THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE H.E. CHIEF JUSTICE WAYNE MARTIN, H.E. JUSTICE SIR PETER GROSS, AND H.E. JUSTICE PATRICK ANTHONY KEANE

BETWEEN

AL BUHAIRA NATIONAL INSURANCE COMPANY

Claimant/Appellant/Cross-Respondent

and

ARAB WAR RISKS INSURANCE SYNDICATE

Defendant/Respondent/Cross-Appellant

Hearing : **29 to 30 June 2026**

Counsel : Mr Nicholas Craig KC instructed by Clyde & Co LLP for the Claimant
Mr Alex Potts KC instructed by Pinsent Masons for the Defendant

Judgment : **10 August 2026**

JUDGMENT OF THE COURT OF APPEAL

UPON the Judgment of H.E. Justice Michael Black dated 9 September 2025 (the "Judgment)

AND UPON the Claimant's Appeal Notice dated 26 September 2025 seeking permission to appeal the Judgment (the "Claimant's PTA Application")

AND UPON the Defendant's Appeal Notice dated 30 September 2025 seeking permission to appeal the Judgment (the "Defendant's PTA Application")

AND UPON the Claimant's Appeal Notice dated 21 October 2025 seeking permission to appeal on an additional ground should the Defendant be granted permission to appeal (the "Claimant's Cross-Appeal PTA Application")

AND UPON the Order with Reasons of H.E. Justice Michael Black dated 27 November 2025 dismissing the Claimant's PTA Application, the Defendant's PTA Application, and making no order on the Claimant's Cross-Appeal PTA Application (the "Order")

AND UPON the Claimant's renewed Appeal Notice dated 18 December 2025 seeking permission to appeal the Judgment (the "Claimant's Renewed PTA Application")

AND UPON the Defendant's renewed Appeal Notice dated 18 December 2025 seeking to appeal the Judgment (the "Defendant's Renewed PTA Application")

AND UPON the Claimant's Cross Appeal dated 8 January 2026 seeking permission to appeal on an additional ground should the Defendant be granted renewed permission to appeal (the "Claimant's Supplementary Appeal Application")

AND UPON the Defendant's submissions in opposition to the Claimant's Supplementary Appeal Application

AND UPON the Order with Reasons of H.E. Chief Justice Wayne Martin dated 4 March 2026 granting the Claimant's Renewed PTA Application in respect of all grounds, granting the Claimant's Supplementary Appeal Application, and granting the Defendant's Renewed PTA Application on specific grounds

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant at the Appeal Hearing held before H.E. Chief Justice Wayne Martin, H.E. Justice Sir Peter Gross, and H.E. Justice Patrick Anthony Keane from 29 to 30 June 2026 (the "Hearing")

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Grounds 1, 2 and 4 in the Appellant's appeal are dismissed.

2. Ground 3 of Appellant's appeal is upheld and it is declared that:

The Reinsurance Contract contains the following term:

"Warranted all terms and conditions as per original Policy and facultative reinsurers to follow all decisions agreed between the insuring company and the insured in regard to all terms, conditions, exceptions, limitations, warranties, return and additional premium. The facultative reinsurers shall also follow in every respect all settlements agreed between the ceding company and the insured."

3. Ground 1 of the Respondent's appeal is dismissed.

4. Ground 2 of the Respondent's appeal is upheld and Order 1 made on 9 September 2025 is set aside.

5. It is unnecessary to determine ground 3 of the Respondent's appeal.

6. It is further declared that:

(a) The Appellant was not in breach of any duty of good faith or fair presentation at the time of placing the Reinsurance Contract and the Respondent is not entitled to avoid the Reinsurance Contract for misrepresentation or non-disclosure by the Appellant.

(b) The Appellant's claim under the Reinsurance Contract was notified and brought within time, and is not barred by reason of any late notification, time-bar or limitation period.

7. Each party is to file and serve submissions with respect to the orders which should be made by the Court with respect to:

(a) The costs of the proceedings at first instance;

(b) The costs of the Initial Application for Permission to Appeal;

(c) The costs of the Renewed Application for Permission to Appeal; and

(d) The costs of the appeal,

having regard to the outcome of the appeals within **twenty-one (21) days** of the date of these orders. The submissions shall be limited to the question of liability for such costs, and shall not extend to the quantum of the costs.

8. Each party shall file and serve submissions in reply to the submissions of the other within **fourteen (14) days** of service of those submissions.

9. Orders for costs will thereafter be made by the Court on the papers and will include directions with respect to the assessment of the quantum of those costs.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 10 August 2026
At: 10am

SCHEDULE OF REASONS

Summary

1. The Appellant, Al Buhaira National Insurance Company (**"ABNIC"**) is an insurance company incorporated in Sharjah in the UAE. It has been in business for over 45 years. It has branches throughout the UAE. ABNIC writes various lines of business, including Marine Hull Insurance.

2. The Respondent, Arab War Risks Insurance Syndicate (**"AWRIS"**) is a syndicate of over 194 insurers from the MENA Region incorporated in the Kingdom of Bahrain. ABNIC is a member of the Syndicate. AWRIS' objective is to protect the interests of Arab insurers in relation to Marine War Risks (amongst others). It offers reinsurance cover on both a treaty and facultative basis for marine war and related perils, including terrorism and piracy, which are normally excluded from a standard Marine Hull and Machinery Policy.

