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Case No: QB/2010/0381

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM MASTER FOSTER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2011

Before :

THE HON. MR. JUSTICE RAMSEY

Between :

Coys of Kensington Automobiles Limited	**Claimant/ Appellant**
- and -	
Tiziana Pugliese	**Defendant/ Respondent**

Oliver Ticciati (instructed by **Wilmot & Co Solicitors LLP**) for the **Claimant/Appellant**
Gerard Rothschild (instructed by **Lewis Silkin LLP**) for the **Defendant/Respondent**

Approved Judgment

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

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THE HON. MR.JUSTICE RAMSEY

The Hon Mr Justice Ramsey:

Introduction

1. This is an appeal against the decision of Master Foster dated 23 June 2010 by which he held that the English Courts did not have jurisdiction in respect of the Claimant's claim against the Defendant. On 5 October 2010 Dobbs J granted the Claimant permission to appeal against that decision.

Background

2. The Claimant auctioneers specialise in the auction of classic motor cars. In May 2009 the Claimant arranged an auction in Monaco. The Defendant is an Italian national who was visiting Monaco and completed a Telephone/Commission Bidding Form on 17 May 2009. She completed her details, signed the document and completed the telephone bid section of the form in respect of Lot No 247 which she described as "Bentley".

3. In these proceedings the Claimant contends that the Defendant, by completing the form and subsequently making a successful bid of €58,000, became bound by the Claimant's conditions of business which included a provision with the title "Governing Law" at Clause 5 which provided that "*All transactions to which the Conditions apply shall be governed by English Law and Coys, the Seller and the Buyer hereby submit to the exclusive jurisdiction of the English Courts.*"

4. The Defendant contends that she did not participate in the auction although she accepts that she signed the form. She says she has *"almost no understanding of written or spoken English"*; that she understood she had completed the form for the purpose of recording who she was and what her contact details were in case she chose to participate in the auction and that she was not referred to any conditions of business or to the auction catalogue, was not given a copy of the catalogue and was unaware of the existence of the conditions of business.

The Law

5. Under Article 1 of the Judgments Regulation (Council Regulation 44/2001) the general rule is that the Defendant would be sued in the courts of Italy, the Member State in which she is domiciled. There are a number of exceptions. In particular in this case Article 23 (1) provides:

> "*If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:*
>
> *(a) in writing or evidenced in writing; or...*"

6. On this appeal it is common ground, first, that the test to be applied in determining whether the requirements of Article 23 are satisfied is that set out in paragraph 28 of the opinion of the Privy Council in Bols Distilleries BV v Superior Yacht Services Limited [2007] 1 WLR 12. In that paragraph Lord Rodger of Earlsferry said this in relation to the test for article 23:

> *"The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a "good arguable case" depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in article 2(1) is ousted by article 23(1), the claimants must demonstrate "clearly and precisely" that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the "good arguable case" standard, the claimants must show they have a much better argument than the defendants that, on the material available at present, the requirements of form in article 23(1) are met and that it can be established, clearly and precisely, that the clause conferring jurisdiction on the Court was the subject of consensus between the parties."*

7. Secondly, it is common ground that the question of whether the requirements of article 23 are satisfied is one of EU law and not national law. In this context I was also referred to what Lord Rodger of Earlsferry said at paragraph 25 of Bols Distilleries which might suggest that national law is to be applied to that issue. In that paragraph Lord Rodger was dealing with the case of Shevill v Presse Alliance SA [1995] 2 AC 18 (ECJ) where it was decided that the harm to be established under Article 5(3) to establish jurisdiction for proceedings for tort had to be decided according to national law.

8. It is evident from a consideration of decisions of the European Court in Powell Duffryn plc v Petereit [1992] I L Pr 300 at paragraph 13 and Benincasa v Dentalkit Srl [1997] I L Pr 559 at paragraph 25 and also as summarised by Lewison J in Knorr-Bremse Systems for Commercial Vehicles Limited v Haldex Brake Products GmbH [2008] I L Pr 26 at paragraph 30 that community as opposed to national law should be used to determine the issue of whether article 23 has been complied with. To the extent that paragraph 25 in Bols Distilleries might be understood to suggest otherwise in relation to article 23, it appears to have been stated *per incuriam* the relevant community law. I therefore proceed on the basis of what is common ground in this case and assess whether the requirements of article 23 have been complied with by reference to EU law.

