Neutral Citation Number: [2007] EWHC 1744 (Comm)

Case No: 2007 Folio 19

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2007

Before :

MR. JUSTICE DAVID STEEL

- -

Between :

KOREA NATIONAL INSURANCE CORPORATION	**Claimant**
- and -	
ALLIANZ GLOBAL CORPORATE & SPECIALTY AG (formerly known as ALLIANZ MARINE & AVIATION VERSICHERUNGS AG) (London Branch) (on its own behalf and on behalf of the reinsurers subscribing to Policy Number AJFM157 for the 2004 year of account)	**Defendant**

- -
- -

Bernard Eder QC & Stephen Midwinter (instructed by **Elborne Mitchell**) for the **Claimant**
Gordon Pollock QC & David Scorey & Damien Walker (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 18th May 2007

- -

Judgment

Mr. Justice David Steel:

1. The Claimant is an insurance company incorporated in the Democratic People's Republic of Korea ("DPRK"). The Claimant claims €44,310,523 together with interest and costs against the reinsurers represented by the Defendant for their respective proportions, it being the sum due under a judgment by the Pyongyang Court. The present application by the Claimant is for summary judgment in respect of certain issues raised in the Defence.

2. By the underlying contract of insurance covering the period 1 November 2004 to 31 October 2005, the Claimant insured Air Koryo (a North Korean airline based in Pyongyang) under an aviation hull and liability policy ("the insurance contract").

3. The policy was expressly subject to the law and jurisdiction of DPRK. In respect of third party liability claims, the limit of indemnity was €45million (or 7.2 billion Korean Won (NKW)) each accident with a nil deductible. Coverage also included crew and non-revenue passengers for accidental bodily injury including death for up to €20,000 (NKW 3.2million) each person.

4. The contract of reinsurance covered the same period. The Claimant was reinsured by the Defendant and the various reinsurers represented by the Defendant in this action (together "the reinsurers") under an aircraft third party liability reinsurance policy ("the reinsurance policy"). The reinsurance contract provided as follows:

   i) The contract contained an express "claims control" clause which provided: "…the reinsurers shall have the sole right to appoint adjusters, assessors, surveyors and/or lawyers and to control all negotiations, adjustments and settlements in connection with such loss or losses."

   ii) it was to cover "the original insured's legal liability to third parties (excluding liability to occupants and cargo) being bodily injury and property damage arising out of their operation of aircraft as per schedule as original";

   iii) the limit of liability for claims involving legal liability to third parties for bodily injury/property damage was €75million each accident, except for claims involving MI-8 helicopters in which case the limit was €45million each accident;

   iv) a subsequent condition extended cover to "crew and non-revenue passengers for accidental bodily injury including death whilst engaging in air travel only; sum insured EUR 20,000 each person";

   v) the Lloyds simultaneous settlement clause LPO438 was to apply. This states that "reinsurers agree to pay their share of any loss hereon simultaneously with insurers participating in the original insurance";

   vi) pursuant to a currency conversion clause, claims in Euros were to be paid in Euros and claims in local currency were to be paid in Euros at an exchange rate of NKW 160 to Euros 1;

   vii) the contract was subject to the laws and jurisdiction of DPRK; and

   viii) the schedule of aircraft covered included amongst others MI-8 Helicopter registration no. 313.

5. The Claimant alleged that at approximately 11pm on 9 July 2005, during an internal flight from Jamae Island to Pyongyang International Airport, the MI-8 helicopter registration no. 313 belonging to Air Koryo crashed into a warehouse situated at Chonam-Ri in Pyongyang owned by the Relief Material Reserve & Supply Centre. The aircraft was destroyed and the three crew members and three passengers were killed. The crash also caused substantial damage to the warehouse and its contents (although it is part of the Defendant's case that the warehouse did not contain the volume and value of contents which the Relief Centre alleged).

6. On or about 11 July 2005, the Claimant informed reinsurers that the crash had occurred. By virtue of the terms of the policy Messrs Beaumont & Son were automatically instructed on behalf of the Claimant. In due course, on about 22 July 2005, loss adjusters were also appointed to carry out a survey.

7. In the meantime, on or about 18 July, the Relief Centre made a claim against Air Koryo for NKW 50million for the rebuilding of the warehouse and NKW 7.6 billion for the contents. The Claimant thereupon invited reinsurers to exercise their power under the reinsurance contract to take control of the claim. However the reinsurers did not respond to the invitation.

