Neutral Citation Number: [2007] EWHC 2818 (Comm)

Case No: FOLIO 887 OF 2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2007

Before :

THE HONOURABLE MR JUSTICE COOKE

- -

Between :

COROMIN LIMITED	**Claimant**
- and -	
(1) AXA RE	**Defendants**
(2) SOCIETE COMMERCIALE DE REASSURANCE	
(3) PARTNER RE SA	
(4) CAISSE CENTRALE DE REASSURANCE	
(5) ARCH REINSURANCE LIMITED (BERMUDA)	
(7) AXIS RE LIMITED	
(8) XL INSURANCE COMPANY LIMITED	
(9) ENDURANCE WORLDWIDE INSURANCE LIMITED	

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- -

Mr Simon Bryan QC and Mr Stephen Houseman (instructed by **Ince & Co**) for the **Claimant**
Mr Richard Millett QC and Ms Philippa Hopkins (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 19-22, 26 November 2007

- -

Judgment

Mr Justice Cooke :

Introduction

1. The Claimant ("Coromin") is the Bermuda-based captive insurer for the worldwide operations of the FTSE 10 mining company Anglo American Plc ("Anglo"). In these proceedings, Coromin seeks a declaration that it is entitled to be indemnified by certain reinsurers (the "Reinsurers") who together form about half of the subscribing stamp of various layers of the annual Anglo Global All Risks reinsurances excess of US $50 million up to US $1 billion reinsuring (through Coromin) Anglo assets worldwide for the period 30 June 2004 to 30 June 2005 (together "the Reinsurances"). In the case of Chilean assets with which this action is concerned, Coromin itself

reinsured a local fronting company but nothing turns on this, as materially the same policy terms and conditions governed all the relevant insurance, reinsurance and retrocession covers.

2. Coromin claims an indemnity arising out of an incident which occurred on 31 March 2005 at a copper mining and processing facility ("the Concentrator Plant") in Northern Chile which forms part of the fourth largest copper mine in the world, and which is owned and operated by the original insured, Compania Minera Dona Inés de Collahuasi ("Collahuasi"). Collahuasi was and remains owned as to 44% by Anglo.

3. Collahuasi mines and mills copper sulphide ores to concentrate, and mines and leaches copper oxide ores to produce cathodes. Collahuasi's facilities include a permanent accommodation complex, the Concentrator Plant, a solvent extraction-electrowinning ("SX-EW") plant and a 200 km pipeline to transport concentrate from the mine to the port of Punta Patache. The mineral from the mine is processed in a rotating crusher and then sent by conveyor belts to coarse mineral storage where it is treated in three separate grinding lines. Two of the lines comprised semi-autogenous ("SAG") mills measuring 32 x 15 feet and a ball mill measuring 22 x 35 feet. The third grinding line, which was added as part of an expansion project described below (known as "Line 3"), comprised a SAG 1011 mill (40 x 20 feet) ("the Mill") and 2 other ball mills, which accepted the product from the SAG Mill before passing the mineral into the flotation process.

4. The Mill, which has a treating capacity of 60,000 tons a day, includes a 21,000 kW (21MW) gearless Mill Drive System consisting of a SAG Mill Motor and associated parts ("the Motor"), which lies at the centre of the dispute.

5. Line 3, which included the Mill, formed part of an expansion programme undertaken by Collahuasi during 2001-2004 known as the Ujina-Rosario Transition Project ("the Project"). The Project involved the entering into of a number of associated contracts between Collahuasi and its respective suppliers/contractors. These included:

   i) A contract for the purchase of the Motor, two ball mills and associated components signed on 16 September 2001 by Kvaerner Metals E&C acting as agent for Collahuasi, and by ABB Industrie A.G. ("ABB"), which was entitled "*Purchase Order 141R-RE0001-01 Gearless Drives*", and which incorporated specified documents as part of that contract (together "the ABB Purchase Order").

   ii) A contract between Collahuasi and Bechtel Chile Limitada signed on 8 May 2002 and entitled, "*Engineering, Procurement and Construction (EPC) Contract Concentrating Expansion and Associated Works - On Shore - for Services in Chile*" and a contract between Collahuasi and Bechtel International, Inc. also signed on 8 May 2002 and entitled "*Engineering, Procurement and Construction (EPC) Contract Concentrating Expansion and Associated Works - Off Shore - for Services outside Chile*" (together "the EPC Contract"). By the terms of these two contracts, they were to be treated together as one contract.

6. On 31 March 2005 the Mill stopped, due to a failure in the Motor manifesting itself in (amongst other matters) damage to the stator which was part of the Motor ("the

Incident"). The stator was temporarily repaired on site, and temporary operation was restored on 29 April 2005, although this provisional repair suffered two main failures, one in March 2006 and another in November of the same year. The damage to the stator required its replacement by a new stator, which took place between January and March 2007. By reason of the Incident, Collahuasi suffered Physical Damage ("PD") and Business Interruption ("BI") losses which it claimed against the fronting company for Coromin in Chile. Both the fronting company and Coromin have accepted liability and Coromin now claims against the Reinsurers for substantial losses amounting to about US $57 million, excess of Coromin's own deductible of US $50 million. A number of reinsurers on the same stamp as the Reinsurers in this action have accepted liability.

7. It is common ground between the parties to this action that the Incident was caused by a failure within the Motor which drives the Mill and that this was the result of a design defect. It is also common ground that the PD element of this could only be the subject of cover under the Electrical or Mechanical Breakdown Extension to the policy (the "EMB Extension").

The Reinsurances

8. The Reinsurance was in the form of a global policy covering Anglo's worldwide operations and was not drafted with a view to any particular asset or contract. It was an "All risks" property cover with an exclusion for damage or business interruption caused by a defective condition due to design defect but with an additional Extension (the EMB Extension) which reintroduced that element of cover (along with other extensions), with a form of wording on which the dispute centres. The Commercial Combined Insurance Policy (CCIP) wording includes the following:-

> "1.1 INSURED
>
> ANGLO AMERICAN PLC (elsewhere in this Policy referred to as the "Named Insured") and their owned and controlled and associated and affiliated and subsidiary companies or corporations and joint venture partners as they are now constituted or lender or mortgagee or minority shareholder, as their respective rights and interests may appear.
>
> …
>
> 1.3 LOCATION OF PROPERTY AND OPERATIONS INSURED/TERRITORIAL LIMITS
>
> This Policy insures Property, operations and activities located anywhere in the world.
>
> 1.4 PERIOD OF INSURANCE
>
> 30th June 2004 to 30th June 2005, both days inclusive at 12.01 am local standard time at the location of the Property, operations or activities insured.

1.5 INTERESTS INSURED

SECTION A - PROPERTY DAMAGE INSURANCE

Section A insures real and personal property against direct physical loss, destruction, damage and electrical or mechanical breakdown, all as more fully defined in the Policy Wording.

SECTION B - BUSINESS INTERRUPTION INSURANCE

Section B insures against loss resulting from the interruption of or interference with the Business and against Extra Expense, Outstanding Debit Balances and Contingent Business Interruption, all as more fully defined in the Policy Wording.

1.6 LIMITS OF THE INSURERS' LIABILITY

SECTION A - PROPERTY DAMAGE INSURANCE

As stated in the attached Schedule of Limits and Sublimits.

SECTION B BUSINESS INTERRUPTION INSURANCE

As agreed by the Insurers, but subject to indemnity period 24 months….

…

2. DEFINITIONS APPLICABLE TO ALL SECTIONS

The following words or expressions shall have the meaning attached to them wherever they may appear in the Policy, unless the Insurers agree to the contrary.

2.1 BUSINESS

"Business" shall include all operations and activities of the Insured…

…

2.2 DAMAGE

"Damage" shall mean any direct physical loss, destruction or direct physical damage not specifically excluded by this Policy.

2.3 BUSINESS INTERRUPTION

"Business Interruption" shall mean loss as determined under Section B due to interruption of or interference with the Business in consequence of Damage.

…

2.5 PROPERTY

"Property" shall mean real and personal property of every kind and description, except where specifically excluded or qualified in this Policy, including but not limited to property owned by the Insured; …….property whilst in the course of construction, renovation, installation, erection, assembly, testing or commissioning;

…

3. EXCLUSIONS APPLICABLE TO ALL SECTIONS

This Policy does not cover Damage, or Business Interruption….

3.4 caused by or resulting from a defective condition due to a defect in design, plan or specification, materials or workmanship, but this exclusion shall not apply to the remainder of the Property which is free of such defective condition;

4.1 ACQUISITIONS AND DISPOSALS/PREMIUM ADJUSTMENT

In the event of the Insured acquiring any company or asset after the inception date, coverage under this Policy shall automatically apply to such company or asset, subject to:

A. (i) advice of such acquisition, or of any disposal of any company or asset, being given to the Insurers within 30 days where the asset values of such acquisition or of any disposal exceed US $100,000,000 in respect of any one transaction; except

…

And

B. premium adjustment and any specific Policy Conditions for any such acquisition or disposal per (i) and (ii) above being agreed between the Insured and Insurers.

…

5. SECTION A - PROPERTY DAMAGE INSURANCE

5.1 INDEMNITY TO THE INSURED UNDER THIS SECTION

Subject to the terms, conditions, limitations and exclusions of the Policy or applicable to this Section, the insurance provided

by this Section covers all risks of Physical Damage occurring during the period of insurance to the Property defined in Clause 2.5 of the Policy.

