[2020 Gib LR 315]

GEFION INSURANCE A/S v. PUKKA INSURANCE LIMITED

SUPREME COURT (Restano, J.): November 6th, 2020

Conflict of Laws—contracts—asymmetric jurisdiction clauses—claimant had better argument that asymmetric jurisdiction clause, governed by Danish law, providing that Danish courts had exclusive jurisdiction save that claimant insurance company could choose to sue insurance intermediary in Gibraltar (where registered), valid under Danish law—such clauses have sound commercial rationale in financial market transactions and held to be valid in number of EU states

The claimant/respondent brought a claim for payment of a debt or damages.

The claimant/respondent, Gefion Insurance A/S ("Gefion"), was a Danish insurance company which went into voluntary liquidation in Denmark in July 2020. It issued a claim form in May 2020 seeking payment of a debt or damages in the sum of £4,947,321 from the defendant/applicant, Pukka Insurance Ltd. ("Pukka"), an insurance intermediary which was registered in Gibraltar.

The claim arose from Pukka's appointment as Gefion's managing general agent, authorizing it to bind Gefion as the insurer for motor insurance policies. The parties had entered into a binding agreement for three twelve-month underwriting periods, May 2016 to April 2019, which contained a sliding scale setting out how Pukka's commission would be calculated based on the overall performance of the contracts. Gefion's claim represented the balance claimed by it following an adjustment under the agreement. Pukka alleged that Gefion was responsible for the loss.

Section 42 of the agreement dealt with jurisdiction and provided:

> "The Agreement and any non-contractual dispute or obligation arising out of or in connection with it shall be subject to the law of Demark and to the exclusive jurisdiction of the courts of Denmark save that the Underwriter [Gefion] may, at its discretion, determine

that the applicable jurisdiction shall be that of the jurisdiction where the Coverholder [Pukka] is domiciled or does business."

Pukka did not submit to the jurisdiction of this court, claiming that Danish law and jurisdiction applied. Pukka filed a claim in the Copenhagen City Court against Gefion claiming that it was entitled to the full commission it had received without any adjustment and further sums. Pukka also applied to the Danish court for modification of the jurisdiction and governing law clause in s.42 of the parties' agreement so that the Danish courts had exclusive jurisdiction to hear and determine the dispute between Gefion and Pukka. The substantive validity of the jurisdiction clause was governed by Danish law.

Pukka applied under CPR r.11(1) and r.11(6) for a declaration that the court had no jurisdiction to try the claim and an order setting aside the claim form and discharging a freezing order. Alternatively, Pukka applied for a stay of the proceedings to enable the Danish courts to determine the question of jurisdiction. Gefion opposed the applications.

Article 25 of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provided:

> "If the parties, regardless of their domicile, 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, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

Gefion submitted that (a) the Gibraltar courts had jurisdiction on a plain reading of s.42 of the agreement and art. 25 of the Regulation; (b) courts across the EU had largely treated asymmetric jurisdiction clauses as valid and enforceable; (c) there was nothing objectionable about Pukka being sued in Gibraltar as a matter of principle and in the absence of Danish jurisprudence on the subject the trend across the EU and the commercial rationale behind asymmetric jurisdiction clauses militated in favour of the Danish courts upholding such clauses rather than concluding that they were inherently objectionable; (d) the agreement had been entered into between commercial parties without coercion or similar considerations; (e) the overriding principle in Danish law was freedom of contract and the autonomy of parties to agree to their own terms of an agreement; (f) the jurisdiction clause had not been imposed on Pukka as a standard term; and (g) a stay should not be ordered as the Gibraltar courts were first seised.

Pukka submitted that (a) Gefion had not established that the court had jurisdiction because the lop-sided nature of the s.42 jurisdiction clause was inherently unfair and contrary to Danish law; (b) Danish contract law aimed not only at protecting consumers but also the weaker party generally in a contractual relationship, and Gefion had been in the

stronger negotiating position and had dictated the terms of the agreement; (c) it would be unfair for the claim to proceed in Gibraltar, governed by Danish law, whilst it had to bring its own claim in Denmark; (d) the proceedings should alternatively be stayed so that the substantive validity of the jurisdiction clause which was governed by Danish law could be determined by the Danish court; and (e) for the purposes of art. 31(2) of the Regulation, the Danish courts had exclusive jurisdiction.

Section 36 of the Danish Contracts Act (in translation) provided:

> "(1) A contract may be modified or set aside, in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce it. The same applies to other juristic acts.
>
> (2) In making a decision under sub-section (1) hereof, regard shall be had to the circumstances existing at the time the contract was concluded, the terms of the contract and subsequent circumstances."

Held, dismissing the applications:

(1) It was common ground that the burden of proof was on Gefion as the claimant to establish that the Gibraltar court had jurisdiction. Gefion had to show with reliable evidence that it had the better argument that the jurisdiction clause was valid under Danish law and that the court could therefore take jurisdiction (paras. 10–15).

(2) Article 25 of Regulation (EU) No. 1215/2012 provided that the question of the substantive validity of a jurisdiction clause was a matter for the law of the Member State designated in the agreement, which in the present case was Danish law. The argument that s.42 was contrary to s.36 of the Danish Contracts Act because its lop-sided nature made it inherently unfair did not appear to have come before the Danish courts, as no Danish authorities were identified by the experts on the validity of asymmetric jurisdiction clauses. There was no point speculating one way or the other about the absence of Danish authority on this issue, especially as this was a summary determination which had to be undertaken with common sense and pragmatism. There was a sound commercial reason for asymmetric jurisdiction clauses in financial market transactions even if they were not upheld in all the courts of EU states. The rationale behind such clauses was to allow a creditor to sue a debtor in the domicile of the debtor (in this case Gibraltar) as well as a chosen court (in this case the Danish courts). That rationale was particularly compelling in the present case as Pukka, which had no presence in Denmark, retained a provisional commission from the premiums paid and the true entitlement to commission fell to be calculated following an adjustment 24 months after the end of the relevant underwriting period. Such clauses had been held to be valid in a number of EU states and the jurisprudence suggested more of a trend across the EU in favour of asymmetric jurisdiction clauses reflecting the sound commercial rationale behind such clauses. In respect of Pukka's concern that it was facing a claim in Gibraltar which was governed by Danish law when it had to bring its own claim in Denmark, the fact that Pukka was facing proceedings in Gibraltar was not unusual as one would

expect to be sued in one's own domicile. The court was not persuaded that there was a risk that something could get "lost in translation." The Gibraltar courts routinely dealt with claims brought under foreign law and were well equipped to do so with questions of foreign law pleaded and proved as fact by way of expert evidence and sometimes by other means. Further, Pukka's complaint in this regard was hypothetical and no particular feature of this case or of the applicable Danish law principles were identified to support the view that there might be injustice if this case proceeded to be tried in Gibraltar. As to the alleged unfairness in Pukka having to bring proceedings in Denmark as required under the jurisdiction clause, Gefion's position was that Pukka was entitled to fully defend the claim and bring its counterclaim by way of set-off in Gibraltar. There was therefore not much force in that complaint either. On the basis of the materials provided, there were good commercial reasons for the use of asymmetric jurisdiction clauses, particularly on the facts of the present case. There was nothing inherently objectionable about this particular s.42 or its operation to lead the court to conclude that it was unreasonable or at variance with the principles of good faith under the Danish Contracts Act. Gefion therefore had the better argument that the s.42 jurisdiction clause was not repugnant to Danish law as a matter of principle (para. 16; paras. 40–44).