9. Whilst it is possible to derive certain principles of EU law from decisions of the European Court and the subsequent decisions of the national court based on those decisions, there are areas where there is no established principle of EU law in which case both parties have sought to rely on decisions of the English national courts to justify their arguments. Whilst that may be seen as conflicting with the principle that fulfilment of article 23 has to be judged by reference to EU law, on which there is common ground, I do not consider that it does provided that those decisions are judged for compliance with principles to be derived from article 23 and EU law.

The Decision of Master Foster

10. Master Foster held that the Claimant had not demonstrated, by a better argument than the Defendant, that Clause 5 of the Claimant's conditions of business had been the subject of consensus between the parties.

11. His reasoning in paragraphs 4, 5 and 7 of his judgment was that the signature on the form, the words at the bottom of the form referring to the conditions of business and the very small print of those conditions did not demonstrate that there had been consensus between the parties when weighed against the Defendant's arguments that she knew nothing of the conditions of business, did not agree to be bound by them and did not understand English and therefore did not consent to the jurisdiction of the English courts.

12. At the beginning of the hearing of this appeal, Mr Oliver Ticciati, appearing on behalf of the Claimant, submitted that in this case the court should proceed under CPR 52.11(1)(b) to hold a rehearing of this matter rather than to take the usual course of reviewing the decision of Master Foster because, in the circumstances of the case, it was in the interests of justice to do so. Mr Gerard Rothschild, on behalf of the Defendant, submitted that the general rule should apply and the Court should carry out a review of the decision of Master Foster and not a rehearing. I do not consider that this is a case where the Court should conduct a rehearing. Whilst Master Foster's decision contained only brief reasoning I consider that it sufficiently sets out the reasoning for the Claimant to be able to show where it contends the Master was wrong. In the event that I am persuaded that the Master was wrong then the Defendant, in the Respondent's Notice, raises a number of contentions on which she relies to uphold the Master's decision.

13. As can be seen from the Master's reasoning he applied the test in Bols Distilleries, which, it is common ground, is the correct test to be applied. In determining whether Clause 5 was the subject of consensus between the parties, Mr Ticciati submits that the Master was wrong in his interpretation of the terms of the form and was wrong to take into account subjective evidence from the Defendant as to her knowledge of the English language and her knowledge of the catalogue. For the reasons set out below I consider that Master Foster did fall into error in those respects because compliance with article 23 has to be judged on an objective approach.

14. On that basis it is appropriate that I should consider both the Claimant's and the Defendant's alternative arguments to determine whether the Claimant has a much better argument than the Defendant that, on the material available at present, the requirements of article 23(1) are met and that it can be established clearly and precisely that Clause 5 was the subject of consensus between the parties.

The Central Question

15. In this case the Claimant alleges that an agreement was made between the Claimant and the Defendant on the basis that she completed and signed the Form and that she made a successful bid for Lot 247 at the auction on 18 May 2009 by telephone, so that the contract was concluded by the fall of the hammer at that auction. The Defendant says that she did not participate in the auction. Whatever

Court is seized of these proceedings will therefore have to decide whether the Defendant made the bid which concluded the contract based upon the Form.

16. I consider that the Claimant has established a good arguable case that the Defendant did participate in the auction. She evidently completed the Form on the basis that she would participate in the auction. Mr Gregor Wenner, the Claimant's Italian Auction manager, was the person who conducted the telephone bid for the Defendant on the day of the auction and annotated the Form with her bid. The Defendant was sent the auction bill of sale and a letter of 12 June 2009 asking for payment. The letter was written in Italian and the Defendant did not, at any time, dispute that she had taken part in the auction until she set out in paragraph 9 of her Witness Statement of 29 March 2010 simply this: "*I did not participate in the auction*". I consider that there is a good arguable case that the Defendant participated in the auction and that her bid and the fall of the auctioneer's hammer concluded an agreement which was evidenced in writing.