8. Following the institution of proceedings in September 2005, the Relief Centre obtained a judgment against Air Koryo from the Pyongyang court on 9 December 2005 in the sum of NKW 7,634,006,244 together with court expenses. On 23 January 2006 Air Koryo wrote to the Claimant advising that it had paid the Relief Centre and requesting reimbursement (the claim now being NKW 7,200,000,000 for third party property damage, NKW 9,600,000 in respect of the deceased crew and NKW 144,000,000 in respect of costs making a total of NKW 7,353,600,000). The Claimant once more notified reinsurers of the claim and invited them to take control but that invitation was once again not taken up.

9. On or about 6 March 2006 Air Koryo commenced arbitration proceedings with the Pyongyang Arbitration Committee pursuant to the insurance contract seeking an award in that sum together with interest and costs. On or about 20 July 2006 the tribunal made an award in favour of Air Koryo in the total sum of KPW7,301,932,137 which the Claimant paid on or about 26 July.

10. When the Claimant refused to indemnify the Claimant, the Claimant launched proceedings in the courts of DPRK against the Defendant on its own behalf and on behalf of the other reinsurers in accordance with the DPRK jurisdiction clause in the policy. The claim, now converted at the rate provided in the reinsurance contract, amounted to €45,637,076. The trial of the Claimant's claim took place on 11 December 2006, a trial which, although notified, the reinsurers did not attend.

11. The judgment upheld the Claimant's claim and ordered the reinsurers to pay the sum of €43,454,383. This sum was made up as follows: third party liability claim €42,750,000, bodily injury to crew €57,000, interest at 4% from the date of the claim to the date of judgment €647,383. The court also awarded costs.

12. Thereafter the present proceedings were instituted to enforce the judgment in England. The Claimant in due course brought an application for summary judgment. The initial response was an application notice by the Defendant contesting jurisdiction in respect of four of the reinsurers (Aviabel, MRG, GIC, MISR) who were domiciled abroad and in respect of whom it was said the Defendant did not act in a representative capacity. In the event this application was in due course abandoned.

13. Thereafter, in response to the merits of the claim, the Defendant served a defence and counter-claim of inordinate length and lack of clarity. It raises five defences which may be summarised as follows:

    i) a claim that there is a defect in the judgment of the DPRK court arising out of the use of representative proceedings;

    ii) an alleged fraud on the DPRK court in having failed to inform it that the dispute had been (conditionally) settled in December 2005 and that all rights and obligations under the policy were discharged by 8 March 2006 at the latest

(it is to be noted that this plea occupies no less than 180 paragraphs of the defence and counter-claim);

iii) an alleged lack of jurisdiction on the same basis;

iv) an alleged fraud on the DPRK court in having failed to inform it that to the Claimant's knowledge the underlying insurance claim was fraudulent

v) a public policy defence on the basis that the English court should not enforce the judgment of the courts of DPRK because its judiciary is partial and is flawed.

14. It was accepted by the Claimant that it was not appropriate to press for summary judgment on issues iv and v. However the Claimant does seek summary judgment under CPR part 24 in respect of defences i, ii& iii on the grounds, the burden being upon the Claimant, that those defences have no realistic prospect of success and there is no other compelling reason why the issues should be disposed of in a trial.

15. It is convenient to start with two matters relating to the question of representative proceedings - first in England and second in North Korea.

16. As regards the first point, the present proceedings have been brought as representative proceedings pursuant to CPR 19.6. The application challenging the court's jurisdiction in respect of the reinsurers domiciled overseas was abandoned. However the Claimant takes issue with the apparent challenge to the format of representative proceedings contained in the Introduction to the Defence and Counterclaim, namely:

i) that the document was the "Defence and Counterclaim of Allianz only"

ii) that the Claimant "has purported to commence these proceedings against Allianz on its own behalf and on behalf of all reinsurers"

iii) that "no admissions are made as to whether it is appropriate to use that procedure "

iv) that "this statement of case is not served on behalf of remaining reinsurers"

17. The concerns in this regard have created more heat than light. The Claimant was fully entitled to commence representative proceedings as the named Defendant has the same interest as all persons it is said to represent. The latter need not be served but are treated as parties to the action so that any judgment obtained against the Defendant will bind all those represented: CPR r 19.6(9).

