knowing he had to offer more in order to interest Turegum, when it came to the point he had simply asked it to reconsider US$160,000.

58. Mr Tang's evidence was that OUI's purpose in attending the meeting was to test Turegum's bottom-line. In some correspondence it had hinted that it was prepared to move down from US$220,000 so OUI had gone for the meeting to test Turegum's determination. But, if this was in fact the case, OUI should have attempted to put forward its alternative figure for Turegum's consideration. This was especially so since Mr Yeo is supposed to have had in mind a figure of US$190,000. Yet, this

was not done.

59. OUI's conduct as related by its witnesses does not make sense to me. There was no point in arranging a meeting in London with Turegum simply to repeat an offer that had consistently been rejected by Turegum. As at 15 October, OUI must have thought that since the figure of US$220,000 had not been expressly withdrawn during the telephone conversation, it could, with the personal skills of its general manager thrown in, still persuade Turegum that it would be better to accept that amount than to go to the expense of conducting arbitration proceedings. The OUI representatives must have gone to the meeting with that intention but Mr Yap must have been thrown off course when Mr Johnson said very firmly that that figure was no longer acceptable and therefore, no figure was put forward by OUI during the meeting.

60. I should also state here that I am drawing an adverse inference from the failure of OUI to call Mr Yap as a witness. No reason was given to me as to why Mr Yap could not be called. As far as I knew, he was still holding his position at OUI at the time the hearing took place. Mr Yeo tried to explain away OUI's failure to call Mr Yap by stating that he had only made one insignificant comment, ie that agreement could not be reached, just when they were about to leave the meeting room. Upon further cross-examination, however, Mr Yeo changed his evidence and asserted that Mr Yap had expressed regret that the gap could not be bridged at the meeting. That comment was more in line with the evidence given by Turegum's representatives.

61. It is not possible to believe, as OUI would have me do, that Mr Yap, the most senior officer among the three representatives of OUI, remained absolutely silent during the entire meeting save for one 'insignificant comment' apparently directed at nobody at particular at the end of the meeting when everyone was about to leave the room. Mr Yap's testimony would have helped shed light on the events that occurred. I can only conclude that his failure to take the stand is because if he had, he would have had to explain why all three of Turegum's witnesses testified that Mr Yap did the talking for OUI and that he said that it was a pity that the offer to commute at US$220,000 had been withdrawn. I therefore infer that Mr Yap's account of the meeting would have been more consistent with that given by Mr Brennan than that given by Mr Yeo.

62. The result of the above is that on 15 October there was no existing offer to commute at US$220,000. The purported acceptance of 21 October therefore did not result in any concluded commutation. Looking at the course of events in the manner suggested in the Projection Pte Ltd case cannot change this outcome. To an objective observer it is plain that on 15 October no agreement could have been reached since the parties were not of like minds. Turegum no longer wished to effect a commutation at US$220,000 and OUI knew this.

The events of 20 and 21 October

63. Whilst the finding above makes consideration of the subsequent events unnecessary, in view of the submissions I have received, I will express my views on them.

64. I have construed Diarmuid Brennan & Co's letter of 5 October as a revocation of any existing offer to commute made by Turegum. The letter which Diarmuid Brennan & Co sent on 20 October giving notice of arbitration must be similarly construed. That in fact was an even stronger manifestation of Turegum's decision not to compromise on the issue and to withdraw all previously existing offers.

65. According to the evidence adduced by Turegum, the notice of arbitration was successfully faxed to OUI's office at just after midnight on 20 October 1999 (Singapore time) or 16:07 hours London time as shown on the relevant fax transmission report. No evidence was provided by OUI to show that the date and time printed on this report were inaccurate. Nor did it provide any affirmative evidence that its office had actually received the notice of arbitration at any other time or date. I accept the evidence adduced by Turegum on this point and find that OUI received the notice of arbitration in the early hours of 21 October 1999. It was therefore available to be read by OUI's officers when they came into the office at the start of business that morning.

66. Although Mr Yeo's evidence-in-chief was that he only saw the arbitration notice after sending out OUI's acceptance of the

US$220,000 offer on 21 October, OUI did not use this assertion as the basis of its contention that the notice had not withdrawn the offer. Instead it pleaded in its reply and defence to counterclaim that the notice was invalid and inoperative as the reinsurance contracts contained no arbitration clause. In its closing submissions, OUI took another tack entirely. It was submitted that since according to Turegum's case, the offer had already been withdrawn by the time the notice was sent out, the notice could not have been a withdrawal of the offer. Further, Turegum could not have intended the notice to have the effect of withdrawing the offer since the withdrawal had already been made. Counsel stated that OUI did not read the notice as having that effect. How then, counsel asked, could the objective meaning of the notice be different from what both parties originally intended.

67. I do not accept the above submissions. Whilst Turegum did not send out the notice of arbitration as an express withdrawal of the compromise offer since in its mind the offer no longer existed, the objective interpretation of the notice must be that Turegum did not want to compromise and that any previous indication of its willingness to do so was no longer effective. Secondly, having heard the witnesses and considered the evidence as a whole, I do not believe that the notice of arbitration was not seen by OUI prior to the acceptance letter being sent out. Mr Yeo might not have realised at that time that the notice of arbitration had the effect of destroying a compromise offer (if any then existed), but he obviously knew that it meant Turegum was now intent on full recovery and that was what prompted the issue of the acceptance. Only the previous day Mr Yeo had sent Diarmuid Brennan & Co a fax asking for a further three weeks to look into the papers relating to the reinsurance contracts. I do not believe that he would have sent out the acceptance the very next day if it had not been for the arrival of the notice of arbitration. It was also telling that the submissions relied on legalities and inferences and logic (ie on the inference to be drawn from the notice) and not on the bald assertion that the notice was not sighted before acceptance. Obviously that evidence was not regarded as compelling.

Conclusion on first issue

68. I therefore hold that no commutation was concluded between the parties on 21 October 1999.

Second Issue: Do the reinsurance contracts contain arbitration clauses?