…

5.4 EXTENSIONS

This Section includes the following extensions to coverage, which shall be included within the limit of the Insurers' liability specified in the Policy Schedule, unless specifically agreed by the Insurers to the contrary:

…

I. ELECTRICAL OR MECHANICAL BREAKDOWN [*The EMB Extension]*

1 Indemnity to the Insured

Subject otherwise to the terms, conditions and limitations applicable to this Section A, the Insurers agree that the insurance provided by this Section A extends to indemnify the Insured in respect of unforeseen and sudden Damage to any machinery, plant, pressure vessel or electronic data processing equipment and media in consequence of an Occurrence at the Premises resulting from

a. defective materials, design, construction, erection, installation;

…

g. fatigue;

…

s. errors, lack of skill, negligence of employees or third parties;

…

Necessitating the repair, replacement or rebuilding of such machinery, plant, pressure vessel or electronic data processing equipment and media.

For the purposes of the coverage provided by this Clause 5.4.1, the term "Damage" shall be deemed to be extended to include unforeseen and sudden electrical or mechanical breakdown, whether or not the machinery, plant, pressure vessel or electronic data processing equipment and media sustains physical loss, destruction or damage.

The Insurers may at their option repair, reinstate or replace property lost, destroyed or damaged or pay the amount of the loss, destruction or damage.

This Section insures any such machinery, plant, pressure vessel or electronic data processing equipment and media:

i. while at work or at rest, and

ii. while being dismantled; moved or re-erected for the purpose of cleaning, inspection, repair or installation at another location within the Premises or at another Premises of the insured, provided such machinery has successfully completed it's performance acceptance test.

The phrase "unforeseen and sudden", as used in this Clause 5.4.1., shall mean unforeseen and sudden from the standpoint of the Insured.

The inclusion of newly constructed or installed plant and equipment for coverage under this Policy is subject to satisfactory completion of the following procedures:

1. Mechanical testing

2. Testing and commissioning

3. Performance testing confirming to 100% Contract Design criteria

4. Official acceptance by the Insured following formal hand over certificate procedure. (It being understood that no equipment faults or punch list items affecting operation integrity of the plant are outstanding).

However it is understood and agreed that this provision shall not apply to existing plant and equipment which is being reinstalled following removal or dismantling for the purpose of overhaul or repair or maintenance or relocation.

…

ii. Exclusions

The insurance under this Clause 5.4.1. does not cover

A. Damage:

…

ii. for which a supplier, contractor, agent or repairer is legally responsible either by law or under contract; provided that this

> exclusion shall not apply to coverage under Section B - Business Interruption Insurance provided that such Damage is of a type which but for the existence of the said legal or contractual responsibility would be covered under this Policy; further provided that in the event the said legal or contractual responsibility is denied and the Damage is otherwise insured under this policy, the Insurers will be liable for all insured losses arising out of the said Damage and in accordance with policy conditions will be entitled to any indemnity or reimbursement subsequently obtained from the supplier, contractor, agent or repairer.
>
> …
>
> 6. SECTION B - BUSINESS INTERRUPTION INSURANCE
>
> 6.1 INDEMNITY TO THE INSURED UNDER THIS SECTION
>
> If any Insured Property (or property used by the Insured) suffers Damage covered under Section A and the Business is or would have been in consequence thereof interrupted or interfered with, the Insurers will pay to the Insured the amount of the loss resulting from such interruption or interference in accordance with the provisions contained in this Section.
>
> The insurance under this Section is limited to loss due to:
>
> A. reduction in Turnover, and
>
> B. Extra Expense
>
> …
>
> 6.2 ADDITIONAL DEFINITIONS APPLICABLE TO THIS SECTION
>
> A. INDEMNITY PERIOD:
>
> The "Indemnity Period" shall be a period of up to 24 months, being the period during which the Business is or would have been interrupted or interfered with, for such length of time as would be required to rebuild, repair or replace the Property which has been lost, destroyed or damaged and to resolve the resulting interruption or interference, commencing with the date of Damage or interference and not limited by the date of expiration of this Policy."

9. It will be seen that the effect of the EMB Extension, when read together with clause 1.5 of the Policy and the definition of "property" in clause 2.5, is to grant cover in respect not only of unforeseen and sudden damage to any machinery or plant resulting from the defective design of any item but also to include breakdown and to give cover

for the damage to that item itself, together with any loss resulting from interference with any operations and activities of the Insured in consequence of "damage", as defined both in clause 2.2 and in the EMB Extension itself. This, where a design defect is concerned, is a form of "buy-back" of cover excluded by clause 3.4. The Reinsurers accept that, by reason of the extended definition of "property", property in the course of construction was insured under this "operating policy" so that, in accordance with clause 3.4, damage caused by a design defect, to items other than the item defectively designed would be recoverable without reference to the EMB Extension and the effect of the Extension was to bring within the cover the defective item itself.

10. The EMB Extension, in part, appears to duplicate cover already given elsewhere in the policy for causes other than design defect, which is the only one of such other causes which is otherwise expressly excluded. It extends cover however in respect of such causes to “breakdown”, as well as covering the defectively designed item itself, which is the most likely cause of breakdown.

11. In order to gain the benefit of the EMB Extension however, if the plant or equipment is newly constructed or installed, four particular requirements must be satisfied as set out in clause 5.4.1, namely "mechanical testing", "testing and commissioning", "performance testing confirming to 100% Contract Design criteria" and "official acceptance by the insured following formal handover certificate procedure". The Reinsurers say that on a proper construction of the Extension and its application to the facts here, there was no compliance with the fourth condition of "official acceptance" so that the EMB Extension does not bite. Furthermore, Reinsurers also say that, in any event, losses claimed in relation to interference in the business cannot include losses relating to a Molybdenum plant which did not exist at the time of the incident or during the policy period and was not insured for PD under the Reinsurance. The latter claim is made by Coromin on the basis that Collahuasi repaired the Motor between January and March 2007 which meant that the Molybdenum plant, constructed after the Incident, could not be operated to the capacity it otherwise would have been.

Principles of Construction

12. Both parties agreed on the principles of construction to be applied, as set out by the Court of Appeal in Absalom v TCRU [2006] 2 LLR 129 at paragraph 7, per Longmore LJ.

> "(i) The aim of the exercise is to ascertain the meaning of the contractual language in the context of the document and against the background to the document. The object of the enquiry is not necessarily to probe the "real" intention of the parties, but to ascertain what the language they used in the document would signify to a properly informed observer.
>
> (ii) The interpretive exercise must not be done in a vacuum, but in the milieu of the admissible background material. That comprises anything that a reasonable man would have regarded as relevant in order to comprehend how the document should be understood, provided that the material was

> reasonably available to both parties at the time (ie up to the time of the creation of the document).
>
> (iii) However, evidence of negotiations and subjective intent are not admissible for the purpose of this exercise.
>
> (iv) A commercial document must be interpreted so as to make business common sense in its context. But if a "detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense": see Antaios Compania Naviera v Salen Rederierna AB [1985] AC 191, 201 per Lord Diplock…"

13. Following that approach, the Court must do three things in this case.

    i) It must examine and interpret the words of Condition 4 in their contractual context, i.e. as part of the EMB Extension and within the CCIP as a whole.

    ii) It must take into account surrounding background matters.

    iii) It must reject a conclusion that flouts business common sense if detailed and syntactical analysis yields such a conclusion.

The History of the Reinsurances

14. Some of the Reinsurers wrote this account on terms which included the EMB Extension from at least 2002 onwards, although at least one Reinsurer first wrote the risk in the 2004-2005 year. In an endorsement dated 1 November 2002, it was noted and agreed by reinsuring underwriters for the June 2002-June 2003 policy that there was a major expansion project at Collahuasi. The endorsement referred to a separate Construction All Risk (CAR) policy in force which would cover the existing property for a limit of $10 million each and every loss subject to US $20 million in the aggregate, with the 2002-2003 global operating policy picking up any losses to existing/surrounding property in excess of that limit. The Reinsurers also noted and agreed that, effective 1 October 2002, new works which had already been finished as part of the project were included for a value of US $41,791,415 with additional premium to be calculated pro rata, payable at expiry of the policy. The Underwriters agreed to waive advice and automatically cover future finished works and property in connection with the project.

15. In a schedule to the 2003-2004 reinsurance the following appeared:-

> "Major projects:
>
> In progress
>
> Base Metals - Collahuasi Chile - there is a separate construction all risks policy in force which will cover existing property for a limit of US $10 million each and every loss subject to US $20 million in the aggregate; with this policy picking up any losses to existing/surrounding property in excess of this limit."

16. The 2004-2005 renewal slip was preceded by the usual structured pattern of placement. In or about November a team from Marsh, the brokers, would meet with representatives of Anglo and Coromin to discuss placement of the global programme with effect from 1 July the following year. A questionnaire would be completed by each Anglo company (and returned by the end of January) which included up to date statistics on each company to be included under the global operating programme and the Property Damage and Business Interruption values as at 31 December. It is these values, as at 31 December 2003, which were used by the Reinsurers for rating the Reinsurances. The figures both for Property Damage and Business Interruption were therefore historic "actuals".

17. Meetings were held with prospective markets in March and April, attended by Marsh, the incumbent market and any reinsurers who had expressed an interest in participating on the global programme and any new markets which Marsh wished to introduce to Coromin. A presentation would be given by a representative of Anglo/Coromin at the meetings and a copy of the presentation and of the Insurance Underwriting Information Report was given to each attendee. There would then be follow up meetings to deal with any questions raised by potential Reinsurers and Marsh would prepare and circulate to interested Reinsurers a draft slip and supplementary information such as asset schedules and "As If" loss information. As part of the reinsurance underwriting information for 2004-2005, which was extensive, appendix 1 included figures at 31 December 2003 for Collahuasi of $718.042 million for property values and $462.261 million for Business Interruption. These values were scaled for the participation of Coromin. The combined PD and BI values in appendix 1 therefore totalled $1,180.304 million as compared with $660.293 million as at 31 December 2002. The Business Interruption figures represented turnover less variable costs in the twelve months period ending on 31 December 2003. (In appendix 2 the anticipated turnover for 2004 for Collahuasi was set out at $925.104 million.) In the underwriting information supplied to the 2004/2005 Reinsurers, Collahuasi appeared as Anglo's sixth most valuable asset. The report referred to the Rosario Project at Collahuasi as being on budget and scheduled to complete in 2004. The figure of $288 million was attributed to Anglo's share in the project.

