Case No: 2010 Folio 12

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 May 2010

MR JUSTICE BURTON

IN AN ARBITRATION CLAIM AND
IN THE MATTER OF AN
ARBITRATION

- -

Between :

IRB Brasil Resseguros SA

Claimant

- and -

CX Reinsurance Company Ltd

Respondent

- -
- -

Sara Cockerill (instructed by **Elborne Mitchell**) for the **Claimant**
Harry Matovu QC (instructed by Barlow, Lyde & Gilbert **LLP**) for the **Respondent**

Hearing date: 22 April 2010

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Judgment

Mr Justice Burton :

1. I gave permission to appeal on 3 March in this case with some expressed reluctance on the basis that I was concerned (i) that this is one of those cases where, albeit that the Arbitrators might have expressed themselves erroneously on occasion in the Award (e.g. those passages pointed out and relied upon in the Grounds of Appeal attached to the Claim Form), nevertheless where, as here, they had, at least on the main ground relied upon by the Claimant, referred to, and quoted, the correct authorities, their Award might be unimpeachable: and (ii) that delay would be caused by an appeal, the significance of which was pointed out by the Respondent in its response to the application for permission to appeal.

2. So far as the latter concern is concerned, not of course a reason for refusing permission if it were otherwise appropriate, it has been allayed by the speed with which this appeal has come on for hearing. The former aspect has occupied the bulk of the argument before me, and I shall be addressing it from the outset of my judgment.

3. Miss Sara Cockerill, who appeared before the Arbitrators and has appeared before me, has argued the matter forcefully on behalf of the Appellant: she submits that, on an analysis not only of the general approach adopted by the Arbitrators, but in particular of each of the six different individual cases which they considered, the subject of this Appeal (two others are not appealed), the Arbitrators' erroneous approach in law is exemplified by the conclusions which they reached.

4. Mr Harry Matovu QC, who also appeared below and has argued the matter equally ably on behalf of the Respondent, submits however that, on analysis of the whole of the Award and of each of the six specific cases, there has been no error of approach in law by the Arbitrators. He submits that, in reality, this is an appeal as to fact, by way of challenge of the Arbitrators' conclusions on those facts, which (in the absence of perversity, which Miss Cockerill abjures) cannot constitute a ground of appeal. He refers in this regard to **TAG Wealth Management v West** [2008] 2 Lloyd's Rep 699 at 706 (para 49) per Aikens J, and to the reference by Akenhead J in **Trustees of Edmond Stern Settlement v Levy (No 2)** [2009] 1 Lloyd's Rep 345 at 349 (para 20) to a "*complaint about the Arbitrators' findings of fact masquerading as a point of law*".

5. He points out not only that this panel of Arbitrators contains, within its membership, a very significant amount of experience of the insurance and reinsurance market, but that they are careful to set out in their Award four important findings as to the factual matrix in paragraph 10 of the Award (stating that the Reinsurance Contract cannot properly be interpreted "*without an appreciation of the market in which they were executed and deployed*"), which have not been challenged by the Claimant on this appeal. As to the exercise which, at the instance of the Claimant, the Court has carried out, of analysing the Award to assess whether the Tribunal can be shown, notwithstanding its correct citations, to have erred in law, Mr Matovu reminds me of the caution by Bingham J in **Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd** [1985] 2 EGLR 14 (repeated by Morison J in **Fidelity Management SA v Myriad International Holdings BV** [2005] 2 Lloyd's Rep 508 at 509 (para 2)), namely:

> "*As a matter of general approach the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it.*"

6. The dispute between the Claimant and the Respondent concerns various reinsurance claims arising from the Claimant's participation in an excess of loss reinsurance programme which protected the Respondent's casualty book of business worldwide from 1976 to 1983. 25 reinsurance contracts are in issue, the total amount claimed being some US$ 1.6 million plus interest. As explained in paragraphs 2 and 5 of the Award, this total consists of a large number of small claims, some of which are, by themselves, *de minimis* in value, and in November 2008 it was agreed that the Arbitrators should in the first instance determine claims in relation to eight selected losses, which amounted to a significant proportion of the total sums claimed under the programme. The Arbitrators, Messrs Simon Twigden, William Bower and Richard Outhwaite, found for the Respondent in respect of each of the eight selected losses, and ordered the Claimant to pay a sum of US$ 665,055.51 accordingly: the six out of the eight matters upon which this appeal is based relate to sums totalling US$ 489,958.73.

7. The six cases where there are appeals relate to US liability insurance. Two of these claims are in respect of the liability of manufacturers of silicon breast implants (AHS and 3M), two of liability of producers of products derived from blood contaminated by HIV or Aids (Baxter Travenol ("Baxter") and Revlon), one in respect of the liability of a company engaged in a business involving the use of asbestos (Owens Corning ("Corning") and one in respect of environmental pollution claims against a manufacturer of chemical and agricultural products (Stauffer). All the claims were compromised by the underlying insurers, including the Respondent, by compromise settlements which were in each case "*agreed, presented and almost universally supported/paid by the London market*" (paragraph 19 of the Award) and found by the Arbitrators to be "*reasonable and businesslike*" compromises. The issue before the Arbitrators, and now before this Court on appeal, is and was whether in each of those six cases the sums paid under the compromise agreement and claimed and paid out by the insurers including the Respondent are properly recoverable by the Respondent against the Claimant, as reinsurer. As I have stated there are two cases, and one particular issue in relation to the Baxter and Revlon cases, where there is no appeal, so that only paragraphs 1-57, 61-62 and 74-85 of the Award are material on this appeal.

8. The four grounds for which I gave permission to appeal are as follows: in fact the first and second plainly run together and were argued together before me:

> "*(a) To what standard of proof is it necessary for a reinsured to prove his case under a "double proviso" follow settlements clause of the type described in* ***Hill v Mercantile*** *[1996] 1 AC 1239 and* ***Equitas v R & Q*** *[2009] EWHC 2787: "balance of probability" or "arguability"?*

> *(b) In considering the question of proof of loss under such a follow settlements clause what is the correct approach to the facts as a matter of law: is it appropriate to look to the underlying facts of the original claim, or to the basis of the claim as compromised?*"

These issues arise in respect of AHS, 3M, Baxter and Revlon.

> "*(c) As a matter of law what requires to be proved in relation to a "losses occurring during" clause in a reinsurance contract containing such a follow settlements clause: is evidence that a loss occurred within the period necessary?*"

This arises in respect of AHS, 3M, Corning and Stauffer.

> "*(d) What is the test for whether a loss was a loss "arising out of an event"? Does it suffice that the loss in each year stemmed from a single cause?*"

This arises only in respect of Corning.

9. With regard to the first two grounds of appeal, they revolve around the "*NOTICE OF LOSS CLAUSE*", which is effectively a standard 'double-proviso' 'follow settlements' clause:

> "*All loss settlements made by the Reinsured, including compromise settlements, shall be unconditionally binding upon Reinsurers provided such settlements are within the conditions of the original policies and/or contracts and within the terms of this reinsurance, and amounts falling to the share of the Reinsurers shall be payable by them upon reasonable evidence of the amount paid being given by the Reinsured.*"

10. With regard to the third ground of appeal, a Period clause was included, which of course in each case would be varied according to the precise period of cover. Miss Cockerill complains that this clause is not expressly cited in the Award, but, as can be seen, its wording is hardly distinctive, and it is plain that the '*allocation*' argument, as it was characterised, was very much in the forefront of both argument and decision:

> "*PERIOD*
>
> *This reinsurance covers all losses as herein defined occurring during the period commencing with ... and ending with ..., both days inclusive, local standard time at the place where the loss occurs.*"

11. In the case of the fourth ground of appeal, the relevant clause was the "*EACH AND EVERY LOSS*" clause:

> "*For the purpose of this reinsurance, the term "each and every loss" shall be understood to mean each and every loss and/or occurrence and/or catastrophe and/or disaster and/or calamity*

and/or series of losses and/or occurrences and/or catastrophes and/or disasters and/or calamities arising out of one event."

