JUDGMENT : MRS JUSTICE GLOSTER: Commercial Court. 20th January 2006

1. This is an application by the claimant reinsurer, Axa Re ("Axa"), for a declaration under section 72(1)(a) of the Arbitration Act 1996 ("the Act") that a reinsurance contract between Axa and the defendant reinsured, Ace Global Markets Limited ("Ace") does not, on its true construction, include an arbitration agreement. The application also seeks injunctive relief to restrain Ace from continuing arbitration proceedings, instituted by it against Axa, by notice of arbitration dated 6 July 2005.

2. By the arbitration proceedings, Ace, as reinsured, claims an indemnity from Axa as reinsurer, in the sum of approximately US $25 million, under a whole account excess of loss reinsurance of Ace written for 100 per cent by Axa for the period 1 May 2001 to 31 December 2002. The reinsurance contract is contained in a reinsurance slip signed by Axa on or about 3 December 2001. The reinsurance slip provides, in a section headed *"Conditions/Wording" as follows:*
"Full wording as EXEL 1.1.90 with additional clauses, deletions, endorsements, special condition and warranties (at no additional premium) as follows:
War Included.
Extra-Contractual Obligations included.
Aggregate Voyage Extension Clause (Cargo) included.
Seepage and Pollution Exclusion Clause AVN SPEC II (1998 Amendment) (LSW 331)
Institute Radioactive Contamination Clause 1.10.90, and USA Endorsement USEN91 to apply to this contract.
Nuclear Energy Risks Exclusion, paragraph 6.2.4. amendment to include Japanese Amendment 1st April 1989
Electronic Date Recognition Endorsement C (XLEDRC) included, and to apply to all business hereunder other than Non Marine Non-Proportional Treaty Account, Casualty Account, Aviation Account and Space Account.
Electronic Date Recognition Endorsement A (XLEDRA) included, but to apply only to Non Marine Non-Proportional Treaty Account.
Date Recognition Exclusion Clause - Avn.2000 included but only to apply to Aviation Account and Space Account
Premium Adjustment Clause (as attached).
Aggregate Clause (as attached).
Ace Global Markets Late Payment Clause (as attached).
OCA (Outstanding Claims Advance) Clause (as attached).
Errors and Omissions Clause (LSW 321).
Amendments and Alterations Clause (LSW 319).
LSW 1001 (Reinsurance) - Several Liability Notice (as attached).
Aviation Grounding Liability Combined Clause (LSW 33OA).
Loss Settlements Combined Clause (LSW 334) in respect of Aviation losses.
This Contract shall be subject to English Law and Jurisdiction.
Recoveries from any underlying layers to this Contract covering the same subject matter as defined herein shall not be deducted in calculating the Net Loss for the purposes of this Contract.
All Reference to details contained in the "Schedule" mentioned in the Joint Excess Loss Committee Clauses shall be understood to mean the relevant details contained in the Slip."

3. It is common ground that the reference to EXEL 1.1.90 is a reference to the *"Joint Excess Loss Committee excess loss clauses*" dated 1 January 1990. EXEL 1.1.90 is a Joint Excess Loss Committee wording that was developed in 1990 and has been used frequently in the market for the last 15 years. The evidence is that the wording is widely available to reinsurance professionals, and can be found on various London market databases.

4. Clause 15 of EXEL 1.1.90 is an arbitration clause in the following terms:
"15 ARBITRATION
15.1 The parties agree that prior recourse to courts of law any dispute between them concerning the provisions of this contract shall first be the subject of arbitration.
15.2 The following arbitration procedure shall be used in any dispute concerning this contract, and shall exist as a separate contract if there is a dispute over the validity or formulation of the contract.
15.3 Unless the parties agree upon a single arbitrator within thirty days of one receiving a written request from the other for arbitration, the claimant (the party requesting the arbitration) shall appoint his arbitrator and give written notice thereof to the respondent. Within thirty days of receiving such notice the respondent shall appoint his arbitrator and give written notice thereof to the claimant, failing which the claimant may apply to the appointor hereinafter named to nominate an arbitrator on behalf of the respondent.
15.4 Before the commencement of arbitration proceedings the two arbitrators shall appoint a third arbitrator who shall act as chairman of the tribunal. Should they fail to appoint such a third arbitrator within thirty days of the appointment of the respondent's arbitrator then either of them or either of the parties may apply to the appointor for the appointment of the third arbitrator. The arbitrators appointed by the parties in dispute shall decide the verdict: if they cannot agree, they shall seek the verdict of the chairman of the tribunal, which shall prevail.
15.5 Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance.
15.6 The arbitration tribunal shall have power to fix all procedural rules for the holding of the arbitration including discretionary power to make orders as to any matters which it may consider proper in the circumstances of the case with regard to pleadings, discovery, inspection of the documents, examination of witnesses and any other