The background

69. There are four reinsurance contracts which are now in issue between OUI and Turegum. Originally, there were five, but Turegum has not been able to find any documents evidencing the fifth contract and is therefore not proceeding on its claim on that contract for the time being. The four contracts which Turegum seeks to refer to arbitration have been known during the proceedings as contracts no. 3TD69, 3TD70, 3TD71 and 3TG71.

70. Before I go on to discuss the issues relating to these contracts, it would be helpful to give a brief account of how such contracts usually come about. An insurance contract placed in the London market is initiated when an insurance broker presents a proposal for insurance or reinsurance to underwriters at Lloyds or to insurance companies. The procedure is described by Lord Diplock in American Airlines Inc. v Hope [1974] 2 LLR 301 at 304-305. What happens is that the broker acting for the assured prepares the slip (a folded card) and indicates in brief terms the cover the assured requires. Thereafter, as Lord Diplock says:

> '... He takes the slip ... to an underwriter whom he has selected to deal with as leading underwriter, i.e., one who has a reputation in the market as an expert in the kind of cover required and whose lead is likely to be followed by other insurers in the market. If it is the first contract of insurance covering that risk in which a particular underwriter has acted as leading underwriter it is treated as

> an original insurance. The broker and the leading underwriter go through the slip together. They agree on any amendments to the broker's draft and fix the premium. When agreement has been reached the leading underwriter initials the slip for his proportion of the cover and the broker then takes the initialled slip round the market to other insurers who initial it for such proportion of the cover as each is willing to accept. For practical purposes, all the negotiations about the terms of the insurance and the rate of premium are carried on between the broker and the leading underwriter alone. …
>
> After the slip has been initialled by all the insurers it is retained by the broker. In due course, often after several months, he prepares the policy from the slip. In the case of an original insurance he generally agrees the wording of the policy with the leading underwriter before taking it to Lloyd's Policy Signing Office for signature.'

71. When the slip is signed, it constitutes a binding contract. At that stage, the whole of the contract is found in the slip. It has been described as 'free-standing'. See Insurance Company of the State of Pennsylvania v Grand Union Reinsurance Co. [1990] 1 LLR 208 and The Zephyr [1984] 1 LLR 58. OUI relies on these principles in relation to the two slips (for contracts 3TG70 and 3TG71) which it has in its possession and argues that since these slips do not contain arbitration clauses or any reference to any arbitration clause in any other document, the contracts of insurance do not contain any agreement to submit disputes to arbitration.

72. The slip is usually only the first stage in the process. Following its signing, the broker will issue a cover note to its own client confirming the cover which has been placed on the client's behalf. As stated in The Law of Reinsurance in England and Bermuda by O'Neill and Woloniecki, the cover note is not provided to the insurer and thus cannot be a contractual document. It is, however, prima facie evidence of a contract and may be used to establish the terms of that contract when the slip is lost.

73. Further, it is often clear from the slip itself that the parties intend that a policy or treaty wording be issued subsequently. The purpose of this is to expand on the terms found in the slip which are usually short and often only titles of the clauses required. According to another text, Reinsurance Practice and The Law [1993] put out by a firm called Barlow, Lyde and Gilbert, once a wording is executed by both parties, it replaces the slip as a contract document. Should any inconsistency between the slip and the wording need to be resolved, it is the wording which is paramount (see section 10.5.1.3). This statement was based on the holding in Youell v Bland Welch [1990] 2 LLR 423 (HC) and [1999] 2 LLR 127 (CA) which discussed the ranking of the slip versus the wording and ruled that if formal wording was subsequently issued, the slip would be inadmissible as an aid to construction of the policy. The judge at first instance, Philips J, also stated (at page 429):

> 'An insurance slip customarily sets out a shorthand version of the contract of insurance, in terms which may neither be clear nor complete. Where, as here, the slip provides for the formal wording to be agreed by the leading underwriter, the other subscribers to the risk anticipate and agree that the leading underwriter will, on their behalf, agree the final wording that will spell out their rights and obligations. If differences between the wording of the slip and that of the formal contract which is embodied in the policy give rise to the possibility that the natural meaning of the slip differs from that of the policy, the natural assumption is and should be that the wording of the policy has been designed the better to reflect the agreement between the parties. To refer to the slip as an aid to construction of the policy runs counter to one of the objects of replacing the slip with the policy.'

The pleadings on the reinsurance contracts

74. The reinsurance contracts which Turegum seeks to enforce go back more than thirty years. As a result, it is not clear whether the documentation that has been produced is all of the documentation. In relation to certain of the contracts, OUI is not willing to accept the authenticity of the documents produced by Turegum as it does not have copies of the same. The difficulty is that OUI acted through agents in the London market and these agents have since closed and the files have been transferred more than once. Retrieval of documents and information has been piecemeal and slow.

75. In its amended Statement of Claim, OUI pleaded that sometime between 1963 and 1979 it had entered into five reinsurance contracts with Turegum in respect of excess of loss. As particulars of this assertion, OUI stated that the contracts of reinsurance were as contained in and/or as evidenced by and/or to be inferred from the slips issued at the time of placement. OUI further stated that in particular it relied on two slips signed by it through its underwriting agents in December 1969 and July 1971 and that it was unable to produce or give precise particulars of any other slips due to the substantial lapse of time. It averred, however, that the terms of all the five reinsurance contracts were either contained in or expressly referred to in slips. It went on to plead that the purported notice of arbitration given by Turegum and all further proceedings consequent upon the notice were null and void because the reinsurance contracts made no reference to nor contained any arbitration clause. OUI averred that in the circumstances there was no agreement to refer any disputes to arbitration and it further put Turegum to strict proof of the existence of any agreement to refer disputes to arbitration.

76. In Turegum's re-amended defence and counterclaim it gave brief details of the five reinsurance contracts which it originally intended to claim under. Paragraph 4 stated that following the issuance of the respective slips when placement of the reinsurances was concluded, Turegum or the brokers issued the full set of terms and conditions of the respective contracts to OUI or its agents. Turegum further averred that each set of the full terms and conditions was signed by OUI and/or its agent. It admitted that it did not have in its possession all five slips or sets of the signed terms and conditions but asserted that the contracts were contained in and/or expressly set out in the respective sets of terms and conditions. It also pleaded that the slips contained a clause reading "Conditions – Wording to be agreed L/U only" and that by virtue of these words because of the usage or custom of the London reinsurance market, OUI and Turegum had agreed to be bound by the full wording and terms and conditions of the reinsurance contract as agreed (including any arbitration clause).