18. This global operating policy covered assets in excess of 300 different locations and the total premium payable to all Reinsurers on the slip was of the order of $23 million. Nonetheless Reinsurers were on notice as to the scale of the Collahuasi asset and of the Project which was due to complete sometime in 2004. It is undisputed that the assets would automatically attach for the purposes of the EMB Extension under the 2003-4 or 2004-5 policy at the time when the EMB conditions were met, if they ever were. At the end of the year it appears that there would be premium adjustment in relation to any increased property values but there was no evidence as to how, if at all, this might work for BI figures.

19. In August 2004 the Reinsurers scratched an endorsement which stated it was "for information purposes only". That endorsement referred to the Collahausi-Ujina Rosario Transition Project as "nearing completion and is in the progress of being handed over on a staggered basis with the bulk of the value attaching by the end of September 2004". Increased values were given for the PD and BI sections of the policy for Collahausi, as compared with the total value declared in the policy underwriting information. PD value was given as $823.5m and BI as $432m with a

total of $1,255.5m which was expressly stated to be $75.196m greater than the previously declared total values, as at 31 December 2003 (although the BI figure had diminished). The endorsement included a valuation in respect of the Mill within the figure for the Concentrator and stated that the increase in values would be reflected in the year end adjustment.

20. The endorsement referred to an updated underwriting report prepared by Marsh, Chile dated April 2004 which described the future operating conditions of the plant once the project was completed, as available upon request. Two Reinsurers (Scor and Arch) requested and obtained a copy of this document. Two Reinsurers (Scor and Partner Re) also included "subjects" on the Endorsement, one of which asked for the exact dates corresponding to the various handover stages of values into the programme. It is accepted that the subjects added nothing to the requirements of the EMB Extension conditions or made no difference on the facts here, whether or not the Reinsurers were entitled to impose subjects. The response to the question on dates was given by Marsh on 10 September 2004, referring to the concentrator handover date as 12 August 2004, a date which does not readily fit with any of the documentary evidence.

21. The Marsh underwriting report to which reference was made in the Endorsement descended into considerable detail about the Ujina Rosario Transition Project, saying that the Project values would be incorporated into the insurance (and thus the reinsurances) as the facilities started commercial operations. The report referred to the SAG Mill as part of the third grinding circuit, together with two parallel ball mills. It informed the reader that Metso was the manufacturer of the mills and that ABB was the manufacturer of the “wrap around” gearless drives for those mills. It referred to the grinding line as designed to treat 2800 tonnes per hour and stated that it was expected to reach design capacity in August 2004. It referred to a major failure of the SAG Mill affecting its gearless drive as a potential loss event with a repair time not exceeding 16 weeks, but curtailing 50% of the total concentrate production for that period, with a total estimated loss of $116 million.

22. It was not until long after the end of the 2004/2005 policy year that an endorsement was issued amending the 2005/2006 policy to include a new Molybdenum Plant which was to begin operation on 18 November 2005. By later endorsements the attachment date was changed to 15 December 2005, with some Reinsurers making it clear that no coverage was being given by that endorsement for that policy year in respect of any loss event occurring prior to the attachment date or any cause of loss occurring prior to that date. By this time, Reinsurers had seen a report from the Loss Adjusters, Crawfords, which stated that the PD to the Motor would give rise to BI losses in respect of the Molybdenum plant and these particular Reinsurers were seeking to protect their position in respect of that loss, so far as they could, in relation to any claim on the 2005-6 policy year.

23. The Endorsement reads as follows:

> "It is noted and agreed that effective 31 October 2005…this reinsurance is amended insofar as follows:
>
> Collahuasi are completing the construction of a new Molybdenum plant…

> The plant will begin operation on 31 October 2005 and underwriters hereon agree the addition of the plant to the programme.
>
> Additional premium to be included in premium adjustment at expiry."

From the exchanges of correspondence between Marsh and one of the Reinsurers (CCR) it appears that 31 October was the date of provisional acceptance, by which it was stated that the testing and commissioning on the policy would have been met. Official acceptance of the plant was to occur on 18 November. Between those two dates outstanding snagging list issues would be completed which were said not to affect the operational integrity of the plant. The values referred to in the endorsement were US $14 million for Property Damage and US $48.5 million annual gross profit for Business Interruption, as scaled for Coromin's participation. By way of information, Reinsurers on that year were told that there was a separate Contractors All Risks (CAR) policy with no advanced loss of profits cover in force until the beginning of the operation and that no claims had been reported to that policy.

24. That endorsement was rebroked, following information given by Marsh to CCR, changing 31 October to 18 November, the date of "official acceptance" as referred to in Marsh's email. In due course a further endorsement was broked changing the date once again to 15 December 2005 in the following form:-

> "It is hereby noted and agreed by Underwriters that in respect of the Molybdenum plant, testing and commissioning had been completed successfully and accordingly this plant attaches to the main policy hereunder with effect from 15 December 2005….
>
> Underwriters further note that values (Property Damage US $27.904 million and Business Interruption $96,969,790) in respect of this plant are included in the overall total insured values declared under this policy."

25. Reinsurers rely upon these exchanges and alterations in the broking of the endorsement in relation to construction of the EMB Extension. Not only is this an inadmissible aid to construction of the earlier policy but it also provides no help in any event. At the time when this endorsement was being broked, the issues which are the subject of this action had already arisen and Reinsurers were acting with a view to protecting or furthering their own interests, whether in relation to the PD claim on the SAG mill in general or the BI claim in relation to the Molybdenum plant in particular.

<u>The Mill and the Motor</u>

26. There are a number of different descriptions of the Motor and the Mill in the documents presented to the court. I was shown diagrams from the loss adjusters' reports and had the benefit of evidence from Mr O'Rourke, the project manager for Bechtel of the Collahuasi Ujina Rosario Project under the EPC Contract. Evidence was also adduced in the form of a statement of Mr Fraser, Collahuasi's Project Manager during the engineering and construction phase of the Project, with specific

responsibility for the Concentrator Plant, which included the Mill. I also heard from the expert instructed by Coromin, Ekkehard Hettler, who was both a qualified engineer and had over 30 years experience in the insurance of large projects, both as Constructors All Risks insurance (CAR), Civil Engineering Completed risks, Erection All Risks and Mechanical Breakdown and Business Interruption and loss of profits insurances.

27. Mr O'Rourke described the Mill as made up of a number of separate items of equipment, including the gearless drive and associated parts. The two essential parts of the gearless drive are the Stator and the Rotor. The Stator fits around the Rotor with an air gap between the two when the Mill is in operation. The Rotor consists of a series of magnetic poles so that the Rotor is driven electromagnetically by the Stator coil which is attached to the Stator casing using key bar supports and key bars. The poles of the Rotor are bolted to the mill drum so that, as the Rotor is driven by the Stator, the Mill itself rotates in order to effect the grinding process to reduce large rocks into smaller product for further grinding and the concentration process. It was ABB who provided the Stator and Rotor, described as a "SAG Mill Motor" in the purchase order/contract referred to in paragraph 5(i) of this judgment (the Motor). Other items were provided by ABB in connection with the Motor, as appears from the Turnover Package, whilst the Vendor End of Service notification from Metso Minerals shows its responsibility for the Mill drum and other items in the Mill supplied under a separate contract with Collahuasi. Various other contractors supplied screens, conveyors, under hung cranes and top running cranes all under contract with Collahuasi. Mr O'Rourke's evidence was clear as to the allocation of responsibility amongst these contractors for these identifiable items, whilst Bechtel remained responsible for the overall engineering procurement and construction of the project, acting as agent for Collahuasi in the purchase of manufactured items. Thus ABB gave a separate guarantee, in respect of the Motor and other equipment supplied by it, from guarantees given by other suppliers or obligations undertaken by Bechtel.

28. In the loss adjusters' fourth report the position was described thus:-

> "3.0 DESCRIPTION OF THE AFFECTED PROCESS
>
> 3.1 Production Increase Project.
>
> As part of the expansion program of the Compania Minera Collahuasi, a study was performed in 2001 for a project involving the construction of a new Sulphide Crushing Production Line for the gradual closing of the Ujina mine and the opening of the Rosario Mine.
>
> For these purposes, the Production Line No 3 was started up and tested by the end of March 2004, thus doubling the productive process. It was in this production line where the now damaged SAG Mill 1011 was installed.
>
> The basic engineering design project for this expansion process was designed by Bechtel Engineering and installed by Ingenieria y Construction Sigdo Koppers S.A.

> The SAG Mill 1011 was manufactured by ABB, with the participation of Alstom in the fabrication of the driving system and Metso Corporation in the frame, among other contractors and subcontractors.
>
> …
>
> 4.0 DESCRIPTION OF THE EQUIPMENT
>
> 4.1 Structuring
>
> The grinding equipment is mechanized by a three phase salient pole synchronous annular motor of projecting poles. Its rotor has 76 poles attached to the mantle of the mill. The Rotor winding is fed by a static excitation system, the current intensity that is transmitted through carbon brushes and slip rings.
>
> The Stator is formed on the inner surface of a Magnetic Core and is mounted on three circular metal segments or rings placed peripherically within the axial length of the stator. The stator winding is inserted into the radial slots.
>
> The Magnetic Core is attached to the frame by bars that have a section with the shape of a "dovetail", which are evenly distributed in the Magnetic Core outer perimeter. These bars as well as the magnetic core are attached through the support plates, which are welded to the stator outer frame."