matter whatsoever relating to the conduct of the arbitration and may receive and act upon such evidence whether oral or written strictly admissible or not as it shall in its discretion think fit.

15.7 The appointor shall be the person indicated in section L of the schedule.

15.8 All costs of the arbitration shall be at the discretion of the arbitration tribunal who may direct to and by whom and in what manner they shall be paid.

15.9 The seat of the arbitration shall be in London and the arbitration tribunal shall apply the laws of England as the proper law of this contract unless indicated in section L to the schedule.

15.10 The award of the arbitration tribunal shall be in writing and binding upon the parties who covenant to carry out the same. If either of the parties should fail to carry out any award the other may apply for its enforcement to a court of competent jurisdiction in any territory in which the party in default is domiciled or has assets or carries on business."

5. It is common ground that the wording of EXEL 1.1.90 was not attached to the slip. However, it is clear from the express terms of the slip that the authors of it clearly had the EXEL 1.1.90 wording in front of them when drafting the slip: see, for example, the specific reference under the nuclear energy risks exclusion to clause 624. Alternatively, it is clear that they were extremely familiar with its provisions.

6. The issue on this application is whether or not, as a matter of construction, the reinsurance slip incorporates the arbitration clause contained in clause 15 of EXEL 1.1.90 into the reinsurance contract, notwithstanding the express incorporation of the English choice of law and jurisdiction clause in the slip. Axa contends that clause 15 is not so incorporated and that accordingly there is no arbitration agreement between the parties; Ace contends to the contrary and maintains its entitlement to bring arbitration proceedings.

7. There was some evidence served by both parties in support of, or in opposition to, the application. In particular, I should mention evidence given on behalf of the claimant, setting out wordings in reinsurance agreements in earlier years. However, I have not found the wording of the earlier contracts of any assistance in determining the issue that arises in this case. Either the earlier wordings are materially different, in which case they do not assist, or they are similar, in which case they reproduce in a slightly different form, the very dispute which I now have to decide. I do not, therefore, derive any factual matrix type assistance from the earlier contractual dealings between the parties, even on the assumption that they are a legitimate aid to construction.

8. Further evidence from both parties was to the effect that EXEL 1.1.90 is a standard wording. That was common ground. However, I do not, in approaching the issue of construction, attach any weight to the contention made by Mr Andrew Green (counsel who appeared on behalf of the claimant), that it is important to bear in mind that EXEL 1.1.90 is not a set of standard trade or market terms and conditions, but rather a group of clauses produced by the Joint Excess of Loss Committee (which is a London market committee set up by Lloyd's and the Institution of London Underwriters). In my judgment, on the evidence before me, EXEL 1.1.90 are in fact a set of standard trade or market terms and conditions. Even if they were merely, as Mr Green seeks to suggest, a group of clauses produced by the JELC, I do not see how that affects my approach to their construction. They are, in reality, standard reinsurance contract wordings in common use.

9. The evidence does not really take the matter much further than that. It is clear that it is open to parties to adopt standard wordings such as EXEL 1.1.90 with or without modifications as they choose. The question here is whether there was or was not any relevant modification in this case, which operated to exclude clause 15 which "imports" the arbitration agreement. That is the question of construction which I have to decide.