77. By 6 and 7, Turegum pleaded that it was an implied term of the five reinsurance contracts that the proper law of the same was English law or, in the alternative, objectively the proper law was English law. In 8, it pleaded that by virtue of the provisions of the English Arbitration Act 1996, each of the reinsurance contracts contained an arbitration agreement. Paragraphs 9, 10 and 11 contained alternative pleas that the arbitration agreements were made in writing or evidenced in writing in accordance with the provisions of the Act.

78. In its reply OUI pleaded that apart from the reinsurance slips, no other documents were issued or signed by it or its agents in relation to the reinsurance contracts. OUI further averred that even if the slips contained the wording relating to the leading underwriter, such wording did not have the effect of, nor was it capable of, incorporating any terms and conditions contained in any other documents into the contract between the parties. It denied also that there was any custom or usage in the London market which dictated that such wording was capable of incorporating terms and conditions in other documents into the contract between the parties.

79. In relation to the governing law, OUI's main plea was that the proper law of the five reinsurance contracts was Singapore law. Even if English law governed these contracts, however, the English Arbitration Act 1996 did not apply and, in any case, did not have the effect which Turegum had contended it did.

80. Whilst it can be seen from the above account that various issues arise in relation to the form and content of the reinsurance contracts, in summary OUI's case is that of the four contracts Turegum now seeks to enforce, it is only aware of two. It says those contracts are contained in the slips and since the slips do not have arbitration clauses, it cannot be forced into arbitration over Turegum's claims. As for the other two contracts, OUI does not accept that it is a party to these and challenges the admissibility and authenticity of the documents which Turegum relies on to establish the contracts.

81. I will deal first with the issue of the governing law. There are other common issues which will arise when I consider the

individual contracts but I think it better to deal with those issues in the concrete environment of an individual contract rather than abstractly.

Governing law

82. There are three stages in determining the governing law of a contract. The first stage is to examine the contract itself to determine whether it states expressly what the governing law should be. In the absence of an express provision one moves to the second stage which is to see whether the intention of the parties as to the governing law can be inferred from the circumstances. If this cannot be done, the third stage is to determine with which system of law the contract has its most close and real connection. That system would be taken, objectively, as the governing or proper law of the contract. See Las Vegas Hilton Corporation v Khoo Teng Hock Sunny [1997] 1 SLR 341 and Dicey & Morris on The Conflict of Laws (11th Ed) at Rule 180.

83. It is common ground here that none of the contracts, whether they are considered as being contained in the slips alone or whether their terms are reflected in other documents such as treaty wording or policies, contains an express choice of law clause. Should I then go on to the second stage? In the Las Vegas case Chao J gave examples of circumstances from which it may be possible to infer a common intention as to the proper law of the contract like clauses giving jurisdiction to the courts of a particular country to decide disputes arising out of the contract and matters like the currency of the transaction or its commercial purpose. He decided, however, that in the circumstances of the case before him which dealt with an alleged oral contract, it was not meaningful to go into an exercise to try and determine the intention of the parties from inference. Instead he went straight to the third stage of determining with which law the transaction before him had its closest and most real connection. I think I should do the same. Since in this case the parties acted entirely through brokers and OUI did not even see many of the documents for years, if at all, it would be absurd to try and infer any intention.

84. OUI's submission was that the three stages had to be applied in strict chronology. It said that the second stage would only be looked at if there was proof that the first stage was inapplicable and the third stage only applied when there was proof that the second stage could not apply. In this case it agreed that the first stage could not apply as there was no express reference to the proper law of the contract. OUI then went on to submit that since no evidence had been adduced of the implied intention which stage two looks for, the court could not move to stage three. I cannot accept this argument. The passages from Dicey & Morris in the commentary for Rule 180 make it clear that the exercise to determine the proper law is one of legal analysis based on the facts in evidence and not one of following mandatory rules in such a manner that if one cannot be followed the rest are inapplicable. The following passage makes this clear:

> '... the line between the search for the inferred intention and the search for the system of law with which the contract has its closest and most real connection is a fine one which is frequently blurred. In theory, in the absence of an express choice as the first test, the court should consider as a second test whether there are any other indications of the parties' intention, and only if there is no such indication go on to consider the third stage, namely with what system of law the contract has its closest and most real connection. But in practice the same result can be reached by the application of the second or third tests, and frequently the courts move straight from the first stage to the third stage. This is largely because the tests of inferred intention and close connection merge into each other, and because before the objective close connection test became fully established the test of inferred intention was in truth an objective test designed not to elicit actual intention but to impute an intention which had not been formed.' (at p 1162)

85. Proceeding with the analysis to elicit the governing law, I note that the only connection that any insurance contract that

came into being had with Singapore is that the reinsurer, OUI, is incorporated in Singapore and has its place of business here. On the other hand there are many factors that connect the contracts with English law. First, although Turegum is incorporated in Switzerland, it had an office in London at the material time. Secondly, the negotiations for the reinsurance contracts took place in London and any contracts that resulted were entered into in London between the respective brokers/agents of OUI and Turegum. Thirdly, the risks undertaken were placed in the London reinsurance market and the lead underwriters carried on business in London. Fourthly, all the contract documents were prepared and issued in London and the terminology of the slips was characteristic of slips issued in the London market. Fifthly, the claims made against Turegum under the policies reinsured with OUI were received and processed in London by Turegum or its brokers. Sixthly, the brokers acting for both parties were situated in London and OUI's London agents were the ones who administered and dealt with the claims in London from inception up till 1992. Turegum also pointed out that the arbitration clauses which were contended to be part of the contracts provided for arbitration in London. Even if I leave this last factor out of consideration since it has not yet been established, the connections between the contracts and London and, therefore, English law, are overwhelming. The only reasonable and logical finding is that English law is the governing law of the insurance contracts as being the law that has the closest and most real connection to them.