18. Against that background, I did not, in the event, understand it to be controversial that there needs to be some amendment to Paragraph 1 of the Defence and Counterclaim:

i) Para 1.1 - "has purported to commence" should be amended to "has commenced"

ii) Para 1.2 - should be deleted

19. Second, the Korean proceedings instituted by the Claimant in the Pyongyang Court were issued against Allianz alone "on its own behalf and on behalf of all those insurers subscribing reinsurance contract no. AJFM157 for the 2004 year account." It is the Defendant's pleaded case in England that the civil procedure of North Korea does not permit representative actions.

20. It is common ground that civil procedure is governed by the Civil Proceedings Act approved by Resolution No. 18 of the Standing Committee of the Supreme People's Assembly on 10 January 1976 as amended by various subsequent decrees and resolutions. The Claimant relies on Article 28 which provides:

> "A suit may be brought by one or several parties against one or several parties. The co-plaintiffs or co-defendants shall conduct acts of litigation indifferently and may leave such acts in the hands of the other co-plaintiff or co-defendants."

21. The Defendant responded that this Article, on its own terms, does not provide for representative proceedings in the sense of giving rise to a binding judgment against persons who have not been served. In response, the Claimant relies on expert evidence relating to the law of North Korea provided by Professor Kang Jong Nam. In his report, he makes reference to an "Interpretation of the Presidium of the Supreme People's Assembly " relating to Article 28:

> "A suit may be brought by one party against one party or several parties or by several parties against one party or several parties.
>
> Several parties shall mean two or more parties having the same interest in a case.
>
> In case when a representative or the position as a representative is ascertained or ascertainable amongst the several parties, one party is entitled to bring suit against a representative or a person holding the position as representative and representative or a person the position as representative can bring suit against one party.
>
> Several parties are deemed to be co-defendants where one party brings a suit against each of several parties and co-plaintiffs where several parties respectively bring suit against one party.
>
> The co-plaintiffs or co-defendants shall conduct acts of litigation independently. Where such acts are to be assigned to other co-plaintiffs or co-defendants, a letter of attorney shall be issued."

22. Although the Defendant says that it has been unable to obtain advice from any lawyer in North Korea to check the source, validity and meaning of "the interpretation", it seems to me that the facility for representative proceedings and its use in a North Korean action is confirmed by the North Korean Court itself which in its judgment expressly finds that Article 28 was engaged. I thus agree with the Claimant and it

follows that Part III of the Defence and Counterclaim: "Validity of the Judgment" should be struck out.

23. This leaves the major issue between the parties, namely the plea exhaustively set out in Part IV of the Defence and Counterclaim: "The Settlement Agreement and KNIC's Associated Fraud in obtaining the Judgment." The stance adopted by the Claimant was that the suggestion that a settlement agreement had been entered into was completely untenable because on any objective assessment the matters pleaded could not amount to a settlement. The submission was said to be fortified first by the absence of any written record of such a significant agreement and second because the contemporary correspondence was entirely inconsistent with any settlement having been achieved.

24. It is accordingly first necessary to focus on the Defendant's case as to the circumstances and terms of the settlement allegedly reached. For this purpose the Defendant served no witness statement but relied upon the contents of the Defence and Counterclaim containing as it did a statement of truth of Mr. Michael Payton the senior partner of the Defendant's solicitors Clyde & Co who attended all the relevant meetings.

25. It is here that the difficulty starts. The document is grossly prolix, part pleading, part citation from witness statements and part argument, without any summary. In the event this part of the claim were to survive this application, steps will be needed at the Case Management Conference to make the document comply with the Admiralty and Commercial Court Guide paragraphs C1.1(a) and C1.4. At the moment it does more to obscure the issues than reveal them.

26. The basic ingredients of the Defendant's case as originally pleaded appear to be as follows:-

    i) In the course of November and December 2005 there were settlement discussions between the Claimant and reinsurers.

    ii) The catalyst for these discussions was the comparison between the contractual rate of exchange of €1 = NKW160 and the open market rate of exchange of €1 = NKW1000 to 3000, together with reservations about the scope of the coverage, the legitimacy of the claim and the scale of the damage allegedly sustained in the incident.

    iii) The Defendant's reservations about the claim and about the potential hard currency windfall to the Claimant were conveyed at a meeting in London on 11 November 2005.

    iv) At a second meeting held on 1 December the Claimant's representative made a statement to the effect that the Claimant would offer to work with reinsurers and Air Koryo to settle the underlying claim in NKW, thereby ignoring the exchange rate provision of the reinsurance contract, but warned that it was not expected that the reinsurers could obtain the necessary NKW.