(3) Turning to Pukka's fact-specific challenge, which was largely based on the alleged power imbalance between the parties, this was not the sort of case where the relative size of the parties to the agreement took matters further one way of another under Danish law. Whether Pukka was the more or less substantial company, both parties were self-standing commercial entities. Pukka's director and ultimate shareholder was an experienced businesswoman in the insurance industry and she had been in a position together with her management team to consider the terms of the agreement and to take advice on it if necessary. Commission reductions that had been agreed did not bring s.36 of the Danish Contracts Act into play. There was nothing unusual about the commercial relationship which followed. Pukka did not have the better of the argument that this aspect of the commercial negotiations was evidence of aggressive business tactics such as displaced the principle of freedom of contract under Danish law. Gefion had the better argument that the plain terms of the s.42 jurisdiction clause applied under Danish law. The court had jurisdiction to determine Gefion's claim (paras. 49–54; para. 63).

(4) The application for a stay of proceedings would be refused. A plain reading of art. 31(2) of the Regulation suggested that the Gibraltar courts were properly seised of the claim. Pukka had produced very little evidence to support the alternative construction which it was commending under Danish law (paras. 61–62).

Cases cited:

(1) *A Aps* v. *Adform A/S*, U2020.3042Ø, High Ct. of Eastern Denmark, distinguished.
(2) *Bols Distilleries B.V.* v. *Superior Yacht Servs. Ltd.*, 2005–06 Gib LR 143, followed.
(3) *Canada Trust Co.* v. *Stolzenberg (No. 2)*, [1998] 1 W.L.R. 547; [1998] 1 All E.R. 318; [1998] C.L.C. 23, considered.
(4) *Commerzbank AG* v. *Liquimar Tankers Management Inc.*, [2017] EWHC 161 (Comm); [2017] 1 W.L.R. 3497; [2017] 2 All E.R. (Comm) 829; [2017] 1 C.L.C. 136, referred to.
(5) *Four Seasons Holdings Inc.* v. *Brownlie*, [2017] UKSC 80; [2018] 1 W.L.R. 192; [2018] 2 All E.R. 91, considered.
(6) *Goldman Sachs Intl.* v. *Novo Banco SA*, [2018] UKSC 34; [2018] 1 W.L.R. 3683; [2018] 2 BCLC 141, considered.
(7) *Intercontainer Cooperative Co.* v. *Oskar Schunck KG*, U1988.829H, referred to.
(8) *Intercontainer Cooperative Co.* v. *Oskar Schunck KG*, FM2019.79Ø, referred to.
(9) *Kaefer Aislamientos SA de CV* v. *AMS Drilling Mexico SA de CV*, [2019] EWCA Civ 10; [2019] 1 W.L.R. 3398; [2019] 3 All E.R. 979, considered.
(10) *Mauritius Commercial Bank Ltd.* v. *Hestia Holdings Ltd.*, [2013] EWHC 1328 (Comm), considered.
(11) *Pechstein* v. *International Skating Union*, Higher Regional Ct. of Munich, January 15th, 2015; on appeal, *sub nom. Mutu and Pechstein* v. *Switzerland* (2018), App. nos. 40575/10 and 67474/10, ECHR 324, considered.
(12) *Société eBizcuss.com* v. *Apple*, Case No. 14–16898, First Civil Chamber, October 7th, 2015, considered.
(13) *VTB Capital plc* v. *Nutritek Intl. Corp.*, [2013] UKSC 5; [2013] 2 A.C. 337; [2013] 2 W.L.R. 398; [2013] 1 All E.R. 1296; [2013] 1 BCLC 179; [2013] BCC 514; [2013] 1 C.L.C. 153, referred to.
(14) *Vedanta Resources plc* v. *Lungowe*, [2019] UKSC 20; [2020] 1 A.C. 1045; [2019] 2 W.L.R. 1051; [2019] 3 All E.R. 1013; [2019] BCC 520; [2019] BLR 327; [2019] Env. L.R. 32, referred to.
(15) *X* v. *Société Banque Privée Edmond de Rothschild Europe*, [2013] I.L. Pr. 12, September 26th, 2012, considered.

Legislation construed:

Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12th, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Recast), art. 25:

"1. If the parties, regardless of their domicile, 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, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

art. 31: The relevant terms of this article are set out at para. 56.

D. Feetham, *Q.C.*, *R. Pennington-Benton* and *D. Martinez* for the claimant/respondent;

C. Simpson and *D. Nagrani* for the defendant/applicant.

1 **RESTANO, J.:**

Introduction

Pukka Insurance Ltd. ("Pukka") made an application on July 3rd, 2020 under CPR r.11(1) and r.11(6) asking for a declaration that the court has no jurisdiction to try this claim, an order setting aside the claim form herein and for the discharge of a freezing order made on June 26th, 2020. The key question which this application raises, therefore, is whether this claim should be allowed to continue in Gibraltar. Alternatively, Pukka applies for a stay of these proceedings to enable the Danish courts to determine the question of jurisdiction. Gefion Insurance A/S ("Gefion") resists both applications.

2 The application is supported by the witness statement of Dhiraj Nagrani dated July 2nd, 2020 and the expert report on Danish law of Jesper Hjetting also dated July 2nd, 2020. In response to the application, the claimant, Gefion, filed the witness statement of Darren Martinez dated July 31st, 2020 and the expert report on Danish law of Michael Carsted Rosenberg dated July 20th, 2020. This then led to Pukka filing the second witness statement of Mr. Nagrani exhibiting the second report of Mr. Hjetting both dated September 7th, 2020 and the third witness statement of Samantha White dated September 4th, 2020.