10. As I have said, the dispute between the parties is whether the reference in the reinsurance slip to English law and jurisdiction is inconsistent with the arbitration clause as Axa contends, such that it must have been the intention of the parties, that clause 15 of EXEL 1.1.90 was deleted. Ace, on the other hand, represented by Mr Steven Berry QC, contends that the reference in the reinsurance slip to the contract being subject to English law and jurisdiction is not inconsistent with the parallel existence of an arbitration agreement and that, there being no express agreement to delete clause 15, the arbitration agreement remains as part of the contract.

11. The principles to be discerned from the case law as to whether or not an arbitration clause is to be incorporated were not really in dispute and may be summarised as follows.

12. First, as Moore-Bick J (as he then was) set out in ***AIG Europe SA v QBE International Insurance Ltd*** [2001] 2 Lloyd's Rep 268, the correct approach to be adopted when considering whether or not a jurisdiction clause is incorporated into a contract, is for the court to "construe the language of the contract in the context of its commercial background and ask itself whether a consensus on the subject matter of the jurisdiction clause is clearly and precisely demonstrated". To similar effect is the statement of Colman J in ***Excess Insurance Co Ltd v Mander*** [1997] 2 Lloyd's Rep 119, in relation to the issue as to the incorporation of an arbitration clause.

13. At page 124 of that judgment he said as follows: *"... it is important not to lose sight of the fact that the basic juridical exercise involved in all the cases is the proper construction of general words of incorporation in one contract referring to the terms of another contract. The imputed mutual intention of the parties has to be arrived at by general principles of construction applicable to any other contractual term."*

14. It is clear that, whatever the position in relation to bills of lading cases (which was the type of case under consideration by Colman J in that part of his judgment), and as to whether or not, in such cases, general words of incorporation used in one contract relating to the terms of another contract are to be construed as incorporating

an arbitration clause, nonetheless, as stated in Merkin on Arbitration Law at paragraph 5.24: *"In the normal course of events it will be enough for the parties to demonstrate an intention to incorporate an arbitration clause by reference to a document which itself contains an arbitration clause."*

Indeed, as Mr Green accepted, section 6(2) of the Act expressly permits incorporation by reference to other documents. That section states: *"The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."*

15. In other words, given that there is no settled rule of construction that general words of incorporation in a contract relating to trade terms, or indeed some other non-contractual document, are sufficient to incorporate an arbitration clause contained in those terms, it is a question of construction on the facts and the wording of the particular contract in each case.

16. In cases of potential inconsistency between clauses, it is well settled that the contract must be read as a whole. As Mr Berry submitted, an effort should be made to give effect to every clause in the agreement and a clause should not be rejected unless it is manifestly inconsistent with or repugnant to the rest of the agreement: see Chitty on Contracts (Vol.1) paragraph 12-078, citing several authorities, including in particular ***Pagnan v Tradax*** [1987] 2 Lloyd's Rep 342 at 349.

17. If, but only if this cannot successfully be done and there is a clear and irreconcilable conflict between a clause that has been specifically agreed and an incorporated clause in standard terms, the clause that was specifically agreed to will prevail. An example of this is ***Indian Oil Corp v Van Oil Inc*** [1991] 2 Lloyd's Rep 634, a case upon which Mr Green relied. In that case, there was an arbitration clause in standard terms in the following terms:

"Article XI: Governing Law and Arbitration.

(a) The contract shall be governed by the laws of India.

(b) In the event of any dispute arising between the two parties relating to the various terms and conditions set forth in the contract the two parties undertake to resolve the differences by mutual consultation. In the event of their inability to resolve the dispute, the parties herein undertake to refer such disputes to an arbitrator: the arbitration shall take place in India."

However, the parties had also agreed to a term as follows: *"Law: the validity construction and performance of the agreement shall be governed by English law and all disputes arising thereunder shall be submitted to the jurisdiction of the English Courts."*

18. Webster J held that, since the obligation to submit all disputes to the jurisdiction of the English court was thought to be incapable of being made consistent with a duty to refer all disputes to arbitration, the terms of the written document, that is to say the specifically agreed term as to the English law clause took precedence over the arbitration terms, which had been incorporated merely by reference to the plaintiff's general terms and conditions for import of products. Webster J therefore concluded that the specifically agreed term took effect in preference to the standard term.