Contract 3TD69

86. The relevant documents produced in court in relation to this contract were the following:

> 1) The original copy of the slip. Attached to it was a document bearing the heading 'Turegum Insurance Company Third Party etc Excess of Loss Insurance' on which was hand-written 'Agreed Wording RO1692';
>
> 2) Premium slips (also attached to the original slip) and
>
> 3) A folder prepared by Rose, Thomson, Young (Reinsurance) Ltd, (Rose, Thomson) Turegum's agents, containing a cover note dated 27 February 1969 issued by Rose, Thomson in respect of this insurance contract, a letter dated 22 July 1969 forwarding to Turegum a copy of the treaty wording of the contract which had been agreed by the leading underwriter, and the treaty wording itself which in terms was identical to that attached to the slip.

It should be noted that the slip was in respect of excess of loss reinsurance covering losses occurring within 12 months from 1 January 1969 and the interest covered was 'all policies and/or contracts of insurance and/or reinsurance covering Third Party Liability and/or all other risks deemed by the Reinsured to be casualty business'.

87. In its Amended Statement of Claim, OUI stated that it relied on two slips signed by it through its underwriting agents in December 1969 and July 1971. In Mr Yeo's Affidavit however, he said that the only policy documentation OUI had been able to retrieve from the papers it obtained from London after it took control of the run-off operations in 1992 were two slips covering the years 1970 and 1971. In its closing OUI did not accept that it had been a party to the 1969 contract. It must be noted however that certain correspondence sent out by OUI in 1994 contains a contract reference found on the 1969 slip and wording which duplicates that found on the slip. OUI may, therefore, although it denies this, have had sight of the slip at that time or at least had documentation which made it aware of the slip's existence and contents.

88. In any case the original slip produced shows that OUI had written a 2% line on this slip on 13th January 1969. On the slip itself, OUI's name appears on a stamp affixed by Winchester Fox which contains a reference number XL/2/462/69. The cover of the slip has the reference number RO1692. The slip contains various terms and conditions. None of these provides for arbitration. Among the conditions however, is the term 'Wording to be agreed L/U only'. Such a clause is commonly known as a leading underwriter clause.

89. It is Turegum's contention that the treaty wording attached to the original slip produced by it was the wording agreed by the 'L/U' or leading underwriter which in that case was Stronghold Insurance Company Ltd (Stronghold). Clause 15 of this wording is entitled 'Arbitration Clause' and provides for disputes between the reinsured and the reinsurer to be referred to two arbitrators and an umpire and for the arbitration to take place in London. Turegum said that this arbitration clause was a part of the reinsurance contract between itself and OUI because OUI was bound by the leading underwriter clause to accept all the terms of the treaty which Stronghold had accepted. This is an argument based on the principle that a principal making a contract through an agent acting with authority is bound by all the terms agreed to by that agent. It is not an argument that the arbitration clause in the treaty wording was binding on OUI because it had been incorporated by reference into the insurance contract contained in the slip.

90. OUI's submission was that the reinsurance contract would effectively have been concluded once the slip was subscribed and signed by the parties. It pointed out that this was accepted by Mr Peter John Downey, a gentleman who had worked for 30 years in the London insurance market and who was called as an expert witness by Turegum. OUI was not however willing to accept Mr Downey's further evidence that the leading underwriter clause in the slip had the effect of binding all the following reinsurers to the wording eventually accepted by the leading underwriter. Mr Downey had stated that the use of leading underwriter clauses was very common in the London reinsurance market and that the effect of this clause was that the leading underwriter had authority from the following market to bind them according to the terms recorded on the slip. He also testified that if a following reinsurer did not wish to be bound by the actions or decisions of the lead as set out in the slip he would endorse the slip with the appropriate note in this respect. In the absence of such objections or alterations, by signing the slip reinsurers were taken to agree to follow the leading underwriter and to be bound by any wording signed by that underwriter.

91. OUI submitted that Mr Downey's evidence on market practice was not satisfactory. It pointed that whilst he was under cross-examination he had accepted that practice varied within the market and that who decided what practice would be followed in a particular case depended on the cedant, the broker or the reinsurer. He also said that the London market was a large market and not everyone follows the same practice. On this basis, OUI submitted that there was no market practice in London whereby reinsurers were bound by treaty wording agreed to by the leading underwriter. It contended that to establish an agreement to arbitrate, Turegum had to show that subsequent to the signing of the slip, OUI had agreed to arbitrate and that the evidence tendered did not prove this.

92. OUI did not call any witness of its own to establish market practice in London. Mr Tang and Mr Yeo had no knowledge of the practices of the London market and thus in order to impugn the evidence given by Turegum's witnesses on such custom, OUI had to try and highlight inconsistencies in such evidence. Although at first glance the answers given by Mr Downey to questions posed while he was in court appeared rather damaging to Turegum's case, further examination revealed that his testimony remained strongly in its favour. The answers that OUI relied on were given in response to questions by OUI's counsel relating to certain other reinsurance contracts that he showed Mr Downey and asked the latter to comment on. In one of those cases, the contract wording had been sent to the following reinsurers for signing notwithstanding a leading underwriter clause and it was OUI's position that such action was inconsistent with the meaning of the leading underwriter clause as propounded by Turegum.

93. The broker's letter to OUI enclosing the wording for signing had stated:

> 'We are sending you a copy of the Wording. This has been agreed by the leading underwriter as required by the broking slip.
>
> We also enclose the signing pages in triplicate. Please sign these and return all three copies …'

As counsel for Turegum noted, Mr Downey's evidence was dealing with the question of signing rather than of agreement. He stated that the wording was agreed by the leading underwriter and the follower must accept that but that the leader did not necessarily have to sign. All the evidence following that point dealt with varying practice regarding signing and not with varying practice regarding agreement. The witness remained firm that the practice was that the following underwriters who did

not object to the leading underwriter clause were bound by the leading underwriter's agreement to the wording. On this issue, Mr Downey's evidence was corroborated by the evidence of Mr Brian Pryce Johnson, an underwriter who had actually worked for Winchester Fox between 1969 and 1972 when Winchester Fox in relation to the excess of loss account wrote non-marine business exclusively on behalf of OUI.