3 At the outset of the hearing, Mr. Simpson requested permission to rely on the third witness statement of Samantha White as well as Ms. White's first witness statement filed in response to the injunction application filed by Gefion. Although Mr. Feetham for Gefion initially sought the exclusion of Ms. White's third witness statement, he did not oppose its admissibility at the hearing provided that he could rely on Mr. Anker-Svendsen's second witness statement, dated September 16th, 2020, in reply. I therefore granted permission for these witness statements to be admitted in evidence. Both parties also applied for permission to adduce the expert evidence on Danish law referred to above. They did not oppose each other's application and I also granted these applications.

4 Mr. Simpson for Pukka then submitted that it would be beneficial to the court for the experts to meet and prepare a joint statement or alternatively for a single joint expert to be appointed and for the hearing to

be adjourned for this purpose. Mr. Feetham opposed this application and referred to the warning by Lord Neuberger in *VTB Capital plc* v. *Nutritek Intl. Corp.* (13) ([2013] 2 A.C. 337, at para. 82) that it would be self-defeating if jurisdictional challenges were conducted like something approaching the trial itself. He also relied on *Vedanta Resources plc* v. *Lungowe* (14), where Lord Briggs emphasized ([2019] 2 W.L.R. 1051, at para. 14) the need for proportionality in relation to jurisdiction appeals. I dismissed the application for an adjournment as the parties were clearly prepared to proceed and I considered that any benefit to be gained by adopting the proposed course at that point was outweighed by the need to deal with the jurisdictional challenge pragmatically and expeditiously.

Background

5 Gefion is a Danish insurance company which went into voluntary liquidation in Denmark on July 13th, 2020. In a claim form issued on May 22nd 2020, it seeks payment of a debt or damages in the sum of £4,947,321 from Pukka, an insurance intermediary which is registered in Gibraltar and is a member of the Freedom Services Group Ltd. ("the Freedom Group"), which includes a company based in the UK called Action 365 Ltd. (trading as Pukka Services).

6 The claim arises from Pukka's appointment as Gefion's managing general agent authorizing it to bind Gefion as the insurer for motor insurance policies. The parties' initial heads of agreement were contained in a term sheet for the provision of insurance intermediary services for the period February 1st, 2016 to January 31st, 2017. This provided for English law and arbitration in the event of a dispute and that the final wording for the agreement between the parties was to be agreed. The parties then entered into a binding agreement (referred to as a "binder") for the period May 1st, 2016 to April 30th, 2019 which provided for three twelve-month underwriting periods referred to as binder years 1 to 3. Addendum 1 of the binder contained a sliding scale setting out how commissions to Pukka were to be worked out based on the overall performance of the contracts. In binder year 3, Pukka agreed to a change in the commission structure which was set out in addendum 2 of the binder and which reduced commissions payable to it. Pukka says it only agreed to this change because it did not want the commercial relationship with Gefion to end and hoped that there could be an extension to the binder which in the event did not come to pass.

7 Commissions were first paid on a provisional basis as a percentage of the gross written premiums ("GWP") which was subject to an adjustment to take into account what is referred to as a loss ratio, *i.e.* how the ultimate cost of claims made against the policies bear to the ultimate GWP with the difference paid back to Gefion. The claim being made by Gefion represents the balance claimed by it following the adjustment for binder

year 3. Pukka, however, alleges that the extent of the loss ratios sustained during this financial year was due to Gefion's failure to properly fund the claims fund and by virtue of its own breach of contract and/or negligence in failing to act as a prudent insurer.

8 Section 42 of the binder which deals with jurisdiction provides as follows:

> "The Agreement and any non-contractual dispute or obligation arising out of or in connection with it shall be subject to the law of Denmark and to the exclusive jurisdiction of the courts of Denmark save that the Underwriter [Gefion] may, at its discretion, determine that the applicable jurisdiction shall be that of the jurisdiction where the Coverholder [Pukka] is domiciled or does business."

9 In response to the filing of this claim, Pukka has not submitted to the jurisdiction of this court and says that Danish law and jurisdiction apply. Further, on June 30th, 2020, Pukka filed a claim in the Copenhagen City Court against Gefion claiming that it is entitled to the full commission which it has received without any adjustment and to further sums. Pukka has also applied to the Danish court for modification of the jurisdiction and governing law clause contained in s.42 of the binder so that the Danish courts have exclusive jurisdiction to hear and determine the commercial dispute between Gefion and Pukka.

Legal principles on the dispute as to jurisdiction

10 It was common ground that the burden of proof is on Gefion as the claimant to establish that the court has jurisdiction. What the claimant must satisfy the court of when jurisdiction is challenged is set out in *Bols Distilleries BV* v. *Superior Yacht Servs.* (2) (following *Canada Trust Co.* v. *Stolzenberg (No. 2)* (3)) (2005–006 Gib LR 143, at para. 28):

> "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 emphasizes, in order to establish that the usual rule in art. 2(1) is ousted by art. 23(1) [now art. 25(1) of the Regulation], 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 that they have a much better argument than the defendants that, on the material available at present, the requirements of form in art. 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."

11 This test has been considered fairly recently in appeals before the Supreme Court of the United Kingdom. The first of those cases is *Four Seasons Holdings Inc.* v. *Brownlie* (5), where Lord Sumption said the following on the *Canada Trust* test as approved by the Privy Council in *Bols* ([2018] 1 W.L.R. 192, at para. 7):

> "In my opinion it is a serviceable test, provided that it is correctly understood. The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice.* What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

12 This formulation was endorsed by the Supreme Court in *Goldman Sachs Intl.* v. *Novo Banco SA* (6). Green, L.J. provided some practical guidance on the application of Lord Sumption's three-limb test in *Kaefer Aislamientos SA de CV* v. *AMS Drilling Mexico SA de CV* (9), as follows:

(i) Green, L.J. said that in his view the reference to "plausible evidential basis" in limb (i) confirms the *Canada Trust* test and is a reference to an evidential basis showing that the claimant has the better argument but that is something other than the balance of probabilities. Further, it is a test which is context specific and "flexible" ([2019] 1 W.L.R. 3398, at paras. 73–76).

(ii) As to limb (ii) Green, L.J. stated that this recognized that jurisdictional challenges are determined on an interim basis and will be characterized by gaps in the evidence and that the court cannot be expected to perform the impossible. Further, this part of the test is an instruction to use judicial common sense and pragmatism not least because the exercise is intended to be one conducted with due dispatch and without hearing oral evidence (*ibid.*, at para. 78).