17. On that basis the central question is therefore whether the terms of the Form relied on by the Claimant provide a sufficiently strong argument to overcome the various matters relied upon by the Defendant so as to establish a "much better argument" that there was consensus between the parties as to clause 5 of the Conditions of Business.

18. Under the provisions of article 23(1) there is a requirement that the parties must have made an agreement in writing or evidenced in writing under article 23(1)(a) or in some other specific form. In this case it is contended that there was such an agreement evidenced in writing by the Form.

19. As the European Court said in Case 25/76 Galeries Segoura SPRL v Rahim Bonakdarian [1976] ECR 1851 at paragraph 6 in relation to article 17(1) of the 1968 Brussels Convention on Jurisdiction which, as the Privy Council stated in the Bols Distilleries case at [22], is not materially different from article 23(1): "*By making such validity subject to the existence of an 'agreement' between the parties, Article 17 imposes upon the court before which the matter is brought the duty of examining, first whether the clause conferring jurisdiction upon it was in fact the subject to a consensus between the parties, which must be clearly and precisely demonstrated*".

20. The requirement that something has to be in writing shows that the court is concerned with that written document and the interpretation of the written document rather than what a party thought, meant or intended by a particular form of words. This shows, as set out in the decision of Moore-Bick LJ in AIG Europe SA v QBE International Insurance Ltd [2001] 2 Lloyd's Rep 268 at [26] and the decision of Gross LJ in Siboti K/S v BP France SA [2003] 2 Lloyd's Rep 364 at [40], that the agreement has to be construed objectively against the relevant background to see whether a consensus on the jurisdiction clause has been clearly and precisely demonstrated.

21. There have been a number of decisions which have considered whether the required consensus between the parties has been clearly and precisely demonstrated where standard terms are involved.

22. The starting point is the decision of the European Court in the Salotti case (Estasis Salotti di Colzani Aimo e Gianmario Colzani v RÜWA Polstereimaschinen GmbH [1977] 1 CMLR 347. In that case the parties had signed an agreement on one party's letterhead which contained, on the back, general conditions of sale which included a German jurisdiction clause. There was no mention of the conditions in the agreement and no reference to them on the face of the letterhead. The agreement referred to an earlier letter which again contained the general conditions of sale on the back and had been sent with a number of offers each of which referred to the general conditions of sale printed on the back of the letter.

23. Two questions were posed for the Court:

(1) Does a clause conferring jurisdiction, which is included among general conditions of sale printed on the back of a contract signed by both parties, fulfil the requirement of a writing under the first paragraph of Article 17 of the Convention?

(2) In particular, is the requirement of a writing under the first paragraph of Article 17 of the Convention fulfilled if the parties expressly refer in the contract to a prior offer in writing in which reference was made to general conditions of sale including a clause conferring jurisdiction and to which these conditions of sale were annexed?

24. In answering the first question the Court said this:

"*[9] Taking into account what has been said above, it should be stated that the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of Article 17, since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction. It is otherwise in the case where the text of the contract signed by both parties itself contains an express reference to general conditions including a clause conferring jurisdiction. [10] Thus it should be answered that where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.*"

25. Then in respect of the second question the Court added:

"*[12] In principle, the requirement of a writing under the first paragraph of Article 17 is fulfilled if the parties have referred in the text of their contract to an offer in which reference was expressly made to general conditions including a clause conferring jurisdiction. This view of the matter, however, is valid only in the case of an express reference, which can be checked by a party exercising reasonable care, and only if it is established that the general conditions including the clause conferring jurisdiction have in fact been communicated to the other contracting party with the offer to which reference is made. But the requirement of a writing in Article 17 would not be fulfilled in the case of indirect or implied*

references to earlier correspondence, for that would not yield any certainty that the clause conferring jurisdiction was in fact part of the subject-matter of the contract properly so-called."