    v) A further meeting took place on 23 December. In the interim the Claimant had received an expert's report which commented on the "unnaturally rapid spread

of fire" and the quantity of debris being inconsistent with the claimed volume of goods stored. This report was handed to the Claimant's representative at the meeting.

vi) At the meeting, the representatives of the Defendant asked whether, if the appropriate NKW became available through the activities of their agents, "everyone would be happy". The response of the Claimant's broker was: "Yes". By means of that exchange and D & CC para 97.1 "Either Ko (Pyongyang) or Ko (London) confirmed and reiterated that, if Reinsurers could obtain the NKW, they had a deal", it was pleaded, a settlement was achieved.

vii) Indeed it was further pleaded that later in the same meeting, Mr Clarabut confirmed that, if reinsurers could obtain the NKW, reinsurers had a deal.

viii) Thereafter the Defendant took elaborate steps to obtain the necessary NKW. The outcome was successful in that by 8 March 2006 reinsurers had made arrangements for the Claimant to be credited with a sum consisting of or equivalent to the claim in NKW pursued by Air Koryo.

ix) This arrangement was agreed by China's Central Bank and other relevant bodies. As a result, the Claimant was obliged to accept the amount tendered and, by implication in the settlement agreement, to furnish a release.

27. In short, the Defendant's case relating to the settlement agreement is set out in Paragraph 4 of the Introduction to the Defence and Counterclaim:

> "By 23 December 2005 at the latest, KNIC had entered into a binding agreement with Reinsurers ("the Settlement Agreement") which compromised the parties' respective rights and obligations under the Reinsurance Contract."

28. However, it became clear in the course of the hearing that the Defendant was in fact advancing two different characterisations of the agreement allegedly reached in regard to the procurement of NKW - namely a conditional settlement agreement (as above) or alternatively a variation of the contract. Following the hearing the Defendant tendered an amended Defence and Counterclaim to reflect that alternative (without prejudice to the contention that no amendment was necessary). It accordingly remains desirable to consider the existing pleading by reference to the objections taken by the Claimant before turning to the appropriateness of any amendment.

Correspondence

29. The Defendant says that the parties reached a settlement or compromise of the claim at the meeting on 23 December. As already noted, the terms of the alleged settlement were that the reinsurers would pay the total indemnity limit under the policy but that payment would be in NKW. Such settlement was conditional on the obtaining by the reinsurers of the necessary NKW. But, if such currency could be sourced and paid over, the contract would be discharged.

30. The primary support for this plea was, as already noted, an assertion by representatives of the Claimant at the meeting on 23 December that, if the reinsurers

could source sufficient NKW to pay the claim, they "would have a deal". Reliance was also placed on the following:

i) The assertion in February by Mr. Tylee, the agent engaged by the Defendant to obtain NKW, that an arrangement to settle in NKW had been reached and the failure of the Claimant's representatives to contradict that assertion;

ii) Mr. Clarabut's assertion on 9 March that he knew that the Claimant "had agreed to accept" the claim in NKW.

iii) Mr. Clarabut's "admission" on 10 April that, if reinsurers were able to obtain sufficient NKW to indemnify the Claimant against Air Koryo's claim against the Claimant, "would accept payment of that amount in NKW".

iv) Mr. Clarabut's statement on 6 July that the Claimant had agreed at the meeting on 23 December that payment of an indemnity in NKW would be acceptable.

31. All this material must be accepted as reliably recorded for the purposes of this application: indeed there was no evidence from the Claimant to challenge it.

32. The reinsurers further relied on the pleaded case in so far as it expressed Mr. Payton's understanding of the outcome of the meeting, supported by his statement of truth, namely that there was an agreement to settle the claim on those terms and, once the condition was met and the NKW paid over, the Reinsurance Contract would be discharged.

33. It was further submitted that such was not only the clear understanding of the reinsurers but also the reality by reason of the fact that the reinsurers expended considerable time and ingenuity thereafter in sourcing NKW, activity which was only a worthwhile exercise if it would lead to final settlement.