(iii) Where the court is unable to form a decided conclusion on the evidence and therefore unable to say who has the better argument, limb (iii) of the test introduces a more flexible test combining good arguable

case and plausibility of evidence which is not necessarily conditional upon relative merits (*ibid.*, at paras. 79–80).

13 The application of *Bols* (2) as refined by limbs (i) and (ii) of Lord Sumption's test was largely agreed between the parties. In particular, it was agreed that the reference in *Bols* to a claimant having to show a much better argument than the defendant was no longer accurate. It is now clear (and the parties agreed) that the use of the adjunct "much" has now been laid to rest as it adds nothing and suggests a superior standard of conviction that is both uncertain and unwarranted.

14 Mr. Simpson submitted, however, that *Bols* is a binding authority on this court as it is a decision of the Judicial Committee of the Privy Council in respect of an appeal from Gibraltar and that the decisions of the English courts, even the decisions of the Supreme Court of the United Kingdom, are not binding although they are of course highly persuasive. In the case of a deadlock where no reliable assessment can be made, as referred to in limb (iii) of the test, Mr. Simpson urged caution and said that a relative test as laid down in *Bols* should continue to apply. This was disputed by Mr. Feetham who submitted that the Supreme Court decisions in *Brownlie* (5) and *Goldman Sachs* (6) formed part of the common law which applied to Gibraltar under s.2(1) of the English Law (Application) Act 1962.

15 Leaving to one side the question of limb (iii) of the three-limbed test in *Brownlie* for now, there was therefore no real dispute between the parties that it was up to Gefion to show with reliable evidence that it has the better argument that the jurisdiction clause is valid under Danish law and that the court can therefore take jurisdiction.

Submissions

16 Gefion founds its claim to jurisdiction on a plain reading of s.42 of the binder and art. 25 of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast) ("the Regulation") which provides that if the parties, regardless of their domicile, have agreed on the courts of a Member State to have jurisdiction to settle disputes, that court shall have jurisdiction unless the agreement is null and void as to its substantive validity under the law of that Member State. Article 25 therefore carves out the question of substantive validity as a matter for the law of the Member State designated in the agreement, which in this case is Danish law. This was agreed between the parties and it was for that reason that both sides adduced expert evidence of Danish law.

17 There was some discussion between the parties as to whether some of the grounds relied on by Pukka were directed at a challenge to formalities rather than substance and which would not be governed by Danish law. In

the event, Mr. Simpson confirmed that Pukka was impugning the substantial validity of the clause and that its challenge was not about formalities. He further explained that Pukka was relying on s.39.1 of the binder which provides that in the event that any portion of the agreement is found to be invalid or unenforceable under the applicable law, *i.e.* Danish law, that portion of the agreement shall be disapplied to the extent necessary to comply with the applicable law and the remainder of the agreement shall remain in force.

18 Pukka's case is that Gefion has not discharged the burden of establishing the court's jurisdiction because the lop-sided nature of s.42 of the binder is contrary to Danish law both as a matter of principle and by reference to the facts of this case. Pukka's expert on Danish law is Jesper Hjetting, a Danish lawyer of over 25 years' experience, who heads the insurance and torts team at Lungrens Law Firm P/S, who states that under Danish law the jurisdiction clause would be modified or declared invalid under s.36 of the Aftaleloven or the Danish Contracts Act 1975 which provides (as translated independently but unofficially into English by www.trans-lex.org) as follows:

> "(1) A contract may be modified or set aside, in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce it. The same applies to other juristic acts.
>
> (2) In making a decision under sub-section (1) hereof, regard shall be had to the circumstances existing at the time the contract was concluded, the terms of the contract and subsequent circumstances."

19 Mr. Hjetting's opinion is that asymmetric clauses such as the one found in s.42, conferring on one party a unilateral right to choose the applicable jurisdiction for determination of a dispute, are scarcely mentioned in Danish legal literature, nor are there any Danish cases on them. Further, his view is that they deviate from Danish market practice as they are not commonly found in insurance contracts in Denmark. All of this together with the fact that their validity has been questioned by various courts in the EU leads him to conclude that they are inherently unfair as a matter of Danish law.

20 Alternatively, Mr. Hjetting states that Gefion was in a stronger negotiating position than Pukka, dictated the terms of a non-negotiable model agreement with a jurisdiction clause which is unfair to Pukka as it confers on Gefion a unilateral right to choose the jurisdiction where a dispute is to be determined. To support its case on the alleged imbalance, Pukka refers to the fact that Gefion was an established Danish/EU insurer whilst Pukka was only a start-up insurance intermediary. Further, and as evidence of this imbalance, Pukka relies on the reduction to the rates of commission payable to Pukka which Ms. White says were imposed on it at the eleventh hour prior to the commencement of the commercial

relationship in 2016. Ms. White also refers to Gefion's reduction of Pukka's commission for binder year 3 which she says she only agreed to on behalf of Pukka in response to a threat by Gefion that it would serve a notice of termination under the binder and following a promise to extend the binder for a period of two years to offset the reduction in the commissions taken. In the event, only a short extension of three months for binder year 3 was agreed and Ms. White states that because of Gefion's own financial, solvency and regulatory issues, it did not deliver on and offer the agreed additional two-year underwriting period.

21 Mr. Hjetting states that whilst Danish law is liberal and built on freedom of contract, s.36 of the Danish Contracts Act was enacted to avoid and prevent harmful economic activity and to protect the weaker party in a contractual relationship. Further, he states that this statutory provision has gained greater significance in commercial relationships. To support this proposition, Mr. Hjetting refers to reports of Danish cases where the court has applied this provision in cases involving standard terms between commercial parties. Mr. Hjetting also refers to the case of *Pechstein* v. *International Skating Union* (11), where an arbitration clause was set aside because the International Skating Union ("ISU") abused its dominant position and forced a German athlete to approve an arbitration clause. Mr. Hjetting says that this illustrates how proper consent cannot be said to have been given in non-negotiable "take it or leave it" agreements and how onerous clauses can be partially amended.

22 In response to the submission that the asymmetric jurisdiction clause is inherently objectionable, Mr. Feetham refers to the opinion of Gefion's expert on Danish law, Mr. Rosenberg, who is a Danish lawyer at Carsted Rosenberg law firm and an English solicitor. Mr. Rosenberg does not consider that s.42 of the binder is manifestly unfair under s.36 of the Danish Contracts Act. His own translation of s.36 is materially the same as the one relied on by Mr. Hjetting except that he refers to "unconscionable" instead of "unreasonable" in sub-s. (1).