12. Effectively by way of a Respondent's Notice (because the contention was raised in response to the appeal and I gave leave for it to be argued), the Respondent relied upon an argument by which the Arbitrators were "*not convinced*" (see paragraph 31 of their Award) namely that if there were, contrary to its primary contention, any doubt that the Arbitrators were entitled to find the necessary standard of proof established in relation to each of the six compromises, that it could rely on the approval by the relevant United States court of the settlements of the blood and breast implant class actions.

The Law

13. The noteworthy aspect of the dispute between the parties on this appeal is that there seems to be common ground as between them with regard to the correct legal approach, and also, on the face of it, as between them and the Arbitrators, insofar as there are citations of law at the outset of the Award (paragraphs 13-17). The issue is whether the Arbitrators in the event applied that approach in reaching their decisions. The common ground is as follows:

    i) Lord Mustill, in his seminal decision in **Hill v Mercantile & General Reinsurance Co plc** [1996] 1 AC 1239, addressed the proper analysis of the two provisos in a double proviso follow settlements clause. At 1247C, he breaks up the (almost identical) clause in that case, such that the first proviso is that settlements of losses by the insurer must be within the terms and conditions of the original policies, and the second proviso is that they must be within the terms and conditions of the reinsurance. There is a lengthy citation from Lord Mustill's speech in paragraphs 15 and 16 of the Award. In particular, the Arbitrators set out the passage at 1251F:

> "*There are only two rules, both obvious. First, that the reinsurer cannot be held liable unless the loss falls within the cover of the policy reinsured and within the cover created by the reinsurer. Second, that the parties are free to agree on ways of proving whether these requirements are satisfied.*"

    ii) Guidance in respect of satisfaction of the first proviso can and should be drawn from the 'single proviso' cases, particularly where (as here, but not in **Hill**) the settlements by the insurer were pursuant to a compromise agreement. Both Counsel referred to **Hiscox v Outhwaite (No 3)** [1991] 1 Lloyd's Rep 524 ("**Hiscox**"), which was referred to by the Arbitrators in their Award (paragraphs 27 and 29) and in any event was a decision of which at least one of the arbitrators would have been acutely aware. As will be discussed later, the claim in that case was held to fall outside the terms of the reinsurance, but Evans J concluded that "*the reinsurer may well be bound to follow the insurer's settlement of the claim which arguably, as a matter of law, is within the scope of the original insurance, regardless of whether the court might hold, if the issue were fully argued before it, that as a matter of law the claim would fail.*" The common ground between the parties (and the Arbitrators –

see paragraph 13 of the Award) was that assistance could be drawn in this case (notwithstanding that it is a 'double proviso' case) from the first instance and Court of Appeal decisions in **Assicurazioni Generali SpA v CGU International Insurance plc** ("**Generali**"). At first instance [2003] Lloyds Rep IR 725, Mr Kealey QC examined a single proviso clause:

> "*39. When one is examining the claim recognised by the insurers when they settle it by admission or compromise, one is examining the real basis on which the claim has been settled. That may not equate with what the assured might have claimed to have happened and to fall within the contract of insurance, nor with what the insurers might advertise as the basis of the settlement ...*
>
> *40. In examining the real basis on which a claim has been settled, one is looking to identify the factual and legal ingredients of the claim embodied and thus recognised in the settlement.*"

Tuckey LJ, delivering the only substantive judgment in the Court of Appeal, [2004] Lloyd's Rep IR 457, and upholding Mr Kealey QC's decision, at paragraph 16, agreed with Evans J in **Hiscox** that "*the insurer does not have to prove that if the original claim was fully argued it would in fact have succeeded. No investigation as to whether it was arguably within the terms of the original policy is required.*" In considering how the first proviso works in practice, he concluded, at paragraph 17 of his judgment:

> "*The reinsurer cannot require the insurer to prove that the assured's claim was in fact covered by the original policy, but requires him to show the basis upon which he settled it was one which fell within the terms of the reinsurance as a matter of law or arguably did so.*"

Mr Matovu, addressing the question, to which I will turn, of the use in various paragraphs of the Award by the Arbitrators of the words "*arguable liability*" and "*arguably liable*" states, in paragraph 13 of his skeleton, that this concerned the issue:

> "*(1) whether it was reasonable for the original insureds and London Market insurers or reinsurers (including* [the Respondent]*) to accept the factual basis upon which the claim against them was compromised; and*
>
> *(2) whether, on the basis of the accepted facts underlying such compromise settlements, the compromise settlements fell properly within the provisos.*"

Miss Cockerill anticipated such argument in paragraph 9 of her skeleton: "*it may be suggested by* [the Claimant] *... that the Tribunal did not apply the wrong test, and that the reference to "arguability" merely refers to the question of whether it was reasonable for original insureds and London*

Market insurers or reinsurers to accept the factual basis upon which the claim was compromised": but she submits though this would have (impliedly) been permissible, that it is not in fact what the Arbitrators were doing.

iii) Lord Mustill in **Hill** did not address what the burden of proof was upon the insurer to establish compliance with the first and second provisos, and Gross J in **Equitas Ltd v R & Q Reinsurance Co (UK) Ltd** [2009] EWHC 2787, again in a passage accepted by both Counsel and by the Arbitrators (by citation in paragraph 17 of the Award) as correctly stating the law, concluded that compliance with both provisos had to be proved on the balance of probabilities:

> "*65. ... Hill v Mercantile essentially stands as authority for the proposition that the Settlements Clause requires the insurer/reinsured to satisfy both provisos ... or, in other words, to satisfy Lord Mustill's "first rule". The burden is on the insurer/reinsurer to do so, to a standard of a balance of probabilities. This issue is one of law, so that if the insurer/reinsurer fails to satisfy either or both provisos ... the reinsurer/retrocessionnaire will not be liable.*"

So far as the first proviso is concerned, taking together the **Generali** case and **Hill** and **Equitas**, that must mean that the proof on the balance of probabilities is that the original claim, i.e. the arguable claim as accepted (by compromise), fell within the terms of the insurance, because, of course, as Gross J says in paragraph 69:

> "*It is perhaps not to be forgotten that the Settlements Clause remains ... a follow the settlements clause, designed to avoid the need to investigate the same issues twice, subject of course to the requirements of* [the first and second] *provisos. Both provisos ... and Lord Mustill's first rule, it is to be underlined, deal with the legal extent of the contracts in question, in the context of losses arguably occurring outside the period of cover – not the facts which generate the claims.*"

The converse must also apply i.e. *in the context of losses arguably occurring* within the period of cover.

iv) It is also common ground that (paragraph 68 of **Equitas**) "*there is nothing in **Hill v Mercantile** as to how* [the insurer] *must [prove satisfaction with the proviso]. For my part this is hardly surprising. What are involved here are matters of fact or evidence, matters which are necessarily fact-sensitive*". Indeed, as can be seen from Lord Mustill's 'second rule', cited in (i) above, not only did he not say anything as to how such case should be proved, but that very rule left the method of proof expressly open.