19. However, as Mr Berry submitted, it is clear that, in appropriate circumstances, and in the context of particular agreements, an agreement that the English courts will have jurisdiction and an arbitration clause in the same contract are not necessarily irreconcilable. The case of ***Paul Smith v H&S International Holding Inc*** [1991] 2 Lloyd's Law Rep at 127 provides a good example of this. In that case, there were two relevant provisions of a written contract. The first, clause 13, entitled "*Settlement of Disputes*" provided that: *"if any dispute or difference shall arise between the parties concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so, the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with those rules."*

20. The second clause 14, entitled "*Language and Law*", provided as follows: *"This Agreement is written in the English language and shall be interpreted according to English law. The courts of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit."*

Steyn J (as he then was) held that those provisions were not inconsistent. He concluded at page 129 that the reference to jurisdiction in clause 14 was to the English court's jurisdiction in respect of the curial law governing the arbitration. At page 129 he said as follows: *"Fortunately, there is a simple and straightforward answer to the suggestion that cll.13 and 14 are inconsistent. Clause 13 is a self-contained agreement providing for the resolution of disputes by arbitration. Clause 14 specifies the lex arbitri the curial law or the law governing the arbitration, which will apply to this particular arbitration. The law governing the arbitration is not to be confused with (1) the proper law of the contract, (2) the proper law of the arbitration agreement, or (3) the procedural rules which will apply in the arbitration. These three regimes depend on the choice, express or presumed, of the parties. In this case it is common ground that both the contract and the arbitration agreement are governed by English law. The procedural rules applicable to the arbitration are not rules derived from English law. On the contrary, the procedural regime is the comprehensive and sophisticated ICC rules which apply by virtue of the parties' agreement."*

He regarded his approach as a simple and straightforward answer to the suggestion that clauses 13 and 14 are inconsistent.

21. Similarly, in ***Shell International Petroleum Co Ltd v Coral Oil Co Ltd*** [1999] 1 Lloyd's Law Rep 72, Moore-Bick J came to a similar conclusion in the context of a contract with provisions, both for exclusive jurisdiction and arbitration. In that case, clause 13 of the relevant contract entitled "applicable law", was in the following terms: *"This Agreement, its interpretation and the relationship of the parties hereto shall be governed and construed in accordance with English law and any dispute under this provision shall be referred to the jurisdiction of the English Courts."*

    Article 14 of the relevant agreement entitled, "Arbitration" provided as follows: *"Any dispute which may arise … in connection with this Agreement shall be finally exclusively settled by arbitration by three arbitrators in London England in accordance with the rules of the London Court of International Arbitration…"*

    Moore-Bick J interpreted the clauses as consistent. He held that Article 13 provided for exclusive jurisdiction in connection with disputes about the proper law with all other disputes being subject to arbitration under Article 14. Having cited the extract from the judgment of Steyn J in ***Paul Smith*** (supra) to which I have just referred, he said (at p 76) as follows: *"That case is different in some respects from the case now before me because the language used in the contract before the Judge in that case was different. Nonetheless it does provide a helpful example of how to approach the problem. I do not think the clauses in the services agreement in this case are incapable of reconciliation. Article 13, which deals with the applicable law, states in terms that the agreement, its interpretation and the relationship of the parties is to be governed and construed in accordance with English law. So far so good, and indeed it is not disputed by Mr Keith that that provision is effective as an express choice of proper law on the part of the parties. The article continues to state: "Any dispute under this provision shall be referred to the jurisdiction of the English courts". In my judgment, that can be read as requiring any dispute about the proper law to be referred to the English Courts and all other substantive disputes to be referred to the arbitration under art.14. I would accept that provisions of that kind ascribing jurisdiction partly to the Courts and partly to arbitrators give rise to an untidy arrangement, but it is quite clear, in my judgment, that the parties did intend substantive disputes between them to be referred to arbitration, even if the Court was intended to have a residual jurisdiction over some kinds of disputes about the proper law. I should prefer not to decide in vacuo whether any particular dispute would fall within the ambit of art.13 or art.14. In my judgment, a question of that sort is better left for decision until a particular issue arises for consideration. Nonetheless I am quite satisfied that these two articles can be reconciled and that the Court should not reject them out of hand as being insensible."*

    He, therefore, was quite satisfied that the two Articles could be reconciled, and that he should not reject them out of hand as being inconsistent.