29. Mr Hettler described the motor, designed and supplied by ABB as, in technical insurance terms, "a key item" or "prime mover" which therefore constituted the engineering risk in the Mill. He compared it to a tractor pulling a heavy duty trailer, the motor being the tractor and the mill the trailer. He pointed out that, instead of driving a mill, the motor could also drive a compressor, a centrifugal pump, an air blower or other machinery although it was tailored for this Mill. He considered the Motor and the Mill as separate items for insurance purposes, with the risk, from an insurance point of view, lying in the Motor from a mechanical and engineering perspective.

30. In his first report, the expert instructed by the Reinsurers, who had, according to that report, read at least two of the loss adjusters' reports, including the one to which I have just referred, the various contracts and the witness statements, concluded that the terms of the EMB Extension should be applied to the Mill as a whole and not simply to the Motor. He said that it was clear to him that it was acceptance under the EPC Contract which mattered, not acceptance under the ABB Purchase Order, and that until the Mill as a whole was in place, it was impossible to ascertain whether the requisite testing and standards had been met for the purpose of the EMB conditions. He said it was not possible to analyse or accept isolated pieces of equipment outside the context of the Mill as a whole. He had no engineering qualification but had extensive experience in the writing of construction risks and was responsible for a department which wrote both construction and erection risks. He did not himself

write erection risks nor loss of profits or Business Interruption insurance. He agreed that the writing of breakdown cover was a specialist risk and that he was not an expert in that.

31. In paragraphs 11-14 of his report, he described the loss in this way, telling the court that his understanding was derived from documents which he could not now identify, but which must have included the loss adjusters' reports I have already referred to:

> "..the claim for PD and BI losses arises out of purported damage to the Stator and Rotor of SAG mill 1011 at the Collahuasi mine on 31 March 2005. The claim is for the cost of a replacement Stator for the SAG mill and the associated reduction of revenue during the repair and replacement time...it appears that the fundamental cause of the loss is unlikely to be in question. My knowledge of the loss is quite basic but I understand the Stator of the SAG mill (by which one end of the mill's drum is surrounded) is comprised of a frame and magnetic core. The frame includes the key bar/hanging plate system by which the frame is connected to the magnetic core. The loss resulted from the progressive breakage of the key bar support plates in the static structure causing the magnetic core to twist/deform under the magnetic forces applied, leading to contact with the Rotor. I believe the root cause of the loss is a fundamental lack of rigidity in the Stator, attributable to defective design and so called workmanship of the magnetic core in that it should have been sufficiently rigid of itself. The insufficient rigidity of the Stator led to pressure on the key bar supports and their inevitable breakage and the twisting/deforming of the core leading to contact with the Rotor. ..It appears to be agreed by each of the relevant parties that the Stator as a whole needs to be replaced."

32. Having read each other's reports, the experts met in accordance with a court order and produced a joint memorandum in the following terms:-

> "2.The only areas of agreement they were able to identify were:-
>
> i.That the Motor is a separate and discrete piece of equipment that falls to be treated as such under the EMB Extension;
>
> ii.That item 1 (Mechanical Completion), item 2 (Testing and Commissioning) and item 3 (Performance Testing) in the EMB Extension were satisfactorily completed in respect of the Mill and the Motor prior to inception of the CCIP on 30 June 2004."

That documented agreement was signed one day after the experts' meeting.

33. In his supplementary report about one month later, the expert instructed by the Reinsurers said this:-

> "4. I now believe that I went too far in agreeing paragraph 29(i) of the Joint Memorandum. I agreed the paragraph on the assumption that the Motor was a separate 'stand alone' piece of equipment and could be operated and tested independently. I now understand, having considered the documents listed above, that the Motor (which is comprised primarily of the rotor and stator) cannot be fully or tested without being attached to the rest of the mill (what I refer to as the drum). In fact I understand that the Motor could not even be turned-over, or rotated, without being attached to the drum. That drum was, I understand, supplied under a separate Purchase Order. The statement of Mr O'Rourke at paragraphs 15 to 20 is helpful in making clear the relationship between the Mill and the Motor. Mr Fraser's statement, at paragraphs 19 and 20, is also helpful in understanding how the mill was comprised of a number of different items but which were operated and tested together once they were all in place. Both of these statements were exhibited to my initial Report."

The Relevance of the Evidence

34. I have already referred to both the factual and expert evidence which I heard. Reinsurers adduced no factual evidence nor evidence of underwriting approach, save that which appeared in the evidence of their expert who had little to say on the subject which was of any help to me, because he had no expertise in writing breakdown, loss of profits or Business Interruption covers. Mr Hettler had such expertise but there were only three areas where his evidence was of any real assistance. He was able to speak of the general underwriting approach to insurance on EMB or similar terms and to say what an underwriter would be interested in when writing the risk. His evidence as to interest in the "prime mover" which constituted the major engineering risk fell into this category. Secondly, he was able to speak of the inter-relationship between CAR and Operational Policies and how the four requirements of the EMB Extension might or might not tie in with CAR policies. In this connection I was shown the Report of the Advanced Study Group 237 on Insuring Industrial and Process Machinery, published by the Insurance Institute of London in 2000, upon which he was cross-examined. Thirdly, he was able to explain how BI underwriters approached underwriting and how they would have regarded the information given to them by Marsh when assessing the risk.

35. Whilst Coromin made much of the agreement reached between the experts and the Reinsurers' expert's retraction of such agreement and also of an admission by him under cross-examination that both contractually as well as physically, a distinction was being drawn between the Motor and the Mill in the handover procedures, the expert evidence was, save in the areas I have mentioned, inadmissible. Whilst both the experts and the witnesses of fact trespassed on areas for the court's determination, whether on questions of construction or application of the EMB terms, there were important areas of factual evidence covered by Mr Fraser and Mr O'Rourke. They gave evidence in relation to the testing and acceptance of the Mill and the Motor under the various contracts and of the issue of certificates and other documentation in relation thereto.

The Application of the EMB Conditions

36. There are few if any material factual disputes between the parties to these proceedings. Mr O'Rourke, Bechtel's project manager, was cross-examined and Mr Fraser, Collahuasi's project manager, produced a statement which was admitted in evidence because his ill health prevented his attendance. The broad effect of their evidence was that, at the very latest, all the criteria required by the EMB Extension were met by 27 June 2004 because the Mill was handed over by then, was fully operational and had satisfied all contractual performance criteria of any relevant contract. Mr Fraser described the handover of the project as "one of the best controlled, best certified and smoothest start ups and handovers" that he had ever experienced in his 50 years in the industry. Whilst their evidence of fact was useful, opinions expressed by him, by Mr O'Rourke and both experts as to whether or not the EMB Extension conditions had been met were not. That, of course, is a question for the court, not for them.

"Newly Constructed or Installed Plant and Equipment"

37. Whilst there was some debate about these words, this first issue was ultimately a non-issue. The words have their ordinary and natural meaning but, for practical purposes, as both parties accepted that the four conditions had to be met before plant or equipment attached to the Reinsurance, the focus of the argument turned to the fulfilment of those conditions. If those conditions were fulfilled in the 2003-2004 year, then the relevant plant or equipment would attach in that year; if in the 2004-2005 year, then it would attach in that policy year; if the conditions were not fulfilled there would be no attachment.

The Mill or the Motor

38. The second issue which falls for decision is whether or not the EMB Extension conditions are to be applied to the Mill as a whole or can be applied to the Motor. Coromin maintains that the requirements should be applied to the Motor and that if that is done, it can be seen that the requirements are satisfied. The Reinsurers maintain that the conditions must be applied to the Mill as a whole but advance no positive case in relation to fulfilment of the requirements, should they properly be applied to the Motor. If the conditions fall to be applied to the Mill, then it is accepted by the Reinsurers that "mechanical completion", "testing and commissioning", and "performance testing" were all done in accordance with the EMB Extension prior to 30 June 2004 and that the only issue which falls for determination is whether or not there was "official acceptance by the Insured following formal handover certificate procedure". Coromin maintains that, even if the conditions have to be applied to the Mill (as opposed to the Motor), this condition was satisfied on 30 April 2004 or 4 May 2004. Reinsurers say that this condition could only be satisfied when a "Definitive Acceptance" ("Definitive Reception" in translation) was given, which could only be done 365 days after the date of Provisional Acceptance ("Provisional Reception"). That could not have occurred before 30 April 2005 at the earliest, after the incident on 31 March 2005.

39. Whilst it is clear that the policy terms, and the EMB Extension in particular, were not drafted with any particular asset or construction contract in mind, it is not possible to apply the terms and requirements of the EMB Extension without regard to any

relevant construction contract, because the third condition requires "performance testing confirming to 100% contract design criteria". Furthermore, "official acceptance by the Insured following formal handover certificate procedure" clearly envisages some form of authorised acceptance, the issue of certificates and some formality in handover, which are likely to be governed by a contract. Whilst the court is concerned with questions of fact as to whether the EMB conditions were met, some of those conditions have to be considered by reference to the underlying contractual situation.

40. It is worth pointing out that defective design is only one of 20 different causes referred to in the EMB Extension. The citation of the clause in this judgment lists only 2 others but there is a series of potential causes, including vibration, maladjustment, misalignment, loosening of parts, abnormal stresses, centrifugal force, self-heating and many others. The purpose of the four conditions is, as was recognised on all sides, with varying degrees of emphasis, to avoid cover for the erection and testing risks of new plant, which due to its high exposure to damage could or should be insured under CAR/EAR and associated loss of profits policies. The potential for mismatch is the subject of discussion in the Report of the Advanced Study Group (number 237) of the Insurance Institute of London in 2000, in which four similar conditions to those in the EMB Extension are set out as a specimen for dealing with such an issue.