23 Mr. Rosenberg further refers to standard commercial templates which contain asymmetrical jurisdiction clauses such as a template for a binding authority agreement issued by the Lloyd's Market Association and a standard credit facility agreement provided by the Loan Market Association. In his opinion, these precedents, and in particular the binding authority agreement, indicates the prevailing market standard in cross-border commercial agreements between commercial parties in the insurance sector even though they are subject to English law. In his view, Danish courts would only intervene to strike down an agreed jurisdiction clause if it differed so significantly from market practice so as to render it unfair and unconscionable to enforce. In his view, this is not the case here especially as in the absence of a jurisdiction clause the default position

under the Regulation would be that Pukka would be sued in Gibraltar where it is domiciled.

24 Mr. Feetham also submitted that courts across the EU have largely treated asymmetric jurisdiction clauses as valid and enforceable. He referred to the decision in *Commerzbank AG* v. *Liquimar Tankers Management Inc.* (4), where the English High Court held that an asymmetric jurisdiction clause becomes exclusive and falls with the scope of art. 25 once exercised in favour of a particular jurisdiction. Mr. Justice Cranston's judgment in that case provides an analysis of asymmetric clauses under English and civil law jurisprudence. He refers to a number of English cases where asymmetric jurisdiction clauses have been treated as valid and enforceable and also refers to the fact that they have been viewed as a long-established and practical feature of international financial documentation.

25 Cranston J. also makes reference to a paper entitled "Issues of Legal Uncertainty Arising in the Context of Asymmetric Jurisdiction Clauses" (July 2016), issued by the Financial Markets Law Committee ("FMLC"), which notes that the English courts have consistently given effect to asymmetric jurisdiction clauses and discusses the law on asymmetric jurisdiction clauses in other European jurisdictions, noting that these clauses have been held to be valid in Luxembourg, Spain, Italy and Greece. The judge also refers to the following conflicting decisions of the French Cour de Cassation: In *X* v. *Société Banque Privé Edmond de Rothschild* (15), the Court de Cassation ruled that an asymmetric jurisdiction clause in the loan agreement was invalid since it was discretionary (*protestativité*) and contrary to the purpose of the precursor to art. 25 of the Regulation. In *Société eBizcuss.com* v. *Apple* (12), however, the Court de Cassation rejected the argument that the clause was discretionary and contrary to what is now art. 25 of the Regulation. Mr. Feetham noted that the way the case had been put in *Rothschild* was not the way Pukka were putting their case here and that it was a decision which had attracted criticism as was clear from the judgment of Popplewell, J. in *Mauritius Commercial Bank Ltd.* v. *Hestia Holdings Ltd.* (10). In that case, a jurisdictional challenge was made to an asymmetrical jurisdiction clause and it was held that there was a good arguable case that under Mauritian law (which usually, but not always, follows French jurisprudence) it would be treated as valid despite the decision in *Rothschild.* Popplewell, J. observed ([2013] EWHC 1328 (Comm), at para. 34) that the decision in *Rothschild* was "controversial and has been subjected to criticism by commentators, both domestically and in the context of Article 23 which requires an autonomous interpretation."

26 The FMLR paper which Mr. Simpson helpfully provided at the hearing states that that there are good commercial reasons for asymmetric clauses in financial market transactions, notably ensuring that a creditor

can always sue a debtor in a chosen court whilst preserving the right to bring proceedings where the debtor's assets may be located at the time a dispute arises which increases the prospect of recovery. Further, the authors of the FMLR paper conclude that the dissonance in this area of the law risks causing legal uncertainty and requires clarification by either an amendment to the Regulation or a reference to the Court of Justice of the European Union.

27 Applying this reasoning, Mr. Feetham submitted that there was nothing objectionable about Pukka being sued in Gibraltar as a matter of principle and that in the absence of any Danish jurisprudence on the subject, the EU trend and commercial rationale behind such clauses militated in favour of the Danish courts upholding such clauses rather than reaching the conclusion that they were inherently objectionable. Mr. Feetham accepted that there might be a valid objection if Pukka were to be sued in some far-flung jurisdiction where substantial justice would not be obtainable but submitted that this was not the case here.

28 As for the alleged disparity of bargaining positions and imposition of standard terms, Mr. Rosenberg makes the point that Pukka is part of an international insurance group that has been active in the insurance market for more than two decades which is led by a sophisticated and highly experienced management team with access to professional advisers. He also observes that Gefion is one of many underwriters in the market. As such, he says that it follows that the agreement was entered into between commercial parties without coercion or similar considerations.

29 Mr. Rosenberg also states that the overriding principle in Danish law is freedom of contract and the autonomy of parties to agree to their own terms of an agreement. He explains that the Danish courts only invoke s.36 of the Danish Contracts Act sparingly and narrowly in connection with agreements between commercial parties as it represents an exception to the principle of freedom of contract. Further, he states that the Danish courts generally view competent commercial parties as needing lesser protection than individuals in the general public acting outside their profession.

30 Mr. Rosenberg gives a recent example of a Danish court setting aside a jurisdiction clause in a case concerning a dispute between a Danish freight agent and a Danish ship owner in relation to the loss of a cargo in transit from Shanghai to Copenhagen. The exclusive jurisdiction clause in that case, requiring the High Court in London to adjudicate on the dispute, was set aside. It was held that the clause did not have a sufficient nexus to England and Wales, and that under the Danish Maritime Act jurisdiction could not be validly agreed in connection with the transport of goods by sea as it limited the claimant's right to initiate proceedings at the place where the goods should have been delivered. Mr. Rosenberg states that

this serves as an example that jurisdiction clauses can only be set aside in commercial matters at the very end of the spectrum and provided that there is statutory authority to support the finding.

31 Whilst Mr. Hjetting makes the point that there are no Danish cases holding asymmetric jurisdiction clauses to be valid, Mr. Rosenberg observes that this also means that there are no cases where asymmetric jurisdiction clauses have been struck down or held to be repugnant to Danish law.