v) As to the issue of *allocation*, referred to in paragraph 10 above, again there was common ground between Counsel that assistance can be derived from the decision in **Municipal Mutual Insurance Ltd v CSEA Insurance Co Ltd**

[1998] Lloyd's Rep IR 421, in the judgment of Hobhouse LJ, and in particular when he states (at 436 Col 2) that "*in order to recover, the plaintiffs must satisfy the court that there has been physical loss or damage which has occurred in the year covered by the relevant contract of reinsurance*", although the issue he was deciding related to the need for such loss to exceed the excess applicable to the relevant contract in that period. Miss Cockerill complains that the Arbitrators made no express reference to **Municipal Mutual**: it will be necessary to consider on analysis of the Arbitrators' decision whether the absence of express reference to such case supports the suggestion of the adoption of an approach inconsistent with it.

vi) Finally, there was no dispute between Counsel as to the law in relation to the fourth ground of appeal, relating to loss "*arising out of an event*". The Arbitrators, at paragraph 80, concluded that they did not derive any assistance in relation to their decision on the Corning case from the cases cited to them. Miss Cockerill had (inter alia) cited to them, as she cited to me, **Axa Reinsurance (UK) plc v Field** [1996] 1 WLR 1026 ("**Axa**") in relation to the distinction between "cause" and "event", but the Arbitrators did refer to another case which was cited to them, **Kuwait Airways Corporation v Kuwait Insurance Co** [1996] 1 Lloyd's Rep 664 ("**Kuwait**"). Miss Cockerill referred to the passage in Rix J's judgment at 686 Col 2, whereby "*the losses' circumstances must be scrutinised to see whether they involve such a degree of unity as to justify their being described as, or arising out of, one occurrence.*" The Arbitrators in paragraph 80 expressly referred to a different passage in Rix J's judgment, namely at 684 Col 2, to the intent that **Caudle v Sharp** [1995] Lloyd's Rep 433 "*suggests ... that what may be a relevant event (or ... occurrence) must take colour from the contractual context, including the perils insured against, and must be causally relevant to the loss or losses in question*".

The Six Individual Cases

14. The issue in those circumstances is therefore whether the Arbitrators correctly applied the law to the six appealed cases. Did they, in relation to AHS, 3M, Baxter and Revlon, apply the correct standard of proof, and to the correct facts, in concluding that the provisos were satisfied (first and second grounds of the appeal)? Did they (in relation to AHS, 3M, Corning and Stauffer) correctly conclude that the losses sought to be recovered under the reinsurance contract fell within the cover for the relevant period (third ground of appeal)? Did they properly decide (in relation to Corning) that the losses for each of the two years of cover arose out of one event for the purpose of the Each and Every Loss Clause (fourth ground of appeal)?

15. I deal first with the issue in relation to the <u>first and second grounds</u>, which relate to the first proviso. As set out above, although the Claimant's case is that the Arbitrators' approach in law was flawed, thus infecting its conclusions (at any rate in relation to all cases which have been appealed), Miss Cockerill submits that such flawed approach is exemplified and demonstrated by reference to their decision in AHS and 3M (the breast implant cases) and Baxter and Revlon (the blood cases). Put another way, the proof of the pudding must be, and is said to be, in the Arbitrators' disposal of these four cases. All four arose as a result of a cross-market settlement of

class actions against the relevant producers. As to the implants, the Arbitrators described this in paragraph 25:

> "*25. As is well known, many women had problems with the implants: some ruptured, some provoked allergic reactions and some caused (or were alleged to cause) various other disorders. Consequently, many claims were filed against Baxter and other implant manufacturers in the US, Canada, and elsewhere: most of the US cases were consolidated in a class action ("Dow Corning v Lindsey") which was settled in September 1994. The settlement terms were revised and approved by the presiding court on the 22 December 1995 (the Revised Settlement Program – "RSP"), The RSP involved the setting up of a fund by the manufacturers, each contributing according to their market share: Baxter's share being some 20%. Individual claimants were paid on an agreed scale of compensation (as approved by the court) from the RSP fund. In addition to the class action, some claimants pursued individual actions against specific manufactures, including Baxter. We understand that most of these "opt-out" claims have been settled.*"

16. As to the blood cases, there is the equivalent description in paragraph 50 of the Award:

> "*50. Most of the US cases were consolidated in a class action, with the four producers as joint defendants. A settlement was agreed and approved on the 8th May 1997 by Judge Grady: the four producers (known as the "Fractionators") would be responsible for payments under the global settlement in proportion to their market share. Claimants would receive compensation according to an agreed schedule.* [Baxter's] *share of the "pool" was 20%. The dispute in this arbitration was in respect of this class action settlement.*"

17. The underwriters were, as the Arbitrators found, well aware of **Hiscox**, which, as the Arbitrators set out in their footnote 1 to paragraph 27 of their Award "*was a case relating to the Wellington Agreement, whereby all asbestos manufacturers agreed (with their insurers) to pay claims on the basis of their market share, even if a manufacturer had not supplied asbestos in an individual instance: it was held that reinsurers were not liable for losses assumed where there was no causal link.*"

18. The Arbitrators explained what steps were taken in the cases before them to ensure that what occurred led to satisfaction only of claims made against the relevant insurer, even though each producer had contributed its market share to the compensation fund from which victims were paid out:

    i) As to implants

> "*27. Mindful of* [**Hiscox**]*, London underwriters did not agree to pay Baxter's 20% contribution to the RSP. For any*

claim to be reimbursed by the London underwriters the original claimant had to demonstrate (to a reasonable degree of proof) that the implant had been supplied by AHS/Heyer Schulte. If it was so demonstrated the claim (in the amount paid to the original claimant) was accepted by the London underwriters. Where more than one insertion of implants had been made and they were from different manufacturers, the sum awarded to the claimant was proportioned between the relevant manufacturers."

ii) As to blood:

"*52. The first problem was dealt with by the four manufacturers in concert (no doubt they were all faced with the same questions from their insurers). Mendes and Mount, in their report to the London underwriters of 4th February 1999, explained:*

> *"As Underwriters and Companies are aware, the four settling manufacturers have retained the services of Keith Rayment and Associates in order to develop a methodology to make certain that the reimbursement requests for the United States class action settlements were only for claimants who named the manufacturer as being potentially liable. Representatives of Baxter conducted an intensive review of each class action participant's claim form and supporting medical documentation to determine the alleged product usage history of each claimant. Baxter has requested reimbursement only for claimants who actually alleged usage of contaminated blood factor concentrate manufactured by Baxter."*

53. Mr Rayment was a well known and respected London market figure (he had been the claims manager for one of the largest Lloyd's syndicates).

54. Mendes and Mount also made it clear that no claims would be presented to underwriters until paid by Baxter."

19. In the following paragraphs the Arbitrators set out the rival contentions:

"*55. IRB argued as follows:*

"*Because of the terms of the CAS, CX Re in settling with Baxter accepted certain elements of claim which were not covered by the insurance. These are those elements consequent upon the Settlement sharing formula:*

...

(b) CX Re's evidence (see the detailed evidence of Miss Comiter ...) is that each fractionator contributed its percentage to each individual claim, and that the sums paid were then "reallocated" (to use a neutral term) to lend verisimilitude to the reinsurance presentation, which would require losses to be in relation to insured risks.