41. Such generalisations do not assist very much in the construction or application of the EMB Extension. Coromin contend that the Motor is a discrete piece of equipment, the function of which is to drive the Mill in order to cause the drum to rotate and to crush and grind the raw material fed into it from the production line. The Motor works in conjunction with the Mill but this does not mean that the EMB conditions must be satisfied in respect of all of the Mill in order for coverage to be provided for the Motor. Coromin draws attention to the installation, testing, commissioning and handing over to Collahuasi of the Motor by ABB under the ABB Purchase Order, as compared with the other non-motor parts of the Mill which were bought from separate suppliers, including the other grinding mechanisms which were bought from Metso. If the parts have separate contractual installation, testing, commissioning and acceptance regimes, that is the clearest indication, it is said, that the EMB Extension conditions can be applied to those parts. Coromin submits that all the contractual and technical documentation treats the Motor as a distinct item, separate from the Mill, and that reference should therefore be made to the ABB contractual position in order to assess whether there has been compliance with the four EMB Extension requirements.

42. By contrast, Reinsurers submit that Coromin's case is an artificial construct. Reinsurers contend that it is wholly contrived to separate out the Motor in this way and the question is whether the Mill as a whole or the grinding line of which it forms part, had satisfied the four requirements. Reinsurers submit that the question whether the conditions apply to the Mill or to the Motor, whether they are severable and where one piece of equipment ends and another starts, are questions of construction of this policy wording and application to the true facts. Expert opinion does not assist. The common sense answer, according to Reinsurers, is obvious. The Motor is part of the Mill and is no use to Collahuasi on its own. Collahuasi was only interested in having a working mill, not in whether or not individual parts worked on their own. It was the

whole and not the parts that interested Collahuasi and the existence of any particular contract or sub-contract for a particular part does not mean that the EMB Extension requirements apply to that individual part. The procurement of the Mill as a whole was the responsibility of Bechtel and it is the Bechtel contract to which regard must be had for the testing, commissioning and acceptance regime.

43. Reinsurers submit that the Motor was not installed separately but was installed as part of the Mill and that the Acceptance Certificates (Reception Certificates), which were issued under the EPC Contract were in respect of the Mill as a whole and not the Motor, and "official acceptance" must be assessed by reference to that contract. Furthermore, Reinsurers maintain that even if it is the Motor and not the Mill which falls to be considered, it is still wrong to focus on the ABB Purchase Order to the exclusion of the EPC Contract because, from Collahuasi's point of view, it was what was happening under the EPC Contract which mattered.

44. As set out earlier in this judgment, one of the key points, if not the key point, in the Reinsurers' expert's mind, as expressed in his supplementary report and as developed in Reinsurers' submissions, is that the Motor cannot be fully tested without being attached to the Mill drum and could not even be turned over or rotated without being so attached.

45. When regard is had to the terms of the EMB Extension, it will be seen that reference is there made to "unforeseen and sudden damage to any machinery, plant, pressure vessel or electronic data processing equipment and media" (the listed items) in consequence of an occurrence resulting from one of the 20 causes set out. Indemnity is given where such damage necessitates the repair, replacement or rebuilding of such listed items. "Damage" is defined for the purposes of the extension as including unforeseen and sudden electrical or mechanical breakdown, whether or not any of the listed items itself sustains physical loss, destruction or damage. The extension specifically insures any listed item while at rest or being dismantled, moved or re-erected provided it has successfully completed its performance acceptance test. The list of items appears four times in the clause. To qualify an item must be constructed or installed.

46. The question is then whether or not the Motor, as described, is a distinct piece of "machinery" or "plant", newly constructed or installed for the purpose of the Extension. The reference to "pressure vessels or electronic data processing equipment and media" suggests that smaller items can be in view as well as large pieces of machinery. The Mill is undoubtedly plant, but do its component parts constitute plant, machinery or equipment? (It is accepted by both parties that the word "equipment" which appears in the clause is shorthand for the listed items other than "plant".) If the question is asked as to what it was that was damaged here the answer would naturally be - the Stator or the Motor - not the Mill. The starting point must be the item which fails in consequence of a design defect. This is what matters so far as the Reinsurers are concerned (the item with the design fault) because they want to be clear that this item, which leads to the loss, has been properly tested and accepted. In ordinary parlance it was not the Mill that failed but the Stator - an integral part of the Motor, because of its lack of rigidity. The Motor was both constructed and installed. The fact that one part of the engine, the Rotor poles were bolted to the Mill drum is, in these circumstances, nothing to the point.

47. The terms of the paragraph before the four conditions and of the proviso following the fourth requirement shows that the four requirements do not apply to "existing plant and equipment which is being re-installed following removal or dismantling for the purpose of overhaul or repair or maintenance or relocation". This specifically envisages not only that the clause applies to "equipment" and that individual items of machinery or plant will be interconnected with others in the installation and may be removed for the purposes of overhaul or repair, but also that something smaller than the Mill is in contemplation. This is what happened to the Stator, the design of which was defective and which required repair or replacement following the Incident. Whilst this does not demonstrate compliance with the conditions it does demonstrate that it is the type of item which would be the subject of those conditions when first installed.

48. In ascertaining whether an item is plant, machinery or equipment for the purpose of the clause however, it is necessary for that item to be capable of satisfying all four conditions. Was the item in question mechanically tested, tested and commissioned, performance tested to Contract Design Criteria and officially accepted? If the item is not subjected to those matters, it cannot, self-evidently, satisfy those conditions. The Stator was not so subject but, in Coromin's submission, the Motor, of which it formed part, was.

49. The Motor is, in one sense, a stand-alone piece of equipment, since it is the subject of a separate contract, the ABB Purchase Order. The ABB Contract, at clause 11, contained performance guarantees and provided for testing and penalties in the event of failure to comply with the tests. The guarantee test was to "prove conclusively that the equipment or individual system furnished by the seller can continuously operate and produce the guaranteed quantity of the product while operating within the limitations for consumption of fuel, power and additives established in the purchase order". Written acceptance of successful performance testing was also to be provided to the sellers within a specified time, whereupon a final invoice could be submitted and final payment became due. The Motor thus had its own separate contractual regime for testing and acceptance. It is not suggested that this was not met.

50. Furthermore, the grinding mechanism of the Mill and other parts were bought from a separate supplier, Metso. There was a separate acceptance and testing regime in relation to the Mill under the EPC Contract, which involved the use of the Motor, since this turned the drum which circulated the rocks from which the copper was to be extracted.

51. The Motor is, of course, what drives the Mill. It has therefore a discrete function, as opposed to the other parts of the Mill which crush or grind the ore. As Coromin points out, in the turnover package provided by Bechtel to Collahuasi the Motor is defined and identified as a distinct "system" from other systems in the Mill. Each system had its separate reference number.

52. Whilst Reinsurers say that the Rotor poles of the Motor are attached to the Mill drum as part of the Mill and that installation and testing of the Motor and the Mill took place together under the EPC Contract, that does not, in my judgment change the position. The fact that one item is bolted to another does not effect the fundamental question as to whether or not each item is a discrete piece of machinery, plant or equipment. In my judgment, whilst the Motor works in conjunction with the Mill

drum, it remains a discrete identifiable item of machinery or equipment which drives the Mill. It could be, and was, the subject of a design defect. The lack of rigidity of the Stator brought it into contact with the Rotor poles which caused damage to the Stator which required it to be removed and repaired. It was that design defect which led to breakdown of the Motor and the consequential cessation of the milling line.

53. It is in this connection that reference can be made to clause 3.4 of the policy. If there had been no EMB Extension, Reinsurers accept that, under the terms of clause 3.4, a distinction has to be drawn between the item which is defective due to a defect in design (which is not insured) and "the remainder of the Property" which is free from such defective condition, but is damaged as a consequence of the defect in design. This classic distinction is well recognised in Property and Hull Insurance and has given rise to debate as to classification of the items in question. In the present case, the item with a defective condition due to a defect in design was self-evidently the Stator and, had any damage been caused to any other part, the damage to that other part would, on Reinsurers' accepted construction of the Reinsurance, have been recoverable under the policy, without reference to the EMB Extension. It would only be the Stator which would be subject to the terms of the exclusion. This, in my judgment, provides a strong pointer to the way in which the EMB Extension was intended to operate, since it was a "buy-back" of that exclusion, amongst other additional indemnities granted. Whilst the EMB Extension has specific conditions which have to be met before attachment of “plant” or “equipment” to the Reinsurance, where the Extension relates to defective design whilst clause 3.4 is concerned with “property”, the classification of items which are subject to cover in the Extension is informed by the characterisation which has to be made for the purposes of the earlier exclusion.

54. Whilst the Stator is the subject of design fault and was damaged, it was not itself the subject of the four conditions. The larger entity of which it formed part, which was the subject of such conditions, was the Motor and since the focus of the EMB Extension, where defective design is concerned, must be the defective item, and its testing, commissioning and acceptance, the terms of clause 3.4 point to the Motor as the relevant item which is required to meet the conditions.

55. If a component part of the Mill breaks down or is damaged, such part has to be examined to see if, so far as Collahuasi is concerned, it stands as an identifiable self-contained item which has a design defect and has failed or whether it is a combination of items or the interlinking or interconnection between items which leads to the breakdown. In such circumstances, there would be a need to focus on the failure and the design fault and on the testing and acceptance. Had there been testing and acceptance, in accordance with the EMB Extension, of those parts or combination of parts which had caused the problem? Here there is no complication because the Stator is the identifiable item, whilst its connection with the Rotor as part of the Motor was an essential ingredient in the damage caused to the Stator and the consequent breakdown of the Motor and the ensuing breakdown of the Mill. This is reinforced by the evidence of Mr Hettler to the effect that Reinsurers' interest would focus upon the "key item" or "prime mover" which was likely to be the subject of any mechanical breakdown. The Motor was such an item whereas the Mill which consisted of a revolving drum in which the rock rotated and dropped from the top, in order to break down its size, had little likelihood of suffering electrical or mechanical breakdown.

The example of loss given in the Underwriting report available with the August Endorsement illustrates this.