94. Apart from the evidence of the London market practice as to the meaning of the leading underwriter clause, there are a number of English cases that have commented on the legal effect of this type of clause. In the American Airlines case, Lord Diplock said:

> 'Almost invariably the slip provides that the wording of the policy is to be agreed by leading underwriter. Where this is the case the leading underwriter may occasionally consent to some clause going into the policy which was not provided for by the slip, if in his judgment it would not affect the premium. So there is the possibility of minor variations being made in the contract of insurance when the terms of the policy are agreed.' (at p 305).

95. Thus under the English law governing the contract contained in the slip the presence of the leading underwriter clause meant that the leading underwriter was given the authority to agree on the wording of the full policy and to even consent to the insertion of a clause which had not been provided for in the slip. Roskill L.J. who was part of the coram in the Court of Appeal in the American Airlines case (reported at [1973] 1 LLR 233) also commented on the leading underwriter clause. He confirmed (at p 245) that it normally had the effect that an underwriter other than the leading underwriter by whom the slip had been subscribed would subsequently be bound by any relevant agreement made by the broker on behalf of the assured and the leading underwriter.

96. In the case of Roadworks (1952) Ltd v JR Charman & Others [1994] 2 LLR 99, the slip contained a leading underwriter clause which stated that 'All alterations, additions, deletions, extensions, agreements, rates and changes in conditions to be agreed by the leading Lloyd's underwriter …. Such agreement to be binding on all Underwriters subscribing hereon.' One of the issues that arose was whether the leading underwriter was the agent of the following underwriters and whether the leader as agent could validly waive a contingent condition. It was held that the slip was a contract between the insurers and the insured. It was not a contract between the leading underwriters and the following underwriters although its terms i.e. the leading underwriter's clause, evidenced the terms of the contract of agency and the leading underwriter had the actual authority of the following underwriters to waive even a contingent condition. The judge expressed the view that the only express material which related to the authority of the leader was the wording of the L/U clause itself.

97. The issue that arises is as to the extent of the authority conferred on the leading underwriter by the L/U clause contained in the slip before me. That is a really brief clause with none of the refinement and elaboration of the clause before the judge in the Roadworks case. It simply states that 'wording' is to be agreed by the leading underwriter only. This may imply a fairly wide ranging authority and such an interpretation would seem to be borne out by an analysis of the document which is put forward as the wording agreed subsequently by the leading underwriter. That contains 15 fairly substantial clauses. Some of these bear the same titles as clauses referred to in the slip for example 'Ultimate net loss clause' and 'Aggregate extension clause' but some clauses like the arbitration clause, the 'Inspection of records clause' and the 'Amendments and alterations clause' are not even hinted at in the slip. It should be noted that even those clauses that are mentioned in the slip are referred to by their titles with no indication as to their content and the evidence was that though such clauses were standard in reinsurance practice they could take varying forms and therefore it was up to the leading underwriter to decide in any particular case which was the most appropriate form of the clause for the insurance contract at hand.

98. Mr Richard Jacobs, QC, who testified as an expert on English law explained that the lead underwriter could not introduce any new clauses that he thought fit. He had to act consistently with the contract that had been made. Mr Jacobs' view was however that the underwriter certainly had the authority to agree an arbitration clause since such a clause was quite usual in a reinsurance contract.

99. Some support is lent to Mr Jacobs' view by the facts of the case of Excess Insurance v Mander [1995] L.R.L.R. 358. There a reinsurance slip which subsequently gave rise to an Excess of Loss treaty (XOL treaty) binding on the plaintiffs contained a provision reading 'full wording as may be agreed by leading Reinsurer only'. In due course, the leading reinsurer agreed the XOL treaty and it contained an arbitration clause. The issue which the judge had to decide as between the plaintiffs and the defendants who had reinsured the plaintiffs' liability under the XOL treaty was whether the arbitration clause in the XOL treaty had been incorporated in the retrocession agreement between the plaintiffs and the defendants. The judge decided it did not because at the time when the retrocession agreement had been concluded the reinsurance slip existed but the XOL treaty had not been concluded and therefore no binding arbitration agreement between the plaintiffs and their own insured existed at that point. It was stated by the judge that the treaty wording had become binding on the plaintiffs when it was issued four months after the defendants became bound by the retrocession. The argument proceeded on the basis that the arbitration clause in the XOL treaty was valid and binding on the plaintiffs and the only issue was as to whether the wording of the retrocession slip had been adequate to incorporate that clause into the retrocession agreement. It was therefore taken for granted by all parties that the leading reinsurer had been given authority by the wording of the leading underwriter clause in the XOL slip to agree to the inclusion of an arbitration clause in the XOL treaty.

100. In view of the foregoing I am satisfied that under English law a leading underwriter clause in the terms contained in the slip for contract 3TD69 would authorise the leading underwriter to agree on treaty wording which would include an arbitration clause and that the following underwriters would be bound by such agreement. I note also that such a clause would not have an impact on the premium payable as it would have no effect on the risk covered. It would therefore fall within the parameters of a minor clause that, as Lord Diplock said, the leading underwriter could agree to even though it was not in the slip.

101. The next question is whether in this case that actually happened. This is an issue relating to the documents produced by Turegum and whether such documents have been sufficiently proved to be admissible in evidence before me. OUI was not willing to accept the treaty wording adduced by Turegum since it had never been given a copy of the same. Further, the treaty wording was the only document that Turegum had which evidenced the agreed terms of the insurance. Turegum was not able to produce a policy between itself and OUI in relation to this slip. It did however produce an original reinsurance policy between itself as reinsured and National Insurance and Guarantee Corporation (NIGC) dated 10 September 1969 under which it was reinsured by NIGC for 0.5% of the risk covered in the slip for contract 3TD69. The wording of this policy is identical (except that a different agent is named in clause 6 for purposes of notice to the reinsurers) to the treaty wording that Rose, Thomson had forwarded to Turegum on 22 July 1969.

102. Section 92 of the Evidence Act (Cap 97) provides:

> 'Where any document purporting or proved to be 30 years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.'