32 As regards the reference to the *Pechstein* v. *International Skating Union* case (11), Mr. Rosenberg says that the precedent relied on by Mr. Hjetting is a decision of the German Higher Regional Court which ended up before the European Court of Human Rights: *Mutu and Pechstein* v. *Switzerland* and which bears no relation to this case. In *Pechstein*, a German professional speed skater was charged with a violation of the ISU's anti-doping rules and banned for two years. She unsuccessfully appealed to the Court of Arbitration for Sport (CAS) and then the Swiss Federal Tribunal (SFT). She also brought proceedings before the Munich Higher Regional Court which held that the jurisdiction clause was invalid under German competition law because the ISU had a dominant position in the market for access to international speed-skating championships. This decision was reversed by the German Federal Tribunal and led Ms. Pechstein to refer the matter to the ECtHR on the grounds that her rights under art. 6(1) of the ECHR had been violated. The ECtHR held that Ms. Pechstein had not freely given her consent the arbitration clause under the ISU rules because ISU was the sole worldwide governing body of professional speed skating and that the only option open to her if she wanted to skate professionally was to accept the arbitration clause. The complaint was dismissed however because it was held that CAS constituted an independent and impartial tribunal for the purposes of art. 6 of the ECHR. Mr. Rosenberg's states that the decision of the German Higher Court which Mr. Hjetting relies on carries no more weight in Denmark than it would in Gibraltar and, in any event, it is based on German competition law. As such, he concludes that little or no weight should be attached to this decision in determining the application of s.36 of the Danish Contracts Act to the jurisdiction clause.

33 Mr. Feetham also submitted that there is no question of the jurisdiction clause having being imposed on Pukka as a standard term. He referred to the fact that Pukka had received the draft agreement on January 5th, 2016, initialled each page and signed the binder in early April 2016 and signed it again later on that month. Whilst there were discussions about other terms of the binder (principally commissions) the jurisdiction clause was never raised. In 2018, the commission rates were amended by way of an addendum to the binder and at no point did Pukka ever raise any objection about the jurisdiction clause.

34 Mr. Feetham therefore submitted that Pukka's challenge is a novel one which relies entirely on Mr. Hjetting's creative arguments, that none of the authorities relied on by him come close to the facts of this case and that Pukka's case represents a clear overreaching of the scope of s.36 of the Danish Contracts Act as the features relied on could apply to any number of agreements entered into every day.

35 In reply, Mr. Simpson submitted that *Liquimar* (4) is a decision based on English and not Danish law and that the position on asymmetrical jurisdiction clauses across the EU is nuanced. He referred to the fact that the FMLR report notes that certain national courts within the European Union such as France, Bulgaria and Poland have held asymmetric jurisdiction clauses to be invalid as a matter of European law and that this has given rise to uncertainty concerning the validity and enforceability of such clauses as a matter of European law. The footnote in the FMLR paper which makes reference to the Bulgarian decision states that that decision was based on similar reasoning to that of the French Supreme Court.

36 Mr. Simpson also urged caution in respect of the Lloyd's Market Association and Loan Market Association precedents as these are governed by English law and in his submission this means that they are irrelevant.

37 Mr. Simpson submitted that s.36 of the Danish Contracts Act is not just aimed at consumers but at the weaker party generally in a contractual relationship, such as in cases of standard form contracts, and had gained greater importance in commercial relationships in recent years. He refers in this connection to Mr. Hjetting's reference to a recent ruling of the High Court of Eastern Denmark *A Aps* v. *Adform A/S* (1) concerning a standard agreement governing the servicing of a photocopying machine. In that case, the company leasing the photocopier had inserted a standard term which provided that the trader entering into the agreement had to pay for the servicing for the full duration of the contract even if the contract was terminated early, which meant that the company leasing the photocopier did not perform any service. The Copenhagen City Court held that the term was so unusual and onerous that it should have been specifically pointed out to the defendant. Mr. Hjetting says that this provides an example of the Danish courts disregarding a standard term in a commercial context and further shows that onerous clauses must be drawn to the attention of a counterparty which, in his view, means that the jurisdiction clause should have been specifically drawn to Pukka's attention.

38 Mr. Hjetting also takes issue with Mr. Rosenberg's assessment that jurisdiction clauses can only be set aside at the end of the spectrum and where there is statutory authority to support the finding. As regards the shipping case relied on by Mr. Rosenberg to support the latter proposition, he states that this merely illustrates one way to set aside a jurisdiction

clause. He also refers to two further Danish cases, namely *Intercontainer Cooperative Co.* v. *Oskar Schunck KG* (7) and (8) which show that jurisdiction clauses may be set aside for reasons other than a mandatory statutory provision.

Analysis

39 It is clear from the parties' submissions that the ambit of s.36 of the Danish Contracts Act is central to this dispute as to jurisdiction. Whilst the translation of this provision was largely agreed, Mr. Rosenberg's referred to "unconscionable" instead of "unreasonable" in his translation of s.36(1). Given that the independent (albeit unofficial) translation of the Danish Contracts Act provided at the hearing refers to "unreasonable" rather than "conscionable," I will proceed on that basis.

40 I will deal first with Pukka's argument that s.42 of the binder is contrary to s.36 of the Danish Contracts Act as its lop-sided nature makes it inherently unfair. This issue does not appear to have come before the Danish courts as no Danish authorities were identified by either of the experts on the validity of asymmetrical jurisdiction clauses. In my view, there is no point speculating one way or another about the absence of Danish authority on this issue especially as this is a summary determination which has to be undertaken with common sense and pragmatism.

41 The High Court's decision in *Liquimar* (4) is a decision made under English law and the facts are slightly different to the facts of the present case, but the judgment of Cranston, J. and the FMLR report referred to are helpful as they provide an analysis on the validity of asymmetric clauses under English and civil law jurisprudence across the EU. This makes it clear that there is a sound commercial reason for asymmetric jurisdiction clauses in financial market transactions even if they are not upheld in all the courts of EU states. The rationale behind such clauses is to allow a creditor to sue a debtor in the domicile of the debtor and where its assets are located (in this case Gibraltar) as well as a chosen court (in this case the Danish courts). It is therefore not surprising that the Lloyd's Market Association and Loan Market Association precedents include such a clause. This rationale is particularly compelling here as Pukka, which has no presence in Denmark, retained a provisional commission from the premiums paid and the true entitlement to commission fell to be calculated following an adjustment twenty-four months from the end of the relevant underwriting period.

42 A number of examples are given in Cranston, J.'s judgment and the FMLR report of courts in EU states which have held such clauses to be valid such as the courts of England and Wales, Spain, Italy and Luxembourg. There is also reference to a Greek case where an asymmetric clause was upheld under the Lugano Convention. It is true that there is no

consolidated approach on this issue across the EU with some courts holding such clauses to be invalid, notably the courts of France, Bulgaria and Poland. In the case of France, the position is unclear and subject to conflicting decisions. It is notable, however, that the reasoning behind the Cour de Cassation's decision in *Rothschild* (15) (which, according to the FMLR report, was followed by the Bulgarian Supreme Court) and which held an asymmetric jurisdiction clause to be null and void appears to have been rejected by the Court de Cassation in the *Apple* case (12). It is also notable that the basis on which the challenge was made in *Rothschild* is different to the way in which Pukka has developed its case here. This jurisprudence therefore suggests more of a trend across the EU in favour of asymmetrical jurisdiction clauses reflecting the sound commercial rationale behind such clauses.