34. Nonetheless, in my judgment, there is no realistic prospect of establishing the existence of a settlement on any objective analysis of this material:

i) The context is important. Given the size of the claim and the significance of the currency exchange clause, it is wholly improbable if not inconceivable that the Claimant and reinsurers would reach (or be viewed as intending to reach) a settlement without a written record of the agreement, or at least a minute of the meeting in which the compromise was achieved. It is not just that the financial implications of the currency conversion clause were so great. The exchanges referred to in the Defence and Counterclaim were couched in fairly casual language. Yet the parties were highly suspicious of each other: indeed the underlying claim was said by the Defendant to be fraudulent in whole or in part.

ii) It is impossible to reconcile the existence of any agreement on either party's part to be bound by the terms of a settlement with the contemporary correspondence. On this topic it is convenient simply to refer to some striking examples:-

a) Immediately after the meeting on 23 December, Mr. Clarabut sent an internal email to Mr. Ko. It makes no reference to any discussion on the topic, let alone a settlement conditional or otherwise. It merely takes the issue of payment on account on from the earlier discussion.

b) The Claimant's solicitors were first instructed in January 2006 and wrote to the reinsurers' solicitors on 25 January 2006: "Our client is becoming increasingly concerned at reinsurers' delay in accepting their liability to meet this claim." Yet this letter was written only a month after the "settlement". The response of reinsurers' solicitors the very next day is wholly inconsistent with the existence of a settlement. It merely states that reinsurers continue to refute liability. There is no mention of the meeting or its content.

c) There ensued further exchanges relating to steps needed to defend Air Koryo's claim. It culminated in a letter from the reinsurers' solicitors dated 23 February 2006:

> "We have explained why your Clients are not liable to reimburse the original insured. If they should nonetheless choose so to do then that will be at their own risk."

This comment would be incomprehensible if the settlement had been proposed let alone achieved.

d) On 10 March, the Claimant's solicitors specifically ask whether (by reference to a draft settlement agreement) the reinsurers were making an offer of settlement by way of payment of NKW 6billion. The response was to the effect that an intermediary had been appointed by the reinsurers' solicitors to assist "to conclude a settlement". This is inconsistent with such a proposal having even been discussed at the earlier meeting

e) On 13 March 2006, only five days after the date on which the reinsurers say the condition was satisfied, their solicitors merely state:

> "To avoid misunderstanding, Reinsurers' position as against your client is and remains fully reserved and there is no admission of liability."

This is impossible to reconcile with the contract having been discharged by consent.

f) In a letter dated 23 March 2006, the Claimant's' solicitors made it plain that any proposal to settle the claim in NKW would be a serious breach of NK exchange control laws. This stance was repeated in a letter of 3 April expressing concern as to the legality of the "proposed" settlement:

> "In the absence of any satisfactory explanation, I do not believe a settlement is achievable."

The inscrutable response from reinsurers, without any reference to the discussions, let alone the settlement, was:

> "First my personal apologies for not having responded to your earlier letter. How shall I put it - there are unusual aspects of dealing with matters in North Korea which do not lend themselves to the conventional approach."

g) Jumping ahead, the Reinsurers' solicitors wrote on 17 May as follows:

> "Less there should be any doubt, Reinsurers' position remains fully reserved. Indeed in recent months information gathered concerning this claim gives Reinsurers further serious doubts as to its validity.
>
> As you are aware Reinsurers have developed discussions directly with KNIC which it is hoped will resolve matters. If this is not the case then please rest assured no stone will be left unturned in the vigorous resistance of this claim."

This expressly identifies discussions which have yet to resolve anything. Yet on the Reinsurers pleaded case this letter was written 5 months after the settlement agreement and 2 months after the condition was satisfied discharging the contract.

h) It was not until the letter of 28 June 2006 that the Reinsurers' solicitors suggested that some form of understanding had been reached on 23 December 2005. But no suggestion whatsoever is made that the outcome had been a binding agreement of any kind. To the contrary, the letter makes it plain that discussions were continuing and had yet to achieve a result:

> "…if your Clients do not in the very near future confirm the previously acceptable arrangement of payment in North Korean Won, these discussions [concerning the efforts to consummate settlement in this matter] and any efforts to settle the matter will be terminated."

i) The correspondence thereafter confirms the continuation of negotiations.

35. There are further, albeit perhaps, subsidiary difficulties about the contention that a settlement agreement was reached in December 2005:

    i) There was no apparent mechanism for identifying the amount payable save by reference to the policy limits.

    ii) There was no agreement on the exchange rate for the purposes of any payment on account in Euros.

    iii) There was said to be a somewhat implied term to the effect that the Claimant would issue a receipt and release to reinsurers on receipt of payment in NKW.

36. As already noted, the Defendant sought to respond to this analysis by submitting that the application ran counter to the belief of Mr. Payton that such a settlement had been reached as demonstrated by his statement of truth. The short answer is, even assuming that it is believed that the pleaded case is legitimately made, such belief is irrelevant. The assessment as to whether a concluded contract had been entered into is an entirely objective exercise. A finding that, on any view a concluded settlement was not achieved involves no concurrent finding of lack of bona fides.