56. Reinsurers focused on the tests under the EPC Contract as opposed to the tests under the ABB Contract. It does not seem to me however that, where testing of one item supplied under one contract has to take place in conjunction with other items supplied under another contract, that this concludes the issue against treating each item as a separate item of machinery or equipment. The question which has to be resolved is whether or not each of those items has been subject to the four requirements and it would not matter if the testing and commissioning of one was done in conjunction with the testing and commissioning of the other as long as there was an independent acceptance of each item as opposed simply to an acceptance of the whole.

57. What emerged from the evidence of Mr O'Rourke and Mr Hettler was that the Rotor had to be supported in order for it to turn within the Stator but testing in situ would inevitably involve turning the Rotor and the Mill drum together since one was bolted to the other and this was the form of the installation and the appropriate means of support. Whilst the inherent strength or rigidity of the Stator could not be tested without energising the Mill once installation had been effected, there were many tests done to the Motor before there was any attachment or energisation. For convenience the Motor was tested using the Mill drum as a wheel to support the Rotor poles, but the test of the engines themselves did not require any particular performance by the Mill. All that was required was that the engine should turn in accordance with the ABB Contract. The question whether the electrical forces of the Motor and the design of the Motor worked was a question of function of the Motor, regardless of any grinding function of the Mill. In theory, the poles or coils of the Rotor could be fitted onto a disc on a shaft for testing the Motor and measuring the torque achieved by the engine, although this was not in practice done. The fact remains that the Motor drove the Mill but was separately identifiable, though connected to it. It could be the subject of mechanical testing, testing and commissioning and the subject of performance testing to 100% Contract Design Criteria, by reference to the ABB Purchase Order and official acceptance could also occur in that context, regardless of the grinding functions of the Mill and the EPC Contract. It is worth noting that elsewhere, on the new third grinding line, ABB supplied the two Ball Mill Motors as well as the cyclo converters, drive control panels, distribution transformers, switch gear exciter systems and containerised electrical buildings with earthquake detectors and VMS/VPD systems, under a contract separate from that of Metso and four other suppliers of other items for the Mill, each of whom had a separate contract.

58. It may be significant that Reinsurers still accept item (ii) of the Joint Memorandum of Experts - that Mechanical Completion, Testing and Commissioning, and Performance Testing, within the meaning of the EMB Extension, were satisfactorily completed in respect of both the Mill and the Motor prior to inception of the Reinsurance from 30 June 2004. Reinsurers have had no difficulty in separating the Mill from the Motor for this purpose and, as appears below, have no positive case to make in relation to Coromin's contention that all four requirements of the EMB Extension were met in respect of the Motor.

<u>The Four Requirements, as applied to the Motor</u>

59. Mr O'Rourke gave evidence, which I accept, in relation to the ABB document dated 16 June 2004 which was signed as part of the clearing up exercise on paperwork. This document was headed "Provisional/Final ACCEPTANCE REPORT". Plainly the intention was that either the word "provisional" or the word "final" should be deleted, but this was not done. Mr O'Rourke did not know why that was but said that this was final acceptance for the particular pieces of equipment referred to in the report. The objects accepted were described in the following manner:-

> "21,000 KW gearless mill drive system (SAG mill 1011, consisting of: SAG mill motor, E-house Container with built in Cyclo converter, Motor Control Carrier and PLC; converter transformers; excitation transformer.
>
> The parties to the above contract hereby confirm jointly that on 27 April 2004, the object supplied by ABB…was ready for use or that the contractual service were fulfilled. The responsibility for operation and maintenance has been transferred entirely to the customer."

Paragraph 6 provided that the customer confirmed delivery conforming to the conditions of the contract and that the 1 year guarantee period began as of 27 April 2004. The certificate was signed by Mr O'Rourke, as agent for Collahuasi, and by a representative of ABB.

60. The evidence of Mr Fraser and Mr O'Rourke was at one, in relation to the EPC Contract position and as to events on 27 April 2004. Mr O'Rourke described two different sets of requirements - those set out in the EPC Contract and those set out in the Independent Test Plans that were received from the vendors, including ABB. The Independent Test Plans showed what the vendors wanted Bechtel to do during installation to ensure that the equipment that they had designed and supplied was being installed to their specification. Bechtel supplied the direct labour and direct supervision but everything done in assembling the components was as dictated by the vendors and, at each critical step, the vendors had to sign off and agree that the installation was in accordance with their design. The relevant sign offs were then included in the Turnover Packages given to Collahuasi. The documentation including the Independent Test Plans provided by ABB for the Motor were conventional and similar in terms of protective systems, installation and testing requirements, to other ABB drives that Bechtel had installed in the past.

61. After nearly 2 years of work installing the equipment, obtaining "sign offs" from the vendors that the equipment had been installed to their designs and completing the pre-operational test work required during and post construction, the Mill was ready for start up on 27 April 2004. Both Mr Fraser and Mr O'Rourke attended. When Mr Fraser arrived, the Bechtel, ABB and Metso engineers checked the Mill for rotation and proper lubrication before starting it. The button was pushed and the Mill started operating without any problems. The Mill was rotated empty without feed material, in accordance with the Independent Test Plans, in a given sequence, taking a number of hours. No problem was encountered and, according to Mr O'Rourke, Mechanical Completion of the Mill was achieved by 5 pm on 27 April, at which point the Mill was handed over to Collahuasi who took care, custody and control at that point and began operating the Mill by introducing feed.

62. On 29 and 30 April 2004 a letter was signed by Mr O'Rourke for Bechtel and Mr Fraser for Collahuasi confirming Collahuasi's agreement that Mechanical Compliance (or Completion) for the Grinding Circuit was achieved on 27 April at 1700 hours. Mechanical Compliance was agreed between them in respect of the Mill (thus including the Motor) and one of the two Ball Mills and all their associated support systems, stockpiles, flotation and supporting infrastructure. It was said then that Provisional Acceptance would take place on 30 April, 72 hours after Mechanical Compliance, and that the formal Certificate of Mechanical Compliance would be prepared and sent in the near future.

63. On 1 May 2004, a Certificate of Mechanical Compliance (or Completion) was sent by Mr O'Rourke which was countersigned by Mr Fraser on 3 May. The letter referred to the "below listed facilities as mechanically complete and ready for start up by Collahuasi". Amongst those items was included, as a separate item, the Motor, whilst the SAG Mill itself and various associated items such as the SAG Mill Feed Belt, SAG Mill Ball Loading System and Lubrication System were also separately listed.

64. Mr O'Rourke's evidence was that the Mill continued to operate without any problems for 72 hours following Mechanical Compliance so that Provisional Acceptance under the EPC Contract could take place on 30 April. There were some non-critical punch list items. At that point care, custody and control of the Mill transferred to Collahuasi irreversibly. If any problems affecting operational integrity had been encountered during the 72 hours, Mr O'Rourke's evidence was that Collahuasi would have handed the Mill back to Bechtel to sort those out, as provided for in the EPC Contract.

65. By a letter dated 4 May, countersigned by Mr Fraser the same day, confirmation was given of Provisional Acceptance by Collahuasi of "the SAG Mill" (including the Motor) and "the first ball mill" and facilities relating to the system "according to Annex 4 of the EPC Contract section 5.2.2 phase 8.III". The acceptance was said to be effective at 1700 hours on 30 April 2004.

66. By a Vendor End of Service Notification signed by ABB and Bechtel on 19 May 2004, it was recognised that the Mill and both of the two ball mills had been satisfactorily installed in accordance with the manufacturer's instructions and that all tests were complete. Subject to the production of a couple of bolts in relation to the second ball mill, the equipment was stated to be ready and able to perform in accordance with the specifications and the requirements of all purchase documents.

67. In my judgment, there can be no doubt that each of the four requirements of the EMB Extension was met in relation to the Motor. The ABB document called the Provisional/Final Acceptance Report shows that responsibility for operation and maintenance of the Motor was transferred to Collahuasi on 27 April when the Motor was ready for use and that contractual services from ABB had been fulfilled, even though the document was not signed until 16 June.

68. It is accepted by both parties that "official acceptance by the Insured following formal handover certificate procedure" does not require a chronological sequence, provided that the "official acceptance" is "pursuant to" or "in accordance with" or "because of" the "formal handover procedure". The two must be linked and it is this connection to which the requirement refers. On this basis, I find that the ABB Provisional/Final Acceptance Report was "Official Acceptance" within the meaning of the EMB

Extension. I accept Mr O'Rourke's evidence that, for Bechtel's purposes, the ABB report was ABB saying that it was satisfied that the installation of the Motor was correct and that Collahuasi was entitled to operate the equipment. Mr O'Rourke's signature evidenced Collahuasi's acceptance of the Motor for the same purpose. There was thus specific final acceptance of the Motor, with the authority of Collahuasi, as complying with the ABB Contract requirements for testing, which were limited and amounted to little more than, as per the guaranteed test, ensuring that the Motor turned the Mill drum with feedstock in it. This happened at or immediately after 5 pm on 27 April 2004 on Mr O'Rourke's evidence.

69. For good measure the position is reinforced by the letter of 29 April (countersigned on 30 April) and the Certificate of Mechanical Compliance (Completion) of the Motor and the Mill dated 1 May and countersigned on 3 May. These show that all necessary testing and commissioning and performance testing had been carried out under the EPC Contract confirming 100% contract design criteria for the Motor and the Mill. They also show an "official acceptance" of the Mill and the Motor, by Collahuasi. Although the terms of the EMB Extension refer to such acceptance "following formal handover certificate procedure", I see no problems in that regard because the EPC Provisional Acceptance of the Mill and the first ball mill and facilities relating to the system (including the Motor), clearly amounts to official acceptance by Collahuasi in connection with the issue of appropriate certificates on 29 April (countersigned on 30 April) and 1 May (countersigned on 3 May) after mechanical testing, testing and commissioning and performance testing over the 72 hour period between 27 and 30 April, together with the countersigned letter of Provisional Acceptance. There was "official acceptance" of the Mill which included the Motor and for good measure, as part of the clearing up process, on 16 June 2004 there was a further "official acceptance" of the Motor.