As stated in Sarkar's Law of Evidence Volume 1, 15th Edition, 1999 (Cap V section 90) this section does away with the strict rules of proof and allows a document to prove itself. If a document not less than 30 years old is produced from proper custody, and is on its face free from suspicion, the court may presume that the document has been signed or written by the person whose signature it bears or in whose handwriting it purports to be and that it has been duly attested and executed if it so purports to be.

103. The two prerequisites for the application on the section are the age of the document and that it has been produced from proper custody. Sarkar makes it clear that the time period of 30 years is computed from the date of the document purports to bear and that the outer limit of time is the date on which, the document having been tendered in evidence, its authenticity or otherwise becomes the subject of proof. The presumption is applicable to documents which were not 30 years old either on the

date of suit or on the date of production, but were so on the date when arguments were heard or when they were sought to be proved.

104. In this case the documents concerned were produced by Turegum and were obtained by a search of Turegum's records by its witnesses. I consider Turegum's custody of the documents to have been a proper custody since they were documents relating to Turegum's contracts and its transactions. As for the dates of the documents, all those that related to contract 3TD69 were more than 30 years old at the time of production in court in September 2000. On the basis of the section there can be no doubt about the authenticity of the original slip for that contract, the cover note prepared by Rose, Thomson, its letter of 22 July 1969 forwarding the agreed wording and the reinsurance policy between OUI and NIGC. As stated earlier, attached to the original slip is the document bearing the words 'Agreed Wording R01692'. That wording is identical to the wording attached to the letter of 22 July 1969 and the wording that appears in the NIGC policy. I am satisfied that that wording was in fact the agreed treaty wording for contract 3TD69.

105. The proposed treaty wording which had already been agreed by the leading underwriter was sent by Rose, Thomson to Turegum as the insured for its comments on 22 July 1969. That covering letter stated that unless the brokers heard from Turegum to the contrary within 7 days they would assume that Turegum had found the wording to be in order and would proceed with the preparation of the formal policy documents incorporating the wording. I think that it is safe to infer that Turegum did not inform the brokers within the prescribed period or even thereafter that it objected to the wording. This is because the brokers did go on to procure the issue of the NIGC policy which contained identical wording. They probably also produced a policy between Turegum and OUI but neither that document nor any other referring to it was produced. It appears to have been lost. There was, however, an authorisation form signed by Winchester Fox which bears the same reference number as Winchester Fox's scratch on the slip i.e. 2/462/69. The evidence of Turegum's witnesses was that OUI by signing the authorisation form through Winchester Fox had authorised the leading company reinsurer to sign a formal policy document. Thus if any formal policy document had come into existence it would have been signed on OUI's behalf.

106. If a policy was produced and signed on OUI's behalf it would have contained the same wording as the NIGC policy and thus OUI would have been bound by the arbitration clause in the policy. Even if no policy was issued, I take the view that OUI is bound by the arbitration clause contained in the agreed wording. Although it was anticipated from the very beginning that a formal policy document would eventually come into existence, this does not mean that until it did so there was no contract and no agreed terms. In this case there was an initial contract evidenced by the slip which in itself anticipated further terms coming into existence and binding the parties thereafter. Once these terms were agreed the parties would be bound by them notwithstanding that they had not been embodied in the formal policy document.

107. The commentary at para 2-106 of Chitty on Contracts (28th Edition) Vol 1, indicates there are three possible consequences of an agreement among parties to produce a formal written contract. One possibility is that the agreement was intended to be incomplete or not binding until incorporated in the formal document and that document is duly executed. The second possibility is that such document is intended only as a solemn record of an already complete and binding agreement whilst the third possibility is that the main contract is not concluded for want of execution of the formal document but a separate preliminary contract comes into existence at an earlier stage.

108. The evidence given by Mr Trowbridge and Mr Brian Johnson who had many years of working experience in the London insurance market was that the wording would be agreed as soon as the lead underwriters had initialled/scratched the same. No evidence to the contrary was introduced by OUI. OUI operated in the London market entirely through brokers who were familiar with its practices and who would have intended matters to be dealt with in the normal way and would have expected the normal consequences to flow from their dealings. Going on the evidence, it appears to me that in the London market the issue of the policy document would have been regarded as the solemn record of an already complete and binding agreement and not as the document creating that agreement. That being the case, OUI was bound by the terms of the agreed wording once it was agreed by the leading underwriter and not objected to by Turegum.

109. In respect of contract 3TD69, therefore, I conclude that it contained the term providing for disputes to be referred to arbitration and that OUI is bound by that term. I also note the evidence of Mr Jacobs that an English Court, on the basis of the

treaty wording incorporating a London arbitration clause, would conclude either that the treaty wording contained an arbitration agreement 'made in writing' within s 5(2)(a) of the 1996 Act or that the treaty wording was written evidence of an arbitration agreement so that that agreement was 'evidenced in writing' within s 5(2)(c) of the 1996 Act.

Contract 3TD70

110. The stand taken by OUI on this contract is that it has not been established. OUI has not agreed to the authenticity or contents of any documents adduced and hence it must be taken that they have not been proved. It should be noted however that OUI has in its possession a photocopy of the original slip produced by Rose, Thomson for this contract.

111. The original slip is not in evidence. Turegum was only able to produce a photocopy. The contents of the copy slip produced by Turegum and that produced by OUI are identical. Both show that the cover was for losses occurring during the 12 months from 1 January 1970 and the interest covered was identical to the interest covered for the preceding 12 months by contract 3TD69. Among the terms of the slip is a leading underwriter clause reading 'Wording as expiring or as agreed L/U only'. Strictly speaking, since there was no evidence that either photocopy was made from the original slip, neither qualified as secondary evidence of the contents of the original pursuant to s 65(a) of the Evidence Act. To my mind however, the fact that each party had a photocopy which was identical to that held by the other, was strongly indicative that indeed the photocopies were true copies of the original slip and disclosed its contents accurately.