22. I turn now to the application of the relevant authorities in the present case.

23. Mr Green, on behalf of the claimant Axa, submitted in summary that it was incontrovertible that the parties to the reinsurance contract had expressly agreed to incorporate the English choice of law and jurisdiction; that they had clearly and specifically addressed their minds to the issues of choice and law and jurisdiction and that they regarded such matters of sufficient importance to justify the inclusion in the reinsurance slip in express wordings. By contrast, clause 15 was simply one of a number of clauses in a document incorporated by reference. He further submitted, that there was no evidence that the parties ever had any discussion about the clauses in EXEL 1.1.90, or addressed their minds to clause 15. He relied upon the fact that the EXEL 1.1.90 wording was not appended to the reinsurance slip.

24. In my judgment, as I have already said, it is clear that, although the EXEL 1.1.90 wording was not attached, the drafters of the slip had its provisions well in mind, if indeed they were not expressly before them when drafting. I do not accept the submission that Mr Green's points predicate the exclusion of the arbitration clause. In my judgment, the fact that the jurisdiction clause was specifically agreed, whereas the arbitration clause was incorporated only by reference, leads only to the conclusion that, if, indeed, there is an irreconcilable conflict between the two provisions, then the former clause (that is to say the jurisdiction clause) would prevail, as is common ground on the authorities between the parties.

25. However, what I have to decide, in the light of the authorities to which I have referred, is whether the two clauses can be sensibly reconciled. If they can, then the arbitration agreement remains. If they cannot, then it is clear, as Mr Green submitted and as Mr Berry accepted, that preference must be given to the expressly and specifically agreed clause.

26. The next point taken by Mr Green was that the defendant's construction is unsustainable and unsupported by the words of the slip or any factual matrix evidence. He submitted that it is surprising that there was no mention in the reinsurance slip of the arbitration provisions in clause 15 that it was very difficult to see how the choice of law clause could be dealing simply with the curial or supervisory jurisdiction of the court over arbitration proceedings or enforcement since both these matters were dealt with by clauses 15.9 and 15.10 of the EXEL 1.1.90 terms.

27. He further submitted that the provision in the reinsurance slip specifying English law and jurisdiction, has to be characterised as a deletion under the introductory words of the conditions and wording. That was because, he submitted, the specific inclusion of the English law and jurisdiction clause, had to be characterised as a deletion, because it clearly operated to delete clause 15 and such construction does not give rise to any violence to the language used. Accordingly, Mr Green submitted, the English choice of law and jurisdiction clause deletes clause 15, in the sense that it is there by way of replacement or substitution for clause 15.

28. In my judgment, it is not possible to construe the jurisdiction clause as a deletion. There are other clauses which operate as deletions, for example, the *"war included"* provision in the slip clearly operates as a deletion of the exclusion for war damage in clauses 5.1 of the EXEL 1.1.90 wording. Accordingly, I reject this submission.

29. The next point made by Mr Green is that the correct construction of the jurisdiction clause is that it is an exclusive jurisdiction clause. In my judgment, the jurisdiction clause, even taken on its own, is not necessarily an exclusive jurisdiction agreement, because it does not transitively require all disputes to be submitted to an English court. I refer in this context to ***Jurisdiction and Arbitration Agreements and their Enforcement*** by David Joseph QC at paragraph 4.14, where he states: *"Similarly, an agreement in terms which provided that "each party consents to the jurisdiction of the courts of England" has been held to give rise to a non-exclusive jurisdiction agreement. More controversial is the phrase "subject to English jurisdiction". This has been held to give rise to a non-exclusive jurisdiction agreement."*

    Reference is then made to ***S&W Beresford Plc v New Hampshire Insurance Company*** [1990] 1 Lloyd's Rep 454, and a contrast is drawn with a decision of the Australian courts in relation to a phrase, *"This reinsurance is subject to English jurisdiction"*. This was held to be an exclusive jurisdiction agreement by the Australian Commercial Division in New South Wales in ***FAI General Insurance v Ocean Marine Mutual*** [1997] 6 RE LR 316.