(c) It follows that each fractionator can recover only their insured percentage (20%) of each of the claims in which they were names. As with the breast implant claims, this is equivalent to the position in [**Hiscox].** *The claims of other fractionators are not insured by CX Re and cannot be recovered. The elements of the claims for which BT/Revlon has not paid are not losses for which an indemnity can be claimed.*"

56. CX Re replied:

(1) Payment was made by the fractionators into a settlement fund, from which fixed sums of US$100,000 were paid to each claimant who satisfied the eligibility criteria (proof of use of product, medical records, etc).

(2) Each claim was carefully vetted for eligibility.

(3) For the purpose of presenting claims to reinsurers, the product liability claims were then allocated only to those fractionators who had been confirmed as one of the suppliers of product which the HIV/AIDS-positive haemophiliac had used over the years.

This painstaking procedure was commissioned and put into operation in order to avoid problems of [**Hiscox**] *and thus allow the spread of the burden of claims through reinsurance market for the benefit of all.*"

In relation to the breast implant claims there were similar recitals of the rival contentions in paragraphs 29 and 30 of the Award.

20. As set out in its submissions, recorded in paragraph 55 of the Award as above, the Claimant asserts that the Respondent did not establish, on the balance of probabilities, that the claims it was paying fell within the cover provided by it and that such settlements fell within the terms of the reinsurance, because of the existence of the market share agreement. The Claimant also made some specific points, as follows:

"*34. ... Miss Cockerill in her closing summary pointed out that the Claimants accepted certain elements of claim which were not covered by the original insurance as follows:*

"Claims which would not have arisen but for the broad approach to compensation adopted by the RSP:

(i) The underlying RSP settlement allowed for:

(1) payment which bore no relation to any evidence of any complaint – such as the advance payment – which was not refundable if a claimant did not evidence anything else. These were payments made without any liability;

(2) complaints (eg lupus) which were never causally linked to the produce or in relation to which liability was never established;

(3) the settlement allowed for payment of, and payments were made in relation to, explants where there was no established bodily injury.""

21. The Arbitrators conclusions were as follows:

i) Implants: as to market share:

"*32. With most class actions and indeed with most claims for damages for bodily injury and/or property damage caused to a third party the dispute is resolved by a compromise settlement between the parties. It is then difficult or even impossible for the first party to prove absolutely that he was, in fact, liable for the damages compromised. In the initial action, he is defending the position and denying liability; then he must do a complete volte-face and argue with his insurers that he was liable, whilst they use his own defences to defeat the claim on the policies. There is, in the present case, something of this tendency apparent in IRB's arguments.*

33. The dichotomy pointed out by IRB between the payments made into the RSP by Baxter and the claims paid by the insurers is, in our opinion, more apparent than real. Baxter subscribed to the fund on the basis that, at the end of the day, their share of the liabilities would be roughly equivalent to their market share of implants supplied. The claims under their insurance policies were in respect of specific payments made to those original claimants who had AHS/Heyer-Schulte implants: AHS's liability in those cases was incontrovertible and the insurers recognised their potential liabilities accordingly. According to Ms Comiter, the amount paid out by Baxter into the fund was significantly larger than claimed from their insurers."

ii) Implants: specific points:

> "*35. In a class action with hundreds or thousands of plaintiffs there is likely to be a very wide variation of degree of bodily injury: the object is to include as many people with a complaint, or who might have a complaint, as possible. It may well be that certain individual plaintiffs receive an award which they do not deserve or more than they deserve, but that is the price to be paid for dealing with the problem on this inclusive basis. The commercial advantages for the defendant company and their insurers (and their reinsurers) are (usually) substantial. Ms Cockerill may well be right in that some of these compensation payments, if taken to Court and a legal decision obtained, may not have been paid. That is arguable. It is not right, however, to say:*
>
> > *"Whether or not AHS might have been found liable in a trial (which IRB say is unlikely in itself, for the reasons given in the attorney reports), there is no evidence that CX Re would under the terms of the insurances have been likely to be held liable for these sort of payments."*
>
> *36. Had AHS been found liable in a trial, however unlikely their attorneys thought that result might be, that would have been conclusive evidence of their liability and their insurers would have to indemnity them (subject to any terms or exclusions in the policy). On the basis of the settlement, these were valid claims and we are satisfied that it was arguable that they are within the terms of the insurance and the reinsurance.*"

iii) Implants: general conclusion:

> "*38. Under these circumstances, CX Re would have no reasonable grounds for disagreeing with all the other underwriters in the London market. They had no reason to disagree with Mendes and Mount and the leading underwriters and it would have been uncommercial to do so. We find that the settlement was one that was on its terms in respect of liabilities that were within the terms of the reinsurance and therefore, under the terms of the Notice of Loss Clause "unconditionally binding upon Reinsurers".*"

iv) Blood: general conclusion:

> "*57. In our opinion the correct questions for us are, first, were* [Baxter] *liable for bodily injury to patients who used their products – or rather, had the patients' claims been pursued to a judgment in court and damages awarded would that result (on the balance of probabilities) in a*

> *claim on their insurance policies? We have no hesitation in answering yes. Therefore, we find that* [Baxter's] *liability is established and is within the conditions of their insurance policies and their reinsurance. Second, does the method of funding the class action settlement affect those liabilities? It does not: this was merely a mechanical means of funding the payouts to the individual claimants.* [Baxter's] *liability to claimants who had used their product remains: the fact that, when established, the payment in practice comes from a central "pot" is of no consequence. Third, was the settlement with* [Baxter] *reasonable and businesslike? It was negotiated by the London underwriters' representatives, and the whole London market accepted it. We find it was both reasonable and businesslike.*"

22. The *allocation* issue arises in respect of AHS, 3M, Corning and Stauffer, and it relates to the second proviso. The Claimant's complaint is that the Arbitrators failed to consider the issue (described above, as to whether the losses occurred within the period covered by the reinsurance) – in that, for example, they stated, in paragraph 22 of their Award, that "*most of the disputed material before* [them] *focussed on the first proviso and not the second proviso*" – and/or reversed the burden of proof.

23. AHS. The *allocation* point is identified in paragraph 26 of the Award:

> "*26. London underwriters participated in many of Baxter's (and AHS's) insurance policies covering products liabilities over a period of many years. If Baxter were held liable for bodily injury caused by its products, the question would arise as to which of Baxter's policies would pay the claims, bearing in mind previous decisions of US courts (notably Keene, an asbestos case where it was held that all policies, from the time of first exposure through incubation to manifestation, were liable, known as the "triple trigger" theory). Underwriters were represented and advised in this matter by Mendes and Mount, a well-known firm of New York lawyers. In September 1995 an agreement was reached between London Market underwriters and Baxter on a "coverage in place" ("CIP") basis: this proportioned losses (those which are the subject of this action) over the years 1974 to 1986, being the years when policies had been issued to AHS. We should point out that Baxter used the years 1974 to 1991: on the basis of CIP 1974 to 1986 covered 63.5% of the losses; and 1987 to 1991, 36.5%. However, the 1987 to 1991 policies were on a "claims made" basis and there was some argument as to whether they were liable to pay any of the losses. Suffice it to say the two sets of underwriters agreed to pay 70% and 30% of the losses respectively: this was raised as a separate issue by IRB (the "allocation" point) which we deal with below.*"

24. The Arbitrators resolve it as follows:

> "*39. What was referred to as the "allocation" point was raised by IRB as demonstrating that CX Re was paying claims for which it was not liable and therefore should not be paid by their reinsurers. This argument was misconceived: if it could be shown that, whilst it was reasonable for the insurers to pay 63.5% of the overall loss it was unreasonable for them to pay 70%, there could be some tangential grounds for questioning the settlement. IRB was unable to show any evidence to that end: indeed, such evidence as was available (though largely circumstantial) was that the settlement of 70% of Baxter's proven liabilities was reasonable and businesslike.*"