43 What about Pukka's concern that it is facing a claim in the Gibraltar courts which governed by Danish law when it has to bring its own claim in Denmark? This appears to be the only substantive unfairness identified by Gefion in support of its complaint. The fact that Pukka is facing proceedings in Gibraltar is not unusual as one would expect to be sued in one's own domicile. That would be the position under the Regulation in the absence of an agreement on jurisdiction except that in such a case, the claim would be governed by Gibraltar law. Mr. Simpson submitted that the fact that the claim is governed by Danish law highlights the inherent unfairness of the proceedings and that there is always the risk that something could get "lost in translation." I am not persuaded by this argument. In my view, the Gibraltar courts routinely deal with claims brought under foreign law and are well equipped to do so with questions of foreign law pleaded and proved as fact by way of expert evidence and sometimes by other means. Further, Pukka's complaint in this regard was hypothetical and no particular feature of this case or of the applicable Danish law principles were identified to support the view that there might be injustice if this case proceeds to be tried in Gibraltar. As for the alleged unfairness that Pukka has been forced to bring proceedings in Denmark as required under the jurisdiction clause, Mr. Feetham confirmed that Gefion's position was that Pukka was entitled to fully defend the claim and bring its counterclaim by way of set-off in Gibraltar. In these circumstances, I do not consider that there is much force in that part of Pukka's complaint either.

44 On the basis of the material provided, my view is that there are good commercial reasons for the use of asymmetric jurisdiction clauses (as reflected by various decision of courts in EU states) particularly so in this case where commission was paid to Pukka on a provisional basis as a percentage of the GWP but which was subject to an adjustment to take into account the loss ratio. Further, I cannot see anything inherently objectionable about this particular clause or the way in which it operates

such as to lead me to conclude that it is unreasonable or at variance with the principles of good faith under the Danish Contracts Act. I therefore conclude that Gefion has the better argument that s.42 of the binder is not repugnant to Danish law as a matter of principle.

45 I turn now to the fact-specific part of Pukka's challenge which is largely based on the allegation that there was a power imbalance between the parties, with Gefion abusing its dominant position and imposing its standard terms on Pukka. First, though, I will deal with Mr. Rosenberg's general statement that before an agreement can be set aside or modified it must fall at the "very end of the spectrum and provided that there is statutory authority to support the finding."

46 The reference to cases having to fall at the very end of the spectrum might well only mean what Pukka itself has said in its writ filed in the Copenhagen City Court, namely that "some caution is generally applied when using section 36 of the Danish Contracts Act in business relations . . ." I do not consider, however, that it is helpful for the purposes of this application to cast the test any more precisely than as set out in s.36 of the Danish Courts Act as the inquiry is ultimately contextual.

47 I also reject Mr. Rosenberg's suggestion that there needs to be a statutory basis for a s.36 challenge to succeed which appears to be based on a decision of the Eastern Denmark Appeals Court in 2020 where a jurisdiction clause was set aside pursuant to the Danish Maritime Act. In my view, however, this case is nothing more than an illustration of a case where a jurisdiction clause was set aside but does not support the proposition that the right to challenge an agreement under s.36 is a parasitic right in the sense that another statutory provision must be invoked for a claim to succeed. The other two cases relied on by Mr. Hjetting in response to this point, namely *Oskar Schunck KG* (7) and (8) confirm this to be the case. In my view, therefore, s.36 represents a free-standing provision under which an agreement can be declared invalid if the facts of a case warrant it.

48 Having cleared away those general arguments, I return to the evidence on which Pukka relies to say that the jurisdiction clause should be declared invalid or modified. Pukka makes the point that when it entered into the binder it was a start-up managing general agent and coverholder, not yet part of the Freedom Group, whereas Gefion was an established underwriter. Mr. Anker-Svendsen says that this is a mischaracterization of the position, that Gefion only had a market share of 0.6% of the non-life insurance market in Denmark and a negligible share in the UK motor insurance market. As an example of Gefion's alleged dominant position, Pukka also submitted that Gefion employed aggressive business tactics. Ms. White states in her third witness statement that, in 2016, Mr. Svendsen reduced commissions payable at the last minute before the

binder was due to be signed which Pukka was forced to accept because if it had pulled out altogether there was a danger that it would have suffered significant losses or even failed as a start-up altogether. She also refers to Pukka's reluctant acceptance of revised and less favourable commission rates in 2018 for the duration of binder year 3 when faced with a threat that the binder would be terminated if this was not accepted and in the light of a promise that the commercial relationship would be extended if this was accepted.

49 In my view, this is not the sort of case where the relative size of the parties to the agreement take matters further one way or another under Danish law. Whether Pukka was the more substantial or less substantial company, both parties were self-standing commercial entities. Ms. White, Pukka's director and ultimate shareholder, is an experienced business-woman in the insurance industry who represented Pukka and together with her management team was in a position to consider the terms of the binder which was provided to her in draft some three months before it was signed. It was also open to her to take advice on the draft binder if necessary.

50 The commission reductions agreed to do not alter my view or point to Pukka having the better argument that the business tactics employed by Gefion were such so as to bring s.36 of the Danish Contracts Act into play. Economic harm resulting from these commission reductions is not the complaint and one should not get side-tracked about this when the only point being made by Pukka in this regard is that the negotiations serve to show that Gefion's conduct was oppressive and repugnant to good faith. The view of Edward Fane of Willis Towers Watson (who Ms. White says were Gefion's brokers) was that the reduced commission which was agreed to in 2016 still represented an excellent deal for Pukka. I cannot say whether this was the case or not but there was nothing unusual about the commercial relationship which followed and in 2018 Pukka agreed to the reduction of the commission for the remainder of the year because it wanted to extend that business relationship and which, in the end, did not happen. In these circumstances, I do not consider that Pukka has the better argument that this aspect of the commercial negotiations is evidence of aggressive business tactics such as displace the principle of freedom of contract under Danish law.