30. Even in isolation, therefore, there must be an argument that such a clause is not an exclusive jurisdiction clause. However, taken in combination with clause 15, in my judgment the clause cannot be regarded as being exclusive.

31. The next point taken by Mr Green is that the two clauses are conflicting because one cannot sensibly construe the reinsurance contract to conclude that the parties were intending to incorporate a second choice of law clause. He submits that the fact that they expressly incorporated the English jurisdiction clause was inconsistent with them having any intention to resolve their disputes by arbitration. He argues that, if indeed clause 15 were incorporated, it was not necessary for the parties to incorporate an English jurisdiction clause in order to ensure that the English courts had supervisory jurisdiction over the arbitration, because clause 15.9 of the EXEL 1.1.90 wording in any event expressly provides that London is the seat of the arbitration, with the result that the Arbitration Act applies to afford the English court supervisory jurisdiction. Likewise, he submitted that if clause 15 were incorporated, it would be difficult to see why the parties chose expressly to incorporate an English jurisdiction clause, because, although clause 15.1 provides that the parties agree that prior to recourse to courts of law any dispute between them shall first be the subject of arbitration, it could not realistically be suggested that this was the provision which led the parties to incorporate the English jurisdiction clause into the reinsurance slip.

32. I accept Mr Berry's submission that the fact that there are two clauses, with an express choice of English law, both in the jurisdiction clause and in the arbitration clause, does not result in any inconsistency. I accept Mr Berry's submissions that Mr Green's arguments are, in effect, based on a so-called presumption against surplusage in a contract. However, it is well recognised that there is no presumption against surplusage in a commercial contract and no conclusions can be drawn from the presence of two express choices of English law. In my judgment, in a commercial contract such as this, one should not be surprised to see parties stating clearly in a belt and braces way, the intention that English law is to apply.

33. Here, as was the position in the ***Paul Smith*** case and in the ***Shell International v Coral Oil*** case, it is perfectly possible to construe the two clauses in a harmonious manner. In my judgment, they can be read together in such a way as to avoid both conflict and surplusage. The arbitration agreement envisages the possibility that the proceedings will take place in court, though only after arbitration. The contract, when properly construed, demonstrates that the parties do not treat arbitration and court as mutually exclusive, but envisage arbitration as a step which may, or will, take place before any action in court.

34. I conclude, as did Steyn J in the ***Paul Smith*** case, that the reference to English jurisdiction operates in parallel with the arbitration provisions by fixing the supervisory court of the arbitration, that is to say the curial law or the law governing the arbitration in relation to matters arising in the course of the arbitration, and further fixes the appropriate court for proceedings after arbitration.

35. In my judgment, therefore, the arbitration agreement is workable alongside the agreement of the parties in the express wording of the reinsurance slip that there should be English jurisdiction. I, therefore, am able to construe the two clauses as consistent with each other, and accordingly I do not consider that an implied deletion of Article 15 is either necessary nor obvious.

36. Having reached that conclusion, it is not appropriate for me to reject Article 15 on the basis that, because it is contained in standard terms, it is to be trumped by the express wording of the jurisdiction agreement.

37. Accordingly, I reject Mr Green's carefully presented arguments and refuse his application. I should say finally that, although he placed reliance on the ***Indian Oil v Van Oil*** case, it is clear to me that the wording in that case can be clearly distinguished because the two clauses were clearly mutually inconsistent. The relevant article (which provided for Indian proper law and arbitration) was contained in general terms and conditions for import of products as opposed to in a standard wording for this type of reinsurance contract. It was a very different situation and was not of assistance to me in reaching my decision.

38. Accordingly, it follows that this application must be dismissed.

MR ANDREW GREEN (Instructed by Messrs Pinsent Masons) appeared on behalf of the Claimant

MR STEVEN BERRY QC (Instructed by Messrs Clyde & Co) appeared on behalf of the Defendant