25. 3M. This allocation point is different. It relates to whether the settlement included claims "*for the future*", which were not shown on a balance of probabilities to have fallen within the period of reinsurance. I must set out the whole relevant passage:

> "*41. 3m acquired McGhan Medical Corporation in 1977. McGhan manufactured breast implants through a wholly owned subsidiary and under 3M this continued until 1984, that business then being sold. Thereby, 3M became liable for bodily injury claims from implants manufactured between 1977 to 1984 and London market underwriters ostensible liable for claims on policies issued during that period. 3M was, like Baxter, a party to the Dow Corning v Lindsey class action, the settlement and the RSP approved by the court in December 1995. In March 1999 Mendes and Mount negotiated a settlement of London underwriters' liabilities on policies issued between 1977 and 1984. This settlement was on a different basis from that agreed on the Baxter policies: the underwriters agreed to "buy back" all liability claims against 3M (except for potential future environmental claims at four specific locations)(the "PBB"), the agreement including the breast implant claims. This meant that the underwriters paid a total sum of $328 million, extinguishing all their liabilities, present and future (except as specifically excluded), the amount being allocated over the relevant policy years.*
>
> *42. To put this in context, 3M had paid over US$1 billion for breast implant claims by August 1999 and in their reported dated 15 March 1999 Mendes and Mount said:*
>
> > *"The (PBB) Agreement incorporates many favourable rulings which Underwriters and Companies have been able to obtain in the ongoing declaratory judgment action in Minnesota. This includes the treatment of all policies on a "costs-inclusive" basis, whereby all settlement amounts, including the associated defence expenses, are within policy limits. The Agreement also incorporates the Court's current pro-rata time on risk methodology which is at this very*

moment under reconsideration by the Court. Any change or modification of the Court's current rulings would have a dramatic effect on the amounts attributable to particular policies and coverage."

43. The "pro-rata time on risk methodology" was further explained by Mendes and Mount in their 25 August 1999 report:

"Judge Shumaker relied on the Minnesota Supreme Court's holding in Northern States Power, an environmental case, to allocate 3M's liability on a pro-rata, time on risk methodology. Applying Minnesota's methodology, he held that 3M's breast implant claims should be allocated from date of first implant to the earlier of the date of each claimant's death (a factual end date) or date of suit (a legal end date)."

44. IRB raised the same issues as in the Baxter claim ... and for the reasons explained above we would find in favour of the Claimants. In addition, IRB raised a further point:

"There is also the issue of the Policy Buy Back (PBB) (a commutation by any other name). As to this:

(a) This is an issue as to whether ... the PBB ... falls within the terms of the reinsurance. The particular issue engaged is the same allocation issue as is referred to above – there must be evidence to establish a loss occurring during the period of the reinsurance.

(b) It is common ground that this was a settlement not only in relation to known claims, but also in relation to future and therefore unknown and unknowable claims.

(c) As to this these liabilities would plainly fall outside the terms of the reinsurance contract.

45. Starting with 3M's liability to the original claimants, had these cases progressed to a judgment in court and 3M been found liable to pay damages, they would have produced valid claims against 3M's products liability insurers. As to which policy or policies would pay this (if it went that far), that would also be an issue to be decided by a US court and the advice to the underwriters was to the effect that – in such circumstances – many years' policies would be vulnerable. The compromise settlement was, in these circumstances, reasonable and businesslike; it settled the insurers' potential liabilities and over periods where, if the claims had gone to court, the insurers would have been held to be liable to indemnify 3M. On

the basis [upon] *which it was settled it was therefore arguable that the loss fell under the insurance and the reinsurance.*

46. As to "future and therefore unknown and unknowable claims" no evidence was produced to show whether any such claims were significant or not. In view of the fact that 3M ceased the manufacture of implants in 1984 and the compromise settlement was agreed in 1999, we think it unlikely. However, we disagree with the proposition that, if some allowance in the settlement had been made for such future claims, reinsurers were not liable for that part of the compromise settlement.

47. Most compromise settlements agreed by insurers (and they would prefer it to be all) involve a final determination of their liabilities, for obvious commercial reasons. Where insurers agree a compromise settlement between an insured and third party claimants, they are settling their potential liability. It is potential rather than actual because although a claim has been made it has not been, nor will it be, determined by a court judgment. There may also be potential claims (particularly where injury or damage becomes apparent over a long period of time) not yet advised, but where there is inevitable future liability. In either case, if the claims proceeded through court to a judgment against the insured the liability of the insurers (and their reinsurers) would be established both in respect of existing claims and declaratory relief in respect of future claims."

26. Corning. Again I must set out most of the relevant passage in the Award, which includes the Arbitrators' conclusion at paragraph 79:

"*74.* [Corning] *manufactured and installed many products containing asbestos, including an insulation material called Kaylo, for many years, back as far as the 1950s. They faced a substantial number of claims as a result of their operations (318,000 by 1998, many unresolved). Two US insurers, … North River and … ISLIC, provided excess liability cover to Owens on policies effective from 1978 to 1983. They in turn were reinsured, partly by London Underwriters, including CX Re.*

75. Up to 1998 these claims against [Corning] *were considered as products liability claims: in that year* [Corning] *began to advise asbestos-related claims as premises or operations liabilities, i.e. not as products liabilities. Accordingly, the claims would not be subject to an aggregate, but an "any one event" limit and* [Corning] *maintained that there was a single event being "the determination of the company to engage in the insulation business and to install Kaylo insulation products over a twenty year period". North River and ISLIC disputed*

their liability: in May 2000 (subsequent to a mediation) the non-products claims were settled for $335 million. Their London reinsurers agreed a compromise settlement of the resultant claims on their reinsurance policies by way of a commutation agreement in 2001, CX Re paying $5.1 million. Claims were presented to their reinsurers, CX Re's total claim against IRB being $56,546 over two policy years, 1978 and 1979.

76. IRB [raises the issue of]*:*

> *(a) Allocation*
>
> > *(i) Was the allocation of the claims to underlying policies (and hence to the reinsurances) arbitrary or supported by evidence?*
> >
> > *(ii) IRB say that (as with the cases above) if there was no evidence to support the allocation across the years, CX Re cannot establish that the losses fell within the terms of the reinsurances.*
>
> ...

77. There was considerable discussion (but not much agreement) about the correct law to be applied. The position as we see it is as follows: the [Corning] *policies written by North River and ISLIC were subject to US law. The insurance claim, which was in respect of many individual original claims over a long period of time, was settled by the payment of $335m. Although we have no direct evidence, we assume (and are entitled to assume in respect of such a huge payment) that this was a reasonable and businesslike compromise with suitable legal advice in settlement of what were (on the balance of probabilities) valid claims under the policies. We certainly have no evidence to the contrary.*

78. The reinsurance contracts written, inter alia, by CX Re were also subject to US law. [They] *were not in evidence, but* [it] *is reasonable to assume that such contracts included a Service of Suit Clause and had a US jurisdiction clause. North River and ISLIC presented claims under these reinsurances: the London underwriters agreed a compromise settlement involving paying claim on several years' policies. Again, we do not have all the details, but we know that CX Re paid a claim on the 1978 and 1979 years' reinsurance policies. We assume, and are entitled to assume, that the settlement was reasonable and businesslike in respect of potential liabilities on the reinsurance contracts. We certainly have no evidence to the contrary.*

79. It follows that we disagree with IRB's view on the allocation issue. If IRB had evidence to show that the allocation of the original loss by North River and ISLIC was wrong or unfair then it could have presented it but no such evidence was forthcoming."