26. Subsequently the German court applying those principles held that the requirement for an agreement under article 17(1) had been satisfied.

27. In Credit Suisse Financial Products v Société Generale d'Enterprises [1997] CLC 168 the Court of Appeal considered the Salotti case in the context of a case where an oral agreement had been confirmed in a document faxed by one party which was then signed and faxed back by the other party. The document referred to a 1992 ISDA Master Agreement which contained an English jurisdiction clause. The party who signed the document was found not to have had a copy of the Master Agreement in their possession or readily available.

28. Saville LJ, with whom the other members of the court agreed, said this at 171 to 172:

"*To my mind the question is simply whether the express reference in the written contract in the present case amounts to a 'clear and precise' demonstration that the clause conferring jurisdiction was the subject of a consensus between the parties.*

I have no doubt at all that it does. It seems to me that there is nothing in Salotti which begins to suggest that where in the written contract itself there is an express incorporation by reference of other written terms, no consensus is established unless the profferee signing the contract has been supplied with a copy of those terms, or as the judge put it, he has 'a copy of those conditions in his possession and readily available to him'. It is true that in Salotti the conditions were printed on the back of the contract, but as the court pointed out, in the absence of a reference to them in the contract itself, this was not enough to satisfy art.17 'since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction'. The court went on to say:

> *'It is otherwise in the case where the text of the contract signed by both parties itself contains an express reverence to general conditions including a clause conferring jurisdiction.'*

It seems to me to be clear from the judgment in Salotti that the court considered that a 'guarantee' of real consent does exist where there is an express reference in the written contract itself by way of incorporation of other written terms which include a clause conferring jurisdiction. Indeed, given such an express reference, it seems to me self evident that the profferee of the written contract, by signing without reservation, has agreed in writing the incorporated terms (and thus the clause conferring jurisdiction) for the simple reason that the very words of the signed written contract itself are to that effect. To my mind the fact that Mr Mossler in the present case did not have a copy of the master agreement in his possession and readily available to him, or, as he said in his affidavit, that he thought the reference to the master agreement was a 'standing clause' is neither here nor there; for in truth Mr Mossler, by signing the confirmation, did agree in writing that the terms of the master agreement formed part of the contract he was making."

29. In 7E Communcations Ltd v Vertex Antennentechnik GmbH [2007] 1 WLR 2175 a German company faxed a quotation to an English company expressed to be on the German company's terms and conditions which contained a German jurisdiction clause. No copy of those terms and conditions was sent to the English party. That quotation was accepted and the goods delivered. The Court of Appeal had to decide whether the clause came within article 23(1). Sir Anthony Clarke MR referred to the passage from the judgment of Saville LJ in Credit Suisse at 172 cited above and said this:

"*In that passage Saville L.J. thus emphasised two points which are of some importance in the instant case. The first is that what the court in the Salotti case [1976] ECR 1831 had called in the first part of para 9 a guarantee that the relevant party has "really consented to the clause" exists where there is an express reference to the terms and conditions which include the jurisdiction clause. It is not necessary for there to be a specific reference to the jurisdiction clause itself. The second is that the fact that the relevant party does not have a copy of the terms and conditions or the jurisdiction clause in its possession is not relevant. So, in the Credit Suisse case, although he did not have a copy of the master agreement in his possession or readily available to him, Mr Mossler, by signing the confirmation, was held to have agreed in writing that the terms of the master contract formed part of the contract.*"

30. From those decisions I derive the following:

(1) Where the jurisdiction clause is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of article 23 is fulfilled only if the contract contains an express reference to those general conditions: the Salotti case.

(2) Where there is an express reference in the written contract itself by way of incorporation of other written terms which include a clause conferring jurisdiction, article 23 is fulfilled even if the party signing did not have a copy of those conditions in their possession or readily available or did not understand what was incorporated: the Credit Suisse case.

(3) It is not necessary for there to be a specific reference to the jurisdiction clause itself for the requirements of article 23 to be fulfilled: the 7E Communications case.