112. Turegum was also able to produce an original document which could make up for the absence of the original slip. This was a cover note dated 13 January 1970 (and an addendum no. 1 dated 21 January 1970) issued by Rose, Thomson to Turegum, confirming that the reinsurance was effected with the schedule of reinsurers mentioned. The reference number RO1940 appears on the cover note and the addendum. A comparison of the cover note and the photocopy of the slip makes it obvious that they relate to the same contract. The period of insurance, interest, geographical limits, limits, and conditions are identical. It can also be seen from the copy slip that a hand-written amendment was made to the clause 'Premium Hereon' by inserting the word 'adjustable' and this amendment is reflected in the cover note. The addendum lists the reinsurers that the reinsurance was effected with. It shows that OUI subscribed two lines, one through Winchester Fox and the other one directly.

113. The cover note was produced as part of a folder printed with Rose, Thomson's name and entitled 'Reinsurance Contract' followed by details of the insured and the type and limits of cover. Inside the folder, apart from the cover note, is a letter dated 28 May 1970 from Rose, Thomson to Turegum forwarding copies of the wording agreed by the leading reinsurer. This letter stated that unless Rose, Thomson heard from Turegum to the contrary within 14 days it would assume that Turegum had found the wording to be in order and would proceed with the preparation of the formal policy documents incorporating the wording. That wording also bears the reference number R01940.

114. Turegum was not able to produce the original policy for the line written by OUI through Winchester Fox. There was no evidence however that it had disagreed with the wording as forwarded to it by Rose, Thomson. That it did not may be inferred from another document that Turegum produced. This is an original document signed by OUI containing treaty wording which Turegum submits was for the direct line written by OUI. The document is entitled 'Turegum Insurance Company Third Party ETC Excess of Loss Reinsurance' and at its top left hand corner the reference number 'R.01940' appears. The first lines of the document read:

> 'Be it known that we Overseas Insurance Ltd., (hereinafter called the "Reinsurers") agree, in consideration of the premium provided for herein, to indemnify Turegum Insurance Company (London Nett Account) (hereinafter called the "Reinsured") for our pro rata proportion of any and all losses the Reinsured may sustain as hereinafter provided.'

Those lines are followed by 15 clauses including, as clause 15, an arbitration clause which is in identical terms to that found in

the treaty wording for contract 3TD69. After the arbitration clause the following wording appears:

> 'Signed in Singapore this 8th day of July 1970. For and on behalf of Overseas Union Insurance Ltd., in respect of a 0.620% of 80% participation.'

That wording is followed by a rubber stamp setting out OUI's name in full and the words 'General Manager'. A signature appears in the space between the name and the title. The document therefore appears to have been signed on 8 July 1970 by OUI and on the basis of s 92 of the Evidence Act, this document which was produced in court in September 2000 from the custody of Turegum, a party to the contract, has proved itself.

115. When that treaty wording is compared with the contents of the photocopy of the slip many similarities are found. For example, the 'Insuring Clause' and the 'Limit of Liability Clause' of the treaty wording cover the same ground as the portions of the slip referring to 'Interest' and 'Limits hereunder'. Under clause 1, 'Insuring Clause', of the treaty wording it is provided that the reinsurance shall apply in respect of 'all loses occurring anywhere in the World during the period of 12 months at 1 January, 1970 under all Policies and/or Contracts of insurance and/or reinsurance covering Third Party Liability and/or other risks deemed by the reinsured to the casualty business'. This wording more or less mirrors the wording in the slip appearing against the titles 'Period' and 'Interest'. Against the title 'Geographical limits' in the slip are written the words 'World wide' and this again corresponds with the geographical limit found in the 'Insuring Clause' in the treaty. The 'Exclusion Clause' in the treaty wording is obviously an expansion of the matters stated next to the title 'Exclusions' in the slip. It is also significant that the treaty wording numbered R01940 is identical, mutatis mutandi to the treaty wording for contract 3TD69 since the contention is that contract 3TD70 was in fact a renewal of the insurance first placed via contract 3TD69 and is also identical to the treaty wording forwarded by Rose, Thomson to Turegum on 28 May 1970 as being the wording agreed by the leading underwriter.

116. Turegum was not able to produce the actual policy although it is probable that it was issued. In any case, the cover note is prima facie evidence of the existence of the contract where the original slip cannot be located. In that event the cover note would be admitted as the best available evidence of the terms of the contract. It, together with the other documents in the folder, is admissible under s 92 of the Evidence Act.

117. I accept the cover note as evidence of the contract 3TD70. I also infer from it and the other documents produced that there was agreed treaty wording for that contract and that such wording was identical to that which OUI signed in respect of the underwriting line which it wrote directly. It is highly improbable that the wording for the reinsurance policy would differ depending on whether the line had been written through Winchester Fox or directly. In any case, the letter of 28 May 1970 does not indicate that more than one set of wording had been agreed.

118. Further, Turegum in relation to this contract was also able to produce the original reinsurance policy for this contract for another line subscribed by NIGC through the brokers D G Jago & Co Ltd. The clauses in this policy are identical to the clauses found in the treaty wording signed by OUI and those forwarded by Rose, Thomson's letter of 28 May 1970.

119. I therefore hold that OUI was a party to the contract of insurance 3TD70 as stated in the addendum no. 1 to cover note RO1940 having subscribed for the same both through its brokers and directly and that the contract for the portion subscribed to through its brokers included an arbitration clause identical to that found in the wording which OUI signed for the portion it subscribed to directly. In respect of this contract therefore, OUI has also agreed to arbitration in London.

Contract 3TD71

120. The only evidence produced in support of this contract was a document entitled 'Endorsement attaching to and forming parts of slip no. RO1940'. It contains only two typewritten sentences, a handwritten proviso and a number of signatures. The typewritten portions read:

> 'It is hereby noted and agreed that this Contract is extended to the 30th June 1971 (Losses occurring during basis) at pro-rata of the Minimum and Deposit Premium. ...
>
> All other terms, clauses and conditions remain unchanged.'

Although the hand-written portion of the endorsement is not entirely legible, it is clear enough for a reader to understand that it deals with limits and not with the arbitration clause. Though the original endorsement was not produced, OUI and Turegum each produced a photocopy of this document and the two copies appear to be more or less identical though one copy is considerably clearer than the other. I therefore consider that the contents of the original document have been shown to be as in the photocopies.