27. The Stauffer point was similar:

"*82. Stauffer was a manufacturer of chemical and agricultural products: they faced environmental pollution claims from about 100 sites which they owned, or had owned in the past. One site in particular, a 400-acre mine at Iron Mountain in Shasta County, California, carried by far the greatest exposure. Stauffer owned this site between 1967 and 1976: Copper, Zinc and Cadmium leachates were contaminating the water system and the surrounding land. Clean-up costs were likely to be huge.*

83. The leading London Underwriters and their US Attorney (Lord Bissell & Brook) negotiated a settlement of all outstanding claims: an agreement was reached in September 2000 in the sum of $46.5 million (this included $1.85m defence costs). This amount was allocated over several years' policies, as explained by Lord Bissell & Brook in their letter dated 26 January 2001:

> *"The $1.85 million for costs was allocated equally to each policy named in the California declaratory judgment actions. The indemnity figure was allocated pro rata to those policies previously allocated a portion of our suggested reserve potentials. The indemnity reserve potentials treated each site as a separate occurrence, and after application of underlying limits, spread the loss from the beginning of Stauffer's operations through the date when Stauffer received a PRP notice or similar correspondence indicating it had an obligation to perform investigation or remedial actions. We assumed that the law of the site would apply to each claim and applied coverage discounts to each claim based on the known facts and that state's particular law on the various coverage issues. The per policy allocation detail previously was provided by LMCS."*

84. Claims were presented to IRB on contracts protecting the 1976 to 1978 policy years. IRB disputes their liability on the grounds that the allocation over the policy years was artificial. As Ms Cockerill put it:

> *"The sole issue on this loss is allocation. It appears that allocation was done by a simple split of the settlement over all policy years referred to in the US litigation, and the*

presentation to IRB consists of CX Re passing this amount on under the 1976 policies. IRB say that what was done does not comprise evidence of any loss occurring during the policy period at all, still less evidence justifying the amount of the claim put forward. As such the claim fails as not being, as a matter of law, a claim on a loss occurring during the policy period and hence being outwith the terms of the reinsurance."

85. There was no dispute that Stauffer were liable to pay clean-up costs or that these were covered under their insurance policies, but simply a question as to which policies should pay. It seems to us that there is little doubt that, if disputed, insurers would be liable for the whole period from start to discovery, as Lord Bissell & Brook assumed, so the problem, in coming to a compromise settle with Stauffer, was how it should be allocated over the policy years. No doubt spreading it equally over all the relevant years is in a sense artificial. It seems to us, however, that it would have been even more artificial to ascribe a larger portion of the loss to one year rather than another. On the terms by which it was settled, the claim fell within the terms of the insurance and the reinsurance. Was the settlement reasonable and businesslike? In our opinion it was, therefore IRB are liable to pay the claims as presented."

28. <u>One or more events</u>? As set out above, this applies only in respect of Corning, and arises out of the facts which I have set out above by citation of the Arbitrators' Award. The issue is summarised and resolved by the Arbitrators as follows:

"*80. On the occurrence issue, several English cases were cited. In all of those cases, the circumstances involved a number of different and distinct losses on different policies, the question being was there sufficient connection between them to establish that they were arising out of one occurrence or one event. In the present case we have insurers making a single payment to their insured (although in respect of a large number of potential claims). The insurers make a series of annual (but single) claims on their reinsurance policies which are settled on that basis. We do not think that the cited cases are helpful, but we bear in mind Rix, J in* [**Kuwait**].

They then cite the passage at 684 Col 2 (set out in paragraph 13(vi) above) as to event or occurrence *taking colour* from the context.

81. We respectfully agree: in the present context, being excess of loss reinsurances, the "perils insured against" are the reinsured suffering a claim (from the portfolio of business protected) in excess of the priority. As to being causally relevant to the loss or losses in question, the loss each year stemmed from a single cause, being [Corning's] *liability arising from their installation activities. In the context of the*

> *excess of loss reinsurance contract written by IRB the claim was settled by CX Re as a single loss: the question of whether it was in fact a series of losses arising out of one event (or not) does not arise.*"

29. With regard to the 'proof on the balance of probabilities' issues, have the Arbitrators erred? At the nub of their decisions on the four cases are conclusions that, as to the AHS implants, "*the claims under their insurance policies were in respect of specific payments made to those original claimants who had AHS/Heyer-Schulte implants*" (paragraph 33), that as to the specific points raised by Miss Cockerill with regard to AHS "*on the basis of the settlement, these were valid claims*" (paragraph 36), and that Baxter's "*liability to claimants who had used their product remains: the fact that, when established, the payment in practice comes from a central "pot" is of no consequence*" (paragraph 57). These are, on the face of them, factual findings by the Arbitrators, after hearing evidence over four days, involving testimony from three witnesses for the Respondent (including a specialist in reinsurance (Ms Comiter) who gave (paragraph 10(3)(b) of the Award) "*impressive testimony*") - none being called by the Claimant; those witnesses gave detailed evidence regarding the nature and history of the losses, the basis on which the original insured settled the claims with the US third party claimants, the basis on which the corresponding liability insurance claims were settled by the London Market, the Respondent's own consideration and settlement of inwards claims, and its presentation of outwards reinsurance claims to the Claimant. As a result the Arbitrators concluded (paragraph 19 of their Award) that they "*saw no basis whatsoever to question the factual basis of the compromise settlements*".

30. In order to see whether such conclusions were flawed, it is necessary to consider the various passages in the Award which are impugned by Miss Cockerill, who accepts that they were preceded by the correct citation of the relevant law (in the Legal Analysis in paragraphs 11 to 17 of the Award); with the proviso that she complains that the part of Gross J's judgment in **Equitas** which is specifically highlighted by the Arbitrator in their citation in paragraph 17 is not the recitation of the standard of balance of probabilities but the passage that follows, relating to the method of proof by "*matters of fact or evidence, matters which are necessarily fact sensitive*". I see nothing strange in that. In the passage which follows on in the Award from such citation the reasons for that highlighting are explained in the context of the Arbitrators' clear recitation of the burden of proof:

> "*In other words, the question as to whether a particular reinsured can discharge the burden on it to prove its claims under a particular Notice of Loss provision is a question of law but the evidence necessary to discharge that burden will depend on the actual facts of the case. Where there has been a settlement, the relevant facts are the facts on which the loss was compromised as opposed to the facts of the loss as it happened (if different).*"

The Impugned Passages

31. "*Arguably*", plainly drawn by the Arbitrators from its use by Tuckey LJ in the passage from his judgment in **Generali** cited in paragraph 13 of the Award (and in paragraph

13(ii) above), makes its first substantive appearance in the following passage in the Award, which follows on after the Arbitrators' consideration of **Equitas:**

> "*17. As Lord Mustill emphasised, we are not required to make any findings in respect of the facts embodied in the settlement but should only appraise the legal implications of those facts and whether the claim or claims (as compromised) fall arguably within the underlying and reinsurance cover granted. It simply cannot have been intended by the parties to a reinsurance contract (containing the double provisos) that the "provided such settlements are within the conditions of the original policies and/or contracts" language meant that the Reinsured had to prove to an absolute standard that the underlying policy would respond to the claim or claims at issue. Such an interpretation would undermine a reasonable interpretation of the follow the settlements clause when read as a whole in the context of the reinsurance agreement per se*."