31. I therefore consider that the central question in this case is whether there was the necessary consensus, on an objective interpretation of the terms of the Form, construed against the relevant background. I therefore turn to that issue.

The Form

32. Mr Ticciati submitted that the terms of the Form, to use the words in Galeries Segoura, clearly and precisely demonstrated the fact that there was consensus between the parties to confer jurisdiction on the English court.

33. He relied on the fact that the Defendant signed and dated the Form after giving her name and address and contact details. She then completed the next table, writing in the Lot No column in manuscript "247" and the Description column in

manuscript "Bentley". That column is under the Heading "Telephone Bids" which stated:

"*Coys are instructed to accept telephone bids on the following Lots. I understand that if my bid is successful the purchase price payable shall be the aggregate of the final bid and a buyer's premium of 15% on the first £30,000/€50,000 of the hammer price and 10% upon any excess, together with VAT on the premium.....*"

34. Immediately below the table it states: "*All bid [sic] shall be treated as offers made within the 'Conditions of business' and 'Important Notice' printed in the catalogue.*" Mr Ticciati submitted that this was a sufficient reference to the Conditions of Business which contained the relevant jurisdiction clause at Clause 5.

35. On this basis, he submitted that, by completing the Form the Defendant had agreed that any bid would be an offer and that any transaction would be subject to the exclusive jurisdiction of the English courts. Accordingly, when the bid was made and the hammer fell, there was a transaction which under Clause 5 was subject to the exclusive jurisdiction of the English courts.

36. Mr Rothschild submitted that there was no agreement as to Clause 5 because:

(1) The Defendant said that she knew nothing of the catalogue.
(2) The Defendant said she knew nothing of the conditions.
(3) The Defendant could not read or understand the relevant terms sufficiently to understand them as she had almost no understanding of written or spoken English.
(4) The Defendant's signature was not immediately under or even near the relevant words which were at the bottom of the page and the Form did not contain words such as "*I agree to be bound by the terms and conditions.*"
(5) The clause was unusual and should not be assumed to be the subject of consensus unless clearly signposted and it was in very small print, under the heading "Governing Law" and in a catalogue which the Defendant denies being given or being referred to.

37. I shall now deal with each of the points raised by Mr Rothschild in turn to assess which party has the stronger case. First, there is the contention that the Defendant knew nothing of the catalogue and secondly that she knew nothing of the conditions. The Form on its face referred to the Conditions of Business printed in the catalogue. As stated in the Salotti case such a reference is sufficient for there to be consensus and as stated in the Credit Suisse case there is no need for the actual terms to be in the possession of the Defendant and available to her for there to be sufficient consensus.

38. The third matter relied on by the Defendant is that she could not read or understand the Form as she was an Italian speaker and the Form was in English. It is evident that she understood enough of the Form to complete the boxes including the reference to the Lot Number and the description of the car. However, as a general principle, a party who completes and signs a document cannot rely on the

fact that they have not read the document or have not understood it. Their acts are generally viewed objectively.

39. Mr Rothschild referred in this context to the decision in Geier v Kujawa [1970] 1 Lloyd's Rep 364. In that case a driver of a car was alleged to have caused injuries to a German speaking passenger. The driver sought to rely on a notice that passengers rode in the car at their own risk. The judge found that the passenger had never seen the notice and, if she did see it, she could not have read it. He added that because the passenger could not speak English, it should have been translated. That case evidently concerned the effect of a notice by which a party wished to exclude risk and the reference to the need for translation does not seem to have formed part of the reasoning and, in any event, has to be read in the context of the need for subjective knowledge of a notice.

40. Mr Ticciati, on the other hand referred to the decision of the Court of Appeal in L'Estrange v Graucob [1934] 2 KB 394 where Scrutton LJ had said that in the case of an agreement signed by a party "it is wholly immaterial whether he has read the document or not." I consider that this is a reflection of the fact that a written agreement has to be construed objectively, a principle which applies under article 23 and EU law. Here the background was that the Defendant visiting Monaco completed and signed the Form written in English for an international car auction. Viewed objectively, I do not consider that there is a strong argument that a person who completes a document such as the Form in such circumstances can avoid its consequences by saying that they did not read it or did not understand it. Otherwise, to make the question of consensus, in a case based on a document, depend on the intellectual or linguistic capacity of a party would cause great uncertainty which an objective analysis is intended to overcome.