51 Pukka also contends that Gefion's dominance in the relationship is evident from the fact that the binder was a standard, non-negotiable Gefion document bearing its logo. I find this argument unconvincing. The asymmetric jurisdiction clause in the binder was first included in a draft circulated on January 5th, 2016, signed on April 5th, 2016 (with every page initialled) and signed again on April 20th, 2016. Amendments were made to the binder largely in relation to the rates of commission but the jurisdiction clause was never raised by Pukka, which had a long period of

time to consider the draft. This does not suggest to me that Pukka failed to raise the jurisdiction clause because it thought it would get nowhere with the challenge or that this was a term dictated to it by Gefion. This simply points to Gefion having the better argument that Pukka did not seek to negotiate this term at the time especially when one bears in mind that the claims handling agreement between Gefion and Action 365 Ltd. (signed by Ms. White on behalf of Action 365 Ltd.) was amended in around February 2019 so as to accommodate the latter's request that the jurisdiction and applicable law clause contained in that agreement be changed to England and Wales.

52 Mr. Hjetting relies on the *Pechstein* decision (11) to support his arguments. In my view, there is a world of difference between a German decision concerning a professional speed skater who was forced to accept an arbitration clause if she wanted to skate professionally and this case which concerns two commercial parties which took a business decision to enter into a commercial agreement.

53 Mr. Simpson submitted that Gefion ought to have drawn the jurisdiction clause to the attention of Pukka because it was the weaker party and because of the unusual and lop-sided nature of the clause which allowed for Pukka to be sued in Gibraltar but under Danish law. In particular, it was submitted that this obligation to put Pukka on notice arose because the jurisdiction clause in the binder had been drafted in similar terms to the one contained in the Lloyd's Market Association template which is governed by English law but amended to provide for Danish law as the governing law. Prior to that, the 2016 term sheet provided for English law and arbitration. In support of this submission, Mr. Simpson relies on Mr. Hjetting's report which in turn refers to the *Adform A/S* decision (1). I do not consider that Pukka is assisted by this authority which is very different to the present case, especially when one takes into account the unusual nature of the clause in the *Adform A/S* case which required payment for services even after a contract had been terminated. In the present case the only practical complaint or harm arising from s.42 of the binder is that Pukka will be sued in its own domicile, albeit under Danish law, whilst it is forced to bring its own claim against Gefion in Denmark. For the reasons which I have given above, the effects of s.42 of the binder are not comparable to the clause in the *Adform* case or otherwise such so as to give rise to an obligation on Gefion to draw it to the attention of Pukka.

54 For all these reasons, I find that Gefion has the better argument that the plain terms the s.42 of the binder apply under Danish law.

55 In the light of my conclusion, it is not necessary for the purposes of this application to determine whether limb (iii) of Lord Sumption's three-limbed test in *Brownlie* (5) applies in Gibraltar. Had it been necessary to decide the point, I would have regarded part (iii) of Lord

Sumption's test as forming part of the common law of Gibraltar. The common law of England and Wales on the approach to be taken on disputes as to jurisdiction of this sort has not diverged from the common law of Gibraltar and the ambulatory provisions of the English Law (Application) Act 1962 therefore apply. This means applying this formulation in full and not just the part of it which consigns to the outer darkness the discredited adjunct "much" previously used in the formulation of the test.

Stay

56 Pukka's alternative application for a stay is made pursuant to CPR r.11 and art. 31(2) of the Regulation. Article 31(1) and (2) of the Regulation provide as follows:

> "1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.
>
> 2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement."

57 Pukka's application for a stay in order of these proceedings is made in order that the substantive validity of the jurisdiction clause which is governed by Danish law can be determined by the Danish courts in the claim which it has filed in the Copenhagen City Court on June 30th, 2020 and thus after this claim was commenced on May 22nd, 2020. In support of this application, Mr. Simpson refers to para. 11 of Mr. Hjetting's first expert report (which forms part of the executive summary) where he states that the jurisdiction clause expressly refers to the exclusive jurisdiction of the courts of Denmark and that the discretionary part of it which allows Gefion to sue Pukka where it is domiciled or does business does not expressly refer to the Gibraltar courts. Accordingly, he submits that for the purposes of art. 31(2) of the Regulation only the Danish courts have exclusive jurisdiction.

58 Mr. Simpson very fairly accepted that this part of his client's case had only been briefly canvassed by Mr. Hjetting in his report. Nevertheless, he submitted that these proceedings should be stayed because the Danish courts, now seised of the proceedings (albeit second seised) are expressly referred to in the jurisdiction clause and a stay should be ordered until such time as the Danish courts have dealt with the question of jurisdiction.

59 Mr. Feetham submitted that art. 31(2) had to be read in the light of art. 31(1) of the Regulation which provides that where actions come

within the jurisdiction of several courts, the court first seised takes jurisdiction and any courts later seised of the matter must decline jurisdiction in favour of that court. Further, he relied on *Liquimar* (4) where the court rejected the argument that the asymmetric jurisdiction clause in that case did not satisfy the notion of exclusivity in art. 31(2) because it did not create a single, exclusive jurisdiction for the determination of all disputes and, applying an autonomous interpretation of the Regulation, held that it came within art. 31(2).

60 Mr. Simpson's submission in relation to *Liquimar* was that Cranston, J.'s reasoning and in particular his rejection that regard should be had to the position under the Hague Convention (where asymmetric jurisdiction clauses arguably do not come within the definition of exclusive choice of court agreements) was not an approach which would necessarily be followed by the Danish courts. Mr. Simpson also pointed out that the factual matrix in that case was slightly different and that the jurisdiction clause was distinguishable because it contained a waiver of objection.

61 In my judgment, a plain reading of art. 31(2) suggests that the Gibraltar courts are properly seised of the claim and Pukka has produced very little evidence to support the alternative construction which it is commending under Danish law. Mr. Hjetting's opinion in relation to this is contained in para. 11 and is repeated at paras. 24–27 of his first report, but this is little more than an assertion with no reasoning provided. Further, I consider that the reasoning contained in Cranston, J.'s judgment in *Liquimar* further operates against Pukka's argument in this regard. Although part of the reasoning underpinning that decision might not be followed by a Danish court, the judge interprets the Regulation autonomously, having regard to the Regulation's aims and following jurisprudence of the European Court of Justice. One would therefore expect a Danish court to adopt a similar approach to this question.

62 For these reasons, I consider that the Gibraltar court is first seised of this claim and the application for a stay is therefore refused.

Conclusion

63 For the reasons set out above, I find that the court has jurisdiction to determine Gefion's claim and that Pukka has not made out its application for a stay. It follows that Pukka's challenge to jurisdiction and its application for a stay in the alternative are both therefore dismissed.

64 The parties are asked to agree a form of order giving effect to my judgment and any consequential issues which may arise. I will hear the parties as to any consequential issues which are in dispute.

65 I am grateful to both Mr. Simpson and Mr. Feetham for their written and oral advocacy.

Applications dismissed.