In addressing this, and indeed other passages, I do so on the basis that the Court will not construe the words of the Arbitrators as if they were a statute, will adopt the approach recommended by Bingham J, set out in paragraph 5 above, and will not 'nitpick'. It seems clear to me on analysis that the Arbitrators are putting in their own words the result of their consideration of **Hill** and **Equitas** in the one hand and **Generali** on the other. The reference to the claims *falling arguably* within the underlying cover and the absence of any requirement to "*prove to an absolute standard*" that the underlying policy would respond is not failing to apply the **Equitas** test. Infelicitously, the Arbitrators use the word *arguably* in relation, not only to the underlying cover, but also to the reinsurance cover. Given what they are addressing, by reference to the recitation of Lord Mustill's *emphasis*, I do not however believe they were seeking to detract from his guidance.

32. But this is to my mind entirely put beyond doubt by what the Arbitrators then proceed to say in paragraph 18 (after reciting the follow settlements clause):

> "*18. The fundamental question for this Tribunal is whether the 8 losses (all involving compromise settlements) claimed by CX Re satisfy the requirements of the follow the settlements language and, as such, are payable by IRB. The Tribunal has no hesitation in determining that all 8 "loss settlements ... including compromise settlements" <u>have been proven on the balance of probabilities</u>* [my underlining] *to fall within the follow the settlements clause including the two provisos. The Tribunal rejects IRB's arguments as speculative, highly technical, and consistent only with a flawed interpretation of the follow the settlements clause that neither party could possible have intended at the time of contracting. IRB's position on the provisos essentially ignores the primary provision in this clause which provides that all loss settlements made by CX Re, including compromise settlements, are to be unconditionally binding on IRB*."

33. Similar considerations apply to paragraphs 19 and 20 of the Award:

> "*19. As to whether the compromises made by CX Re fall within the conditions of the original policies and the conditions of the reinsurance, CX Re is entitled to discharge the legal burden of satisfying the provisos by adducing the best factual evidence available to it. The recent* [**Equitas**] *Judgment made this clear. In order to determine this issue, it is permissible to consider whether CX Re was arguably liable to the insureds/reinsureds on the basis of the loss as compromised. Any further enquiry into the underlying dispute between producers and product liability claimants is not contemplated or required by the terms of the follow the settlements clause or market practice.*"

34. Again it is plain that the use of "*arguably liable*" is not intended to detract from the very requirements of satisfying the proviso which the Arbitrators are themselves addressing, and this is clear by any fair reading of what they go on to say in paragraph 20:

> "*20. ... From the factual evidence presented in this arbitration, the Tribunal saw no reason to doubt that the compromise settlements were predicated on actual or arguable liability in law, based on legal advice, and were settlements that accordingly satisfied the first proviso of the follow settlement clause.*"

35. Once again, to look at the approach of the Arbitrators is enlightening, as revealed in paragraph 21, where they show that they have considered the facts carefully:

> "*21. ... This is not to say that all compromise settlements are automatically payable by a reinsurer, as this would have the effect of neutralising the proviso. However, on the facts of this matter and on the basis of the evidence present, the Tribunal is satisfied that these losses should be paid.*"

36. Further, in paragraph 22, the Arbitrators conclude "*The Tribunal has considered carefully whether the second proviso was satisfied and has no hesitation in concluding that it was, in respect of each of the disputed claims.*"

37. When it comes to the detailed consideration of the breast cases, there is occasional further infelicitous phraseology by the Arbitrators. Paragraph 29 makes it quite clear what it is that the Arbitrators are resolving, when they state: "*IRB disputes that the class action settlement was in respect of liabilities which would on the balance of probabilities result in a valid claim under the original insurance policies*". The second sentence of paragraph 36 however is capable of criticism:

> "*On the basis of the settlement, these were valid claims and we are satisfied that it was arguable that they are within the terms of the insurance and the reinsurance.*"

There is no repetition of the need of proof on the balance of probabilities, and the question of arguability is inapt to the terms of the reinsurance. However, only two paragraphs further on, comes the resounding conclusion:

> "*38. ... We find that the settlement was one that was on its terms in respect of liabilities that were within the terms of the reinsurance and therefore ... "unconditionally binding upon Reinsurers.*"

38. There is a similar problematic wording in what the Arbitrators said in dealing with 3M. In paragraph 45 the conclusion is "*the compromise settlement ... settled the insurers' potential liabilities and over periods where, if the claims had gone to court, the insurers would have been held liable to indemnity 3M. On the basis* [upon] *which it was settled it was therefore arguable that the loss fell under the insurance and the reinsurance.*" The penultimate sentence appears to be clear and to comply with the 'common ground' set out in paragraph 13 above. The last sentence appears to fail to comply with the requirement for proof on the balance of probabilities.

39. There is a very similar position in relation to the express consideration of the *future claims*, to which I will return below in the context of consideration of *allocation.* In paragraph 46 the Arbitrators reject the Claimant's proposition that the reinsurers were not liable, and in paragraph 47 they "*see no reason why*" the claims "*should not form a valid claim on a reinsurance policy*". The conclusion, in paragraph 48, is then however expressed as being that the compromise settlement was unconditionally binding on reinsurers and was *arguably* within the terms of the insurance and reinsurance.

40. In relation to the two blood cases, the Arbitrators do not use the words *arguable* or *arguably*, and address and answer the questions in a way which would seem difficult for the Claimant to criticise. The Arbitrators ask themselves a question in paragraph 57 which is expressly framed by reference to the *balance of probabilities*, to which the Arbitrators respond "*we have no hesitation in answering yes. Therefore, we find that* [Baxter's] *liability is established and is within the conditions of their insurance policies and their reinsurance.*" They then simply adopt those reasons with relation to Revlon, without further elaboration, in paragraph 62 of the Award.

41. Although there is a certain amount of confused terminology, as discussed above, I am entirely satisfied that the Arbitrators were, and were in effect expressing themselves to be, satisfied on the balance of probabilities that the arguable claims which were settled by the compromise agreement fell within the terms of the insurance agreement and that the claims so compromised fell within the terms of the reinsurance agreement. There was no error of law.

Respondent's Notice

42. In the circumstances I do not need to deal with the contention by the Respondent, addressed in paragraph 31 of the Award, that any doubt as to the balance of probabilities could and should be resolved by the existence of the Court approved settlements, said *conclusively to establish* the liability of the manufacturers. Like the Arbitrators, I find it unnecessary to consider the question as to whether they (a)

amount to a conclusion by a court and (b) are resolutive as between insurer and reinsurer.

Allocation

43. I turn to the question of *allocation*. I have set out the relevant passages of the Award in that regard in paragraphs 22 to 27 above. I am unimpressed by three general points which Miss Cockerill makes, which I have already mentioned. I do not consider that it was necessary either for the Arbitrators to spell out the Period clause (see paragraph 10 above) or to make express reference to **Municipal Mutual** (paragraph 13(v)), a case which illustrated a principle which would be well known to such an experienced tribunal, and with which, in any event, it is apparent that they are grappling in their consideration in the course of the passages in their Award, which I have set out above. Equally, it is quite plain that they did indeed consider the issue of *allocation*, and Miss Cockerill's submissions on it, notwithstanding the passage in paragraph 22 of their Award (paragraph 22 above). I am also satisfied, as concluded above, that they applied the relevant standard of proof in their consideration of all aspects of the two provisos. Particularly given Miss Cockerill's abjuration of any reliance on an allegation of perversity (paragraph 4 above), she is left, so far as any point of law is concerned, with her suggestion that the Arbitrators have reversed the standard of proof.