41. In this case, when permission to appeal was given, a matter which was thought to be relevant was that there was now evidence that the Defendant was an Italian lawyer. The Claimant sought to adduce that evidence and the Defendant objected to it. I do not consider that this fact, even if I had decided to admit the further evidence which I do not, would have made any difference. That, I consider, would lead to considerations of whether subjectively an Italian lawyer would be better able to understand the Form in English and therefore be more likely to have read and understood the Form. Whilst that might be a matter relevant to cross-examination of the Defendant at any trial, I do not consider that it assists at this stage.

42. The fourth point made by Mr Rothschild is that Defendant's signature was not immediately under or even near the relevant words and the Form did not contain words such as "*I agree to be bound by the terms and conditions.*" The signature was in the table at the top of the Form but the Defendant completed the telephone bid table below it and at the bottom of that table were the words stating that bids would be treated as offers made within the 'Conditions of business' and 'Important Notice' printed in the catalogue.

43. Whilst the signature could have been placed below the tables and it would have been clearer had there been the suggested wording, the question is what is the effect of the signature being in the position where it is, given the wording that was

in fact used. Such an objective construction accords with the principles to be applied and was illustrated by the decision in Erasmus Robert Foster v The Mentor Life Assurance Company (1854) 3 E & B 48, cited by Mr Ticciati. The fact that the Form was signed by the Defendant is of importance and I do not consider that an argument based on any misunderstanding of the purpose for the signature has much strength.

44. Reading the text of the Form against the background of a person putting a signature on it in the context of wishing to bid in an international car auction, I consider that the stronger argument is that the Defendant intended the signature to be an acknowledgment of the terms of the Form. I gain some support for this conclusion from the decision of the Italian District Court at Leghorn in Alpina Compagnia di Assicurazione SA v Agenzia Marittima LV Ghianda SNC (the "Ice Express") [1990] I L Pr 263 where a party had not signed a bill of lading immediately below the declaration and claimed to have signed merely to acknowledge special instructions for looking after the cargo but was held to be bound by a jurisdiction clause.

45. The wording of the Form referred to the Conditions of Business in the context of a party making a bid in the auction. Given the layout of the form and the fact that the Defendant completed the table below the signature, I do not consider that the contention that the location of the signature was not near the reference to the conditions of business has much force. Equally, whilst the wording could have better, I consider that viewed objectively the argument that it is sufficient is a stronger one.

46. The fifth point made by Mr Rothschild is that, as the clause was unusual, consensus should not be assumed unless the clause was clearly signposted and in this case it was in very small print, under the heading "Governing Law" in the catalogue. However, as stated in the 7E Communications case, it is not necessary for there to be a specific reference to the jurisdiction clause itself. This strongly supports the argument that there is nothing particularly unusual in such a clause, particularly in the context of an international transaction, such as this auction.

47. The Conditions of Business are in small print but it is not suggested that, in this case, that affected the notice which the Defendant had of this particular term. There was notice of the Conditions of Business by the reference on the face of the Form. The fact that the writing was small is not, in my judgment, a strong basis for arguing that there was not consensus.

Conclusion

48. On the basis of an objective analysis of the Form signed by the Defendant, which I consider to be the correct approach in cases where article 23(1)(a) is relied upon, for the reasons set out above I have come to the overall conclusion that it is the Claimant who has a much better argument than the Defendant that the requirements of article 23 are met and that it can be established, clearly and precisely, that Clause 5 of the Claimant's conditions of business conferring jurisdiction on this Court was the subject of consensus between the parties.

49. Accordingly, for those reasons I allow the appeal and would ask the parties to decide what form the form of order should be and how any ancillary matters should be dealt with. I am grateful to both counsel for their helpful and clear submissions on the issues raised by this case.