121. Mr Brian Johnson testified that he personally initialled this endorsement on behalf of OUI and that since he underwrote solely on behalf of the plaintiffs at that time this endorsement committed OUI to an extension of the expiring contract for a further six months. He also testified that the endorsement related to contract 3TD70. His testimony on this point was credible. Turegum submitted that it would logically follow that the extended contract would have been governed by the same terms and conditions, including the arbitration clause, as was originally agreed. I agree. This interpretation is also supported by the wording of the endorsement that stated the conditions would remain unchanged except as specifically written in the endorsement.

122. I also consider this evidence of the extension of contract 3TD70 to be excellent evidence of the original conclusion of that contract. Mr Johnson acting on behalf of OUI could not have agreed to a six months extension of a contract on behalf of OUI unless OUI was already a party to the initial contract.

Contract 3TG71

123. This is the other contract in respect of which a copy of the slip is in OUI's possession. This contract is the most complete one from the point of view of documents. Turegum produced a complete set of original documents evidencing this contract. The original slip, reinsurance policy, authorisation form and cover note were tendered in court.

124. The copy slip produced by OUI consists of two pages. These two pages correspond to two of the four pages of the original slip and appear to be almost identical to those two pages. However, the photocopy is not clear and some of the endorsements on the original slip do not appear on the photocopy. The typewritten portions of both documents are identical. According to the slip, OUI wrote a line of 7% through Winchester Fox. The reference on the Winchester Fox stamp on the slip is 'XL/2/395/71'. The cover of the slip contains the handwritten reference 10318/A. According to Mr Brian Johnson's evidence, he signed the slip for 7.5% which was subsequently signed down to 6.13% and this contract was a renewal of contract 3TD70. The slip is applicable to losses occurring during the 12 month period commencing 1 July 1971, i.e. the coverage continues directly from the expiry of the period covered in the endorsement for contract 3TD71. The slip does not contain an arbitration clause. It does however, have a clause which reads:

> 'Wording as expiring or as agreed by leading underwriter.'

125. The other two original documents are the cover note dated 10 August 1971 issued by Bellew, Parry & Raven Ltd, the same brokers who issued the slip and a Companies Collective Reinsurance Policy signed by the leading underwriter and dated 3 March 1972. This policy is numbered 10318 which is the same number as appears on the slip. The policy identifies OUI as a reinsurer with a 6.13% line. Attached to the policy is the agreed wording and Clause 10 of this is an arbitration clause providing for arbitration to take place in London and the laws of England to govern the arbitration procedure.

126. I have already decided that the presence of a leading underwriter clause in the form found on the slip here would authorise

the leading underwriter to agree treaty wording which included an arbitration clause and that the following underwriters would be bound by the treaty wording once agreed. The issue in this case is whether the insurance policy produced can be admitted in evidence and taken as having been signed with the authority of OUI.

127. The third original document produced was entitled 'Authorisation Form'. It was stated to be in respect of 'Collective Policy No. 10318' and was dated 10 September 1971. It also states the reinsurers' policy reference number to be 2/395/71. This is the same number that appeared on the slip. This form is clearly admissible in evidence since Mr Trowbridge who signed it on behalf of Winchester Fox gave evidence confirming this fact. The form provided that OUI authorised the leading underwriter, Home & Overseas Insurance Co. Ltd. to sign the collective policy on its behalf.

128. As Mr Brian Johnson explained in his affidavit the authorisation form was issued and the policy was signed by the leading company underwriter because of the application of an agreement called the Companies Collective Signing Agreement to which Winchester Fox was a signatory. This agreement allowed the leading company underwriter to sign on behalf of the other company underwriters on the slip. The policy itself purports to have been signed on 3 March 1972 by a manager of the Treaty Department of Home & Overseas Insurance Co. Ltd. This person was not called however and since the document is less than 30 years old I have to consider whether the original policy may be admitted.

129. Section 32(b) of the Evidence Act allows a statement made in the ordinary course of business and in particular when it consists of a document used in commerce to be admitted in evidence even though the maker of the statement is not called as long as the maker is dead or cannot be found or his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable.

130. From the evidence before me, as to the course of business in the London insurance market, it is plain that the policy is a document that was made in the ordinary course of insurance business. It is a document that was used in commerce. The document is one of a series of documents relating to the transaction and is consistent with the other documents which were generated for the transaction as part of the normal course of events. Having examined the document, I am satisfied of its physical integrity and that the clauses attached to the policy were (as shown by the careful placement of the rubber stamp of Home & Overseas Insurance Co. Ltd.) part of the document when it was signed. I am also satisfied that since the document was signed 28 years ago by a person working for a company that is not a party to this action, it would have caused an unreasonable amount of delay and expense in what was supposed to be an expedited hearing for a search to have been made for the person who signed the policy or a colleague who could identify his signature.

131. It should also be noted that up to two days before the first hearing of this case, OUI had not made it plain to Turegum that it required strict proof of all documents in the case. It was this position that caused Turegum to subsequently undertake a wholesale search of its storage facilities and retrieve the original documents which it later adduced. Turegum also did its best to prove these documents by calling former employees of Winchester Fox as witnesses. Although Winchester Fox was OUI's agent, OUI itself made no attempt to track down witnesses or to ascertain exactly what documents had been signed on its behalf by its agent and whether Turegum's case was a genuine one. Instead it preferred to stand on its strict legal right of calling for strict proof of any and every document, even those of which it had copies in its possession.

132. In the circumstances, I hold that the policy is admissible in evidence despite the fact that the maker was not called. I therefore find that OUI was a party to contract 3TG71 and that that contract contained an arbitration clause for arbitration in London that bound OUI.

Conclusion

133. In the light of the conclusions I have come to, the claim of the plaintiffs OUI must be dismissed. Turegum has succeeded on its counterclaim in relation to the existence of the contracts and the arbitration clauses. I therefore make the following declarations:

1. The four reinsurance contracts nos. 3TD69, 3TD70, 3TD71 and 3TG71 are valid and subsisting and binding on OUI.

2. Each of the foregoing contracts contains an arbitration clause whereby parties have agreed to submit all disputes arising to arbitration in London.

OUI shall pay the costs of the claim and the counterclaim.

Sgd:

Judith Prakash
Judge