70. In my judgment therefore, on the facts as I find them to be and the proper construction of the EMB Extension, the motor was a discrete piece of machinery, plant or equipment covered by the policy terms which had met each of the four requirements set out in the extension clause before the inception of the 2004-5 cover.

The Four Requirements, as applied to the Mill

71. I also find that each of the four requirements was satisfied in relation to the Mill, if it is necessary, as a matter of law and/or fact, to consider it, as opposed to the Motor.

72. For these purposes, attention focused upon the EPC agreement between Collahuasi and Bechtel (the two contracts being by their terms, treated as one). Under the terms of that contract Bechtel was responsible for the Project and for administration of the contracts which it concluded with suppliers as agent for Collahuasi, together with the ABB Contract concluded prior to the EPC Contract by Kvaerner as agent for Collahuasi.

73. By Article 10.1, the "reception" (acceptance) of the services provided by Bechtel was to be made by four stages - Mechanical Compliance, Provisional Reception (Acceptance), Operational Compliance and Definitive Reception (Acceptance), as set out in the Technical Bases which formed part of the contract. Phase 8 of stage II,

under section 5 of the Technical Bases, set out the requirements for "Mechanical Fulfilment" (Compliance), "Provisional Reception", "Operational Compliance" and "Definitive Reception". The Reinsurers accepted, as did their expert in the joint memorandum, that Mechanical Testing, Testing and Commissioning and Performance Testing within the meaning of the EMB Extension were satisfactorily completed in respect of both the Mill and the Motor prior to inception of the policy on 30 June 2004.

74. The only issue therefore is the question of "official acceptance by the Insured following formal handover certificate procedure", which the Reinsurers equate with "Definitive Reception" in the EPC Contract, which under the terms of the technical bases cannot occur until 365 days after "Provisional Reception". It is accepted that the four conditions can be met in any order. Coromin submits that Official Acceptance will often precede Performance Testing and Testing and Commissioning, because this is likely to occur after handover of the machinery to the owner, albeit with the benefit of warranties or guarantees under the relevant supply and/or procurement contract. Reinsurers contend that the order in the EMB conditions will be the usual order but accept that there is nothing in the wording that requires this. It is also in my judgment plain that one or more condition could be satisfied at one and the same time.

75. Reinsurers accept that the requirements for Mechanical Testing, Testing and Commissioning and Performance Testing confirming to 100% Contract Design criteria were met by 27 June 2004, 10 months before the Incident on 31 March 2005. Under the EPC Contract, there were prescribed performance tests which were to demonstrate that in a continuous period of 72 hours, two cumulative conditions were met. The first was that the new grinding line should process 186,000 tonnes of ore during the continuous period of 72 hours, measured in the conveyor belt. The second was that the three grinding lines, constituting the expanded Concentrator Plant, should process 330,000 tonnes of mineral in the same continuous period of 72 hours, measured in the conveyor belts feeding the SAG Mill. All three lines achieved the latter requirement on 30 May but the former requirement for the new line was achieved on 27 June 2004, some 3 days prior to inception of the cover.

76. There was thus "Mechanical Fulfilment or Compliance" (see the letter of 29 April and the Certificate of 1 May), "Testing and Commissioning" (see the provisional acceptance in the letter of 4 May) and "Performance Testing in accordance with Contract Design criteria". These procedures, as referred to in the EMB Extension, do not, for the purposes of the extension, require certification although the clause requires a formal handover of whatever certificates there are. Whether or not the procedures have been effected is a matter of fact, but there are certificates under the EPC Contract, or documents, which evidence compliance of the Mill in April/May/June 2004. Reinsurers draw attention to Phase 8 of section 5 of the Technical Bases of the EPC Contract and seek to equate various stages set out therein to the requirements of the EMB conditions. Since the policy was a global policy, designed without reference to any particular contract, it would not be surprising if the stages did not equate directly with the four conditions. They do not.

77. Stage 1 of Phase 8 is entitled "Training, Advisory, Assistance and Technical Assistance", which does not feature in the EMB Extension at all. Stage 2 is "Mechanical Fulfilment" (Compliance) which involves the issuing of a "Certificate of

Mechanical Compliance". As referred to earlier in this judgment, that certificate was issued on 29 April, countersigned on 30 April and related to 1700 hrs on 27 April 2004. It is not contested that this certificate was properly issued. The third stage was "Provisional Reception" or "Provisional Acceptance" which was to occur 72 hours after Mechanical Compliance, provided the Concentrator Plant operated effectively during that period, as it did.

78. The fourth stage under the EPC Contract was "Commissioning" which was to commence immediately after Mechanical Compliance on 27 April and was the responsibility of Collahuasi which by its Provisional Acceptance on 30 April/4 May also accepted responsibility for the operation of the plant. Reinsurers suggest that the "Testing and Commissioning" requirement of the EMB Extension correlates to the third and fourth stages under the EPC Contract, stating that "testing" is met by "Provisional Acceptance" and "commissioning" is "commissioning". "Provisional Acceptance" does not however fit happily into this analysis since, under the terms of the EPC Contract, following Mechanical Compliance, Bechtel was to deliver the Concentrator Plant to Collahuasi for its operation for a period of 72 hours, under Collahuasi's control. At the point where 72 hours of continuous satisfactory operation occurred, "Provisional Acceptance" took place and that was to be formalised by means of the execution of a Certificate of Provisional Acceptance, thereby recognising the handover of the plant to Collahuasi. The commissioning stage, whilst commencing after "Mechanical Compliance" was also to be effected under Collahuasi's responsibility whilst Bechtel was responsible for co-ordinating the suppliers and assisting in effecting the necessary commissioning work. The process was to include "the development of the stages of control for the tests with loads" and setting up a stable regime for the equipment systems and facilities and contemplates this happening or continuing after Provisional Acceptance.

79. Reinsurers suggest that "Performance Testing confirming to 100% Contract Design criteria" correlates strongly with the fifth stage under the EPC Contract of "Operational Compliance" which has, as only one of its requirements the performance tests to which I have already made reference.

80. By this process, Reinsurers identify "official acceptance by the Insured following formal handover certificate procedure" in the EMB Extension with "Definitive Acceptance" which cannot take place until 365 days after "Provisional Acceptance". By that time however, under the provisions of the EPC Contract, the Mill had been operating under Collahuasi's control for a full year, being in its custody and its responsibility throughout. Moreover "Definitive Acceptance" could only take place after 365 days if all deficiencies had been resolved. If not, that "Definitive Acceptance" would not occur until they were resolved.

81. Coromin and Reinsurers accept that "Official Acceptance" must be connected to the "formal handover certificate procedure". Reinsurers state it must be a distinct stage of the process. Coromin's case is that such Official Acceptance of the Mill took place on 30 April when Provisional Acceptance took place under the EPC Contract. Coromin maintains that Reinsurers are incorrect in equating "Definitive Acceptance" with the fourth requirement for a number of reasons. I agree.

82. First, "Definitive Acceptance" requires there to be no outstanding defects, whereas "official acceptance by the Insured" under the EMB conditions envisages the

possibility of outstanding faults or punch list items which exist but do not affect the operational integrity of the plant. I agree.

83. Secondly, "official acceptance" in my judgment, involves a degree of formality but relates to "handover" of the plant or machinery to the Insured so that it becomes the Insured's responsibility and therefore operates under its responsibility. This acceptance and handover must involve the handover certificate procedure so there can be no doubt about transfer of responsibility and acceptance of it. This then creates the attachment point for the Operating Policy, as opposed to the CAR.

84. Thirdly, whilst Reinsurers rely upon the existence of guarantees and warranties under the suppliers' contracts as militating against official acceptance, those only operate after handover and do not usually cover consequential loss, such as lost profit. The terms of the exclusion in the EMB Extension show that, even if a supplier, contractor, or repairer is legally liable, Business Interruption cover is granted, if the damage is of a type which but for the existence of that legal liability, would be covered under the policy. Furthermore, in the event that liability is denied, as has happened here, the reinsurance bites and the Reinsurers are subrogated to all the Insured's rights against the supplier or contractor in question.

85. In my judgment what the fourth condition requires is an authorised formal acceptance by the Insured of the plant or machinery in question "following" - in accordance with - the formal handover of appropriate certification. It does not matter whether the handover of certificates actually precedes the acceptance, constitutes the acceptance or comes after the acceptance, provided there is the appropriate interconnection between them. What matters from Reinsurers' point of view is that there is clarity about acceptance and handover of certification. What is envisaged is appropriate formal certification and official acceptance by reference to it.

86. Both Mr O'Rourke and Mr Fraser agreed that the Mill was "handed over" under the EPC Contract on 30 April 2004 as confirmed by the Provisional Acceptance Certificate dated 4 May 2004. From that point in time onwards the Mill operated under the care, custody and control of Collahuasi who began to ramp up the systems and operate the Mill under increasing load. The performance of the Mill exceeded expectations and whereas the EPC Contract stipulated a 6 month period for the attainment of performance targets, they were in fact achieved by 27 June. It continued to operate under load for almost one year until the incident on 31 March. There can be no doubt that Bechtel did not regard the Mill or its running after 30 April as their responsibility. Both regarded the Certificate of Provisional Acceptance as evidence of a formal handover of the newly built plant and machinery. There is no doubt that Mr Fraser was authorised to sign the Provisional Acceptance, as was Mr O'Rourke. This was an "Official Acceptance" by Collahuasi and appropriate certification was either already provided or was then being provided.