44. I turn to each of the four cases where it is suggested that the Arbitrators made an erroneous conclusion in relation to the *allocation* argument.

    i) AHS. As set out by the Arbitrators in paragraph 26 of their Award (paragraph 23 above) the simple point which Miss Cockerill made was as follows. On the basis of that concept of liability described in New York law as "coverage in place", of the 100% of the losses between 1974 and 1991, 63.5% arose in the years (1974 to 1986) falling within the Claimant's cover, and 36.5% consequently arose in respect of the subsequent period not covered by the Claimant; since the two sets of underwriters responsible for those two periods agreed to pay, not 63.5% and 36.5%, but 70% and 30%, accordingly that additional 6.5% cannot have fallen within the cover for the relevant (earlier) period. It is however quite apparent why the Arbitrators came to the conclusion that the compromise figure of 70% did indeed fall within the cover for that period, and that is explained in paragraph 26 itself. There is, and at all material times had been (as was well known to those, such as Mendes and Mount, advising at the time), a "triple trigger theory" applicable in the United States courts, by which, once the defect (in this case a breast implant) was identified, liability could be found on (at least) three different occasions, and thus within three different periods of cover. Given that there was the real risk (explained in paragraph 26) that the 1987 to 1991 insurers, whose cover was provided on a 'claims made' basis, would not be liable at all, there must have been the corresponding risk that, by virtue of the triple trigger theory, the earlier insurers could be found liable for 100% of the loss. It is clear that it was on that basis that the Arbitrators found as a fact that (bearing in mind **Municipal Mutual**) there was a claim for up to 100%, but certainly arguably 70%, of the losses, which fell within the relevant contract of reinsurance. The discussion in paragraph 39 of the Award as to the reasonableness of the settlement obscures that simple proposition.

ii) 3M. The *allocation* point is addressed in the passages of the Award set out in paragraph 25 above. Although the question as to 'future claims' is on the face of it different from the 70% point, it is clear that the Arbitrators arrived at their decision for very similar reasons. The *de minimis* conclusion at paragraph 46 of their Award is certainly reflected in their decision. But the answer mainly lies, as Mr Matovu submits, in the question of 'long-tail liability'. As is clear from what I have said above, and from paragraphs 43 and 45 of the Award, the Arbitrators had very much in mind that the impact of the approach of the US courts to product liability insurance, in particular by reference to the triple trigger theory, relating to the triggering of cover entitled them to infer and conclude that, insofar as there might be any 'future claims' at all, such losses would be likely to be treated as falling within the cover of the policy the subject of the Policy Buy Back ("PBB").

iii) Corning. As appears in the passages of the Award set out in paragraph 26 above, the *allocation* point here was straightforward. The asbestos claims were in respect of a period of 20 years of operation by Corning. The class actions alleged that it was Corning's operation which was to blame, and that the exposure, and hence the infiltration of the employees, occurred throughout the 20-year period. The Respondent's cover was for two years, 1978 and 1979, thus 10% of that period. The settlement was on the basis was that a fair conclusion was that a similar proportion of the losses over the 20-year period had occurred in that 2-year period: consequently that the $56,546 was properly allocated to the two policy years, 1978 and 1979, and was thus within the cover. This was attacked by Miss Cockerill as summarised at paragraph 76(a)(ii) of the Award (set out in paragraph 26 above):

> "*... if there was no evidence to support the allocation across the years, CX Re cannot establish that the losses fell within the terms of the reinsurances.*"

She submits that such a conclusion does not comply with the requirements of **Municipal Mutual**, set out in paragraph 13(v) above, because it is simply a mathematical calculation or apportionment. It seems to me however that there is nothing to prevent a court or arbitrator relying on such reasoning in order to draw an inference and reach a conclusion. It seems to me that it is in fact just what Hobhouse J was invited to do in **Municipal Mutual**, where there was the added complications that the loss and damage not only had to be shown or inferred to have incurred in a particular period, but to have exceeded the excess during that period, and that he did reach that conclusion on the balance of probabilities by – in that case – assuming (where appropriate) a straight line basis for the pilferage and vandalism which led to the loss (at 436-438). Miss Cockerill also submits that there is a reversal of the burden of proof by the Arbitrators when they say (at paragraph 79) that "*if IRB had evidence to show that the allocation of the original loss by North River and ISLIC was wrong or unfair, then it could have presented it, but no such evidence was forthcoming*". This is not reversing the onus of proof, in my judgment, but stating that there is nothing by way of evidence (it being recalled that, in any event, the Claimant called no evidence) to disturb the inference that the Arbitrators were

otherwise minded to draw. I am satisfied that the same applies to the other similar passages in the Award (paragraphs 46 and 78).

iv) Stauffer. The *allocation* point here is identical, as appears from the passages in the Award set out in paragraph 27 above. The Arbitrators were satisfied that the pollution, and hence the clean-up costs, occurred, as Hobhouse J might have put it, on a straight line basis, and in any event that that was the nature of the settlement by the insurers, so that (paragraph 85 of the Award) "*the claim fell within the terms of the insurance and the reinsurance*".

45. The Arbitrators made no error of law in arriving at their conclusions as to *allocation* of loss to periods of cover.

Event

46. This relates to Corning, and I have set out the relevant passages in the Award in paragraph 28 above. The Arbitrators' reasoning is clear from paragraph 80, based as it upon the facts and matters to which I have referred above in relation to there being (paragraph 75 of the Award) "*a single event being "the determination of the company to engage in the insulation business and to install Kaylo insulation products over a 20-year period.*" It is clear that the Arbitrators were satisfied that that was the basis upon which the insurance claims were settled, that this was a settlement within the terms of the insurance, and that, in those circumstances, they did not need to consider the authorities (referred to in paragraph 13(vi) above), save for that passage in Rix J's judgment in **Kuwait** which entitled them to "*take colour from the contractual context*". It is quite clear that the Arbitrators then proceed to commit what might be termed a 'howler' in referring, in paragraph 81, to whether "*the loss each year stemmed from a single cause*". It is not surprising that Miss Cockerill in that regard was astute to draw attention to the words of Lord Mustill in **Axa**, in which he points out that "*cause*" and "*event*" are "*not at all the same*". I am however clear that what the Arbitrators intended to say in paragraph 81 is that which was derived from their reasoning in paragraphs 75 and 80, namely that "*the loss each year stemmed from a single* [event]*, being* [Corning's] *liability arising from their installation activities*". I agree with Mr Matovu that the Arbitrators were entitled to conclude that the determination of Corning each year to carry out its installation activities was an annual "aggregating" event in accordance with the decision in **Axa**, and met the test of unity in the citation from **Kuwait** (at 686) referred to by Miss Cockerill (see paragraph 13(vi) above), and that, in any event (paragraph 81 of the Award), there was a finding of fact that "*in the context of the excess of loss of reinsurance written by IRB the claim was settled by CX Re as a single loss*". There is no basis for challenge in law on the Claimant's fourth ground.

Conclusion

47. Notwithstanding therefore what I have described from time to time as occasional infelicities in the wording of the Award, the Arbitrators' reasoning is clear and in my judgment unchallengeable in law, as are their decisions in respect of each of the six appealed cases. I therefore dismiss this appeal.