37. Indeed it is worth adding this. The Defendant recognises the difficulties of reconciling the contemporary correspondence with the submission that a settlement was achieved. The only explanation put forward was that both firms of solicitors were conducting the correspondence on the basis that no settlement had been achieved deliberately in the case of Clyde & Co or for want of instructions in the case of Elborne Mitchell. There is no evidence of this phenomenon and indeed it makes no sense.

38. The Defendant relied heavily on reinsurers' industry in seeking to source NKW as only explicable on the basis that agreement on settlement had been achieved. But this strikes me as neutral. It may well be that the topic of the contractual exchange rate was raised from time to time. It may well be that Reinsurers were pursuing the idea of tendering NKW and were not rebuffed by the Claimant. But it was not a proposal that was going to work unless there was a realistic possibility of obtaining NKW matching the claim as met by the Claimant (and that within a reasonable time). This is all the more so in circumstances when North Korea had stringent exchange control regulations.

39. Viewed overall, it is my judgment that the plea of the settlement as contained in Part IV of the Defence and Counterclaim as originally pleaded has no realistic prospect of success and should be struck out.

40. In their original skeleton argument the Defendants said this:

> "24.In many respects, KNIC's complaint about the adequacy of the pleading and the terms of the agreement are derived from an analysis that the agreement was to constitute a full and final binding settlement between the parties and that, KNIC contends, various further intrinsic and fundamental maters were left unresolved. However, quite apart from the points made above, KNIC's complaints fall away once one analyses the true

> nature of the agreement between the parties, namely as a variation of the Reinsurance Contract for the purposes of performance for the payment of the KNIC Indemnity Amount (i.e. the payment of any indemnity in NKW rather than in Euros). Once this is understood, it is apparent that KNIC's complaints about the implied term and outstanding issues are misdirected."

41. This approach was further pursued in the course of the oral hearing and later led to an application to amend on which topic the parties exchanged further written skeletons. Here the burden is on the Defendant to establish that the proposed plea has a realistic prospect of success.

42. The amendment pleaded, as an alternative to the settlement agreement, is that "another possible legal characterisation" of the outcome of the 23 December meeting is that the parties agreed a variation to the reinsurance contract to the effect that, if the Defendant was able to source NKW, the claimant would no longer be entitled to enforce the obligation to pay in Euros as required by the currency conversion clause. Yet despite this variation, the Claimant fraudulently sought to enforce that very obligation in the Pyongyang proceedings.

43. The threshold point was the contention that there was and is no need to amend since those facts on which the Defendant relied were fully pleaded and the correct legal characterisation (i.e. whether settlement or variation) was unnecessary.

44. I disagree. It may be possible to confine the pleadings to underlying facts which make good the defence of one form or another. But here the Defendant has gone to inordinate lengths to set out both the factual basis of the Defence and the characterisation of its legal nature. It would be inconsistent with the fundamental principles of pleading (to ensure an accurate and concise summary of the Defence) to set out an elaborate exposition of the circumstances leading to a final settlement with no indication whatsoever that those same materials would be relied on to establish a variation. Such would lead to the Claimant being taken by surprise, not least because it would fail to account for the different implications that would arise (e.g. proper law/jurisdiction).

45. In my judgment the alternative case equally falls short of having any realistic prospect of success. To a great extent the points are similar: in particular the implications of the absence of a contemporary record and the inconsistency with the contemporary correspondence. Of considerable note are the letters written in the aftermath of the December meeting which contain no mention of the currency conversion clause let alone an agreement that it should not be enforceable.

46. But various additional points arise:-

    i) Unlike the settlement agreement which would at least arguably be subject to English law, the proper law of any variation would be North Korean law. The evidence before the Court is to the effect that any variation of the policy must be in writing. (Indeed, even as a matter of English law and practice, it is striking that no endorsement was made to record it.)

ii) Unlike the settlement agreement, it is unclear what the limit of cover (expressed in Euros) would become if the currency clause became unenforceable.

iii) Unlike the settlement agreement, it is not arguable that the jurisdiction clause has been terminated. Thus the Defendant must establish a fraud on the Pyongyang Court in failing to draw the court's attention to the variation – a proposition which has only been advanced in the Defendant's skeleton some two years later.

47. Accordingly, for all those reasons, the Defendant has not established that it would be appropriate to give leave to amend.