87. As from provisional acceptance of the Mill on 30 April 2004, as certified on 4 May 2004, Collahuasi had taken over and accepted the Mill, as between themselves and all their contractors under the terms of the EPC Contract. Collahuasi had care and custody of it and assumed all risk and responsibility in relation to it. It began to operate the Mill commercially. Whilst performance testing for the EPC Contract yet remained to be done, in order to comply with the two cumulative tonnage processing requirements, there can be no doubt, in my judgment, that handover and acceptance

had occurred in accordance with the appropriate procedures. At that stage whilst there were punch-list deficiencies, there were no deficiencies which affected the integrity of the plant or prevented it from operating and Collahuasi was in total control of the Mill, assuming risk and responsibility and operating it for commercial purposes. Appropriate Certificates were issued, the last of which was dated 4 May with effect from 30 April. At that stage the first, second and fourth requirements of the EMB Extension were met and the only outstanding matter was the tonnage performance test requirement which itself was met on 27 June and for which no certificate was required under the Extension.

The claimed Business Interruption loss in respect of the Molybdenum Plant

88. Reinsurers contend that they cannot be liable for losses in respect of the Molybdenum Plant because at no time was it insured under the PD section of the policy in 2004/2005, nor was it even in existence at that time. In consequence, if they were to be held liable for business losses relating to it, they would be subjected to a risk of which they had no knowledge and which they were unable to rate, since values for the asset and business losses relating to it were not declared to that policy and could only be declared to the subsequent policy once the plant had come into operation.

89. The point however turns upon the proper construction of the Reinsurances. The BI insurance insures against "loss resulting from the interruption of or interference with the business". "Business" is defined to include "all operations and activities of the Insured". There is no qualification or limitation, in terms of scope or time. "Business Interruption" is defined as meaning "loss…due to interruption of or interference with the business in consequence of damage", which, for the reasons I have held, includes breakdown and damage to the Motor and the Mill in 2004.

90. No issue is raised here of causation or failure to sue and labour about the loss. As is usual in matters of this kind, even where there is a dispute as to liability, Collahuasi sought to effect repairs, in liaison with the loss adjusters, to minimise the loss flowing from the "occurrence". Temporary repairs were undertaken and then, in due course, permanent repairs in January to March 2007, by which time the Molybdenum Plant had come on stream and was thereby affected by the loss of one grinding line out of three. The business indemnity period extended up to 24 months, being the period during which there was interruption of the Business, regardless of the date of expiration of the policy. On the face of it, as was accepted by the expert instructed by Reinsurers, there is nothing in the wording of the policy which prevents recovery of the loss in question. It is not suggested that the Business Interruption loss was not a consequence of the PD occurrence or that Collahuasi had failed properly to minimise its loss.

91. In the absence of any such issue, where insured property suffers damage covered under section A of the policy and the business of the Insured, of whatever kind, is interrupted or interfered with, Reinsurers are bound to pay the amount of the loss resulting from such interruption or interference up to a period of 24 months after its occurrence. It is neither here nor there that, when the occurrence took place, it had no immediate impact upon the Molybdenum Plant, because that plant did not then exist. The consequence of the Damage under the PD section is a Business Interruption flowing from the replacement of the Stator in a 3 month period in 2007. The need for that repair put the third grinding line out of action and thereby interfered with another

element of Collahuasi's business, namely the Molybdenum Plant which drew out, from the same product, a different mineral than copper.

92. The policy wording does not require the business which is interrupted to be business which existed at the time of the occurrence. It is self-evident that, in a policy year and a fortiori, in a potential period of up to 2 years during which Business Interference can occur, the Insured's business will vary. Whilst there could be an acquisition of an asset, in which circumstances section 4.1 of the policy would take effect with premium adjustment, the business can change without such an acquisition or disposal. A decision might be taken to sell waste material or process it in some way and a new business could thus arise after an occurrence of loss, which would nonetheless be affected by the need to repair the damaged item. In such circumstances Reinsurers would not be given the opportunity, prior to the inception of the cover, to make a rating assessment by reference to what was then a future business, which the Insured had not yet decided to conduct. The definition of "business" is very wide and therefore relates to such business as the Insured carries on, from time to time, whether in the 12 month policy period or in the Indemnity Period.

93. The Indemnity Period runs for up to 24 months from either the date of damage or the date of interference. It also refers to the period "during which the business is or would have been interrupted or interfered with" because the clause provides for the recovery of additional expenditure necessarily or reasonably incurred for the purpose of avoiding or diminishing a reduction in turnover or maintaining the normal operations of the Insured during the Indemnity Period. It is clear that what the clause envisages is cover for a reduction in turnover, where there is physical damage or breakdown, for such period as is necessary to put the matter right and for recovery of the expense incurred in doing so. Repairs may be effected, recoverable under the PD section of the Reinsurance, either shortly after the occurrence or at a later stage, if they cannot be done earlier or it is more beneficial, from a financial standpoint, to do so. If there is no interference with the business until the repairs are effected, then the Indemnity Period will not commence until those repairs commence, which might involve a significant delay if that made economic sense.

94. Contrary to what was one of Reinsurers' arguments, there is no question of creating a second indemnity period, one starting at the date of Damage and one starting with the period of interruption. There is no question of interrupting a business that does not exist. Once causation is accepted, there is nothing to the Reinsurers' point.

95. The argument based upon the absence of ability to rate is not a good one. As previously set out in this judgment, rating took place on historic actual values, as at 31 December 2003, for the June 2004-2005 policy year. Whilst there were adjustments for overall changes at the year end, the BI values were based upon gross profit or turnover and the maximum indemnity period was specifically 24 months, a period recognised expressly in the CCIP terms as being above and beyond the 12 month limit in the policy. With an occurrence on the last day of the policy year, the business indemnity period could extend effectively or 2 years more. In those circumstances any repair would be bound to take place after the expiry of the policy year with an impact on the business conducted in the following 2 years, rather than that declared for the year when the PD occurred. With delayed repairs and delayed interferences the 24 month period could start and finish even later. The rating on the subsequent years would be done by reference to historic actual values with any premium

adjustment as provided. That is the blunt tool which Reinsurers accepted for rating purposes on an annual basis.

96. If the Molybdenum Plant had become operational and come on stream after the occurrence of 31 March 2005 but before the end of the policy period ending 30 June 2005, the Reinsurers would have received some additional premium for the year in respect of the PD and BI values declared for the Molybdenum Plant, perhaps prorated for time on risk in some way, but the essential principle would remain the same. At the time of the inception of the policy and of the occurrence, the Molybdenum business did not exist, only coming into being at a later date. But this misses the point since the issue is solely one of causation.

97. In reality, although the Reinsurers said that, if the Molybdenum Plant Business Interruption was to be the subject of indemnity, they had written the 2004/2005 reinsurance "blind", this would be true, even if the Molybdenum Plant had come on stream before the occurrence or thereafter, but within the policy year. Reinsurers chose to write the business on actual historic values with regard to PD and BI, and were in no position to tell in what ways Business Interruption might subsequently arise from an insured peril. That was a risk which they knowingly undertook.

98. Reinsurers effectively seek to equate "business" with "physical property" whereas this is not necessarily the case. Whilst the Molybdenum Plant, when built was subject to PD and later became the subject of insurance in Autumn 2005, there is no requirement in the policy for "business" to be insured as property. All that the reinsurance requires, for BI, is that insured Property suffers Damage, which is covered for PD and which then gives rise to Business Interruption of any kind. In those circumstances a loss flowing from such interruption is itself covered, whether or not the business arises in relation to an asset which is insured under the PD section of the Policy.

99. The only information which underwriters receive for rating relates to insured property and Business Interruption values connected thereto, with a limit on maximum liability. For ordinary business changes, without acquisitions of property or additional property to be included in the PD section, there is no way in which Reinsurers would know of changes in business values during the course of the policy year. As Coromin pointed out, the price of copper is highly volatile which would effect both turnover and revenue in an unpredictable way. Reinsurers do not rate the business on what the position is going to be, even at inception, but on the basis of historical information which is actually 6 months out of date. Business changes of many different kinds may occur which may or may not give rise to premium adjustment at the end of the year. In truth Reinsurers can have little idea how business will be effected by an occurrence and must therefore rate on the basis of maximum values insured and an assessment of the risk of likelihood of PD happening, which could cause a business loss to occur.

Implied Term

100. Reinsurers seek to rely upon an implied term to limit the word "business" in the BI section of the policy to "business which was being carried on by the assured during the period of the policy" having previously asserted an implied term limiting it to business carried on at the date of Damage. In my judgment the implication of either term is not necessary nor even reasonable. It is certainly not so obvious that the

parties did not feel that they had to spell it out and none of the tests which are set out in Philips Electronique Grand Public S.A. v British Sky Broadcasting Limited [1995] EML 472 is met. In some BI covers, there is a requirement that the item damaged must be the subject of PD cover, whether under the same or a different policy. In the CCIP, Business Interruption losses are only recoverable in the event of damage which falls within the PD section but there is no basis for saying that the ultimate Insured's business must remain the same over the 2 years following the Damage or that reasonable loss is limited to that business or business conducted in that policy year, on which some premium might be payable if a property asset was declared to the Policy. For a global policy to restrict the ultimate Insured's business activity or his recoverable loss to particular aspects of his business activity would in my judgment be wholly unreasonable. It is not something that Collahuasi would ever have accepted. Neither legal efficacy, business necessity, business sense nor bystander obviousness give rise to such a term. The Reinsurances work without any such implication.

Conclusion

101. In these circumstances Coromin is entitled to recover under the Reinsurances in respect of the damaged Stator, the cost of repair to the Motor and Mill and the Business Interruption loss consequent thereon, including that resulting from the interruption of the business of the Molybdenum Plant within the 2 year period.

102. Costs must, in the absence of some special feature of which I am unaware, follow the event. If the parties can agree the form of order to be made in the light of this judgment, so much the better, but if not, I will determine any outstanding issues after the formal hand over of this judgment.