3. ABNIC entered into a reinsurance policy with AWRIS in relation to risks ABNIC had insured under a Marine Hull War Risks Policy taken out by Horizon Energy LLC ("Horizon"), a company incorporated in Dubai, together with its subsidiaries and affiliated companies which included Al Buhaira International Shipping Inc (**"ABIS"**), a Liberian company. ABIS was the owner of a tanker, the M/T BETA. The sum insured by the underlying policy was USD 70m. ABNIC also entered into a Marine Hull and Machinery Policy with Horizon covering the BETA.

4. Horizon asserts that the BETA disappeared during the period covered by the Hull and War Policies and gave notice of a claim to ABNIC.

5. ABNIC commenced proceedings in this Court seeking a declaration that it was entitled to avoid both the Hull and War Policies. Horizon and ABIS commenced proceedings against ABNIC in the Sharjah Court of First Instance although those proceedings were later stayed in favour of the proceedings in this Court.

6. ABNIC then commenced these proceedings against AWRIS seeking various declarations. AWRIS defended those proceedings and asserted that it had no liability to ABNIC under the Reinsurance Policy.

7. Each party had a measure of success before the Judge. Each party has been granted permission to appeal from aspects of the Judge's decision, and AWRIS has served a Notice of Contention. For the reasons which follow, each party has also had a measure of success in this appeal.

8. The contentious issues between the parties on appeal, and the grounds of appeal are best developed through the analysis of the reasons given by the Judge which follows.

The reasons of the Judge

9. The Judge commenced his reasons with a description of the parties, the relevant insurance policies, the claims, and the history of the legal proceedings in rather more detail than is set out above. He noted that on 26 September 2024, H.E. Justice Robert French gave judgment in the proceedings commenced by ABNIC in this Court against Horizon and ABIS. His Excellency held that ABNIC had established that it was entitled to avoid both the Hull and War Policies for a deliberate or reckless breach by Horizon/ABIS of their duty of fair presentation. His Excellency found that Horizon represented to ABNIC, by a responsible officer, that the BETA was in class, when in fact it was not. His Excellency found that ABNIC would not have issued the relevant policies had it known the true position.

10. H.E. Justice French found that ABNIC was entitled to avoid each policy with effect ab initio. Horizon/ABIS did not appear at the trial of the DIFC proceedings, and no appeal was brought from the judgment in those proceedings.

11. At the time of the trial of these proceedings, Horizon had applied to the Sharjah Courts to lift the stay of its claim against ABNIC, and ABNIC had requested the Sharjah Court to dismiss Horizon's claim because of the judgment which had been entered against it in this Court.

12. The Judge noted that ABNIC claimed declarations that it was entitled to be indemnified by AWRIS under the Reinsurance Contract in respect of:

(a) Any liability that it may have under the War Policy following the loss of the BETA; and

(b) All reasonable costs and expenses incurred in proceedings brought by or against Horizon under the War Policy (the **"Defence costs"**).

13. The Judge recounted the history of the proceedings and the course of the trial. He was critical of the written evidence of all of the factual witnesses. However, as none of the issues in the appeal turn on any contentious issues of fact, it is unnecessary to refer to the Judge's criticisms of the statements.

14. The Judge then referred to the evidence relating to ABNIC's normal procedures with respect to the placement of War Risk reinsurance. He then addressed the particular circumstances in which ABNIC took out facultative reinsurance with AWRIS in relation to the War Risk insurance it had provided to Horizon in respect of various vessels, including the BETA, when the insurance was originally taken out in 2015, and when it was renewed in 2018, the latter being the policy under which Horizon/ABIS claimed. It will be necessary to consider the documentary evidence relating to the placement of the reinsurance in due course, in the context of one of the grounds of appeal.

15. The Judge then referred to various clauses incorporated into the Reinsurance Policy including various standard Institute clauses. It will be necessary to refer to some of those clauses in the context of a ground of appeal relating to the governing law of the Reinsurance Policy.

16. The Judge noted that the factual witnesses called by ABNIC and AWRIS disagreed on the question of whether there was a practice under which AWRIS would follow ABNIC's decisions in respect of a claim and reimburse ABNIC for its costs of dealing with such claim. He noted that Mr Hamama, on behalf of AWRIS, asserted that decisions with respect to reimbursement of costs incurred by the primary level insurer were taken on a case by case basis and depended upon the particular circumstances of the case.[1]

17. The Judge recorded that on 18 November 2020 Horizon emailed ABNIC giving notice of a claim under the Hull Policy on the basis that the BETA had disappeared during the period of cover. The Judge further recorded that ABNIC forwarded the email making the claim to AWRIS on 6 January 2021.

18. The Judge further recorded that by letter dated 25 October 2021 Horizon gave notice to ABNIC of a claim under the War Policy in which Horizon alleged that toward the end of November 2018 Horizon had arranged for the BETA to be anchored at the borders of the outer port of Fujairah, UAE. Horizon further asserted that to the best of its knowledge, in May 2019 the BETA was last anchored at a particular location. Horizon asserted that on 12 May 2019, the UAE Coastguard had requested assistance from the Federal Transport Authority Land and Maritime in towing the BETA, together with two other vessels, to the nearest port "due to risks posed to vessels in that area".

19. In its claim Horizon asserted that in mid-November 2019 it had become aware that the security company it utilised was unable to access the BETA, which appeared to have been located in Iran, under the name MV Makran since mid-May 2019 and to have been converted into a naval auxiliary vessel in the service of the Iranian Navy. Horizon asserted that the loss of the vessel fell within a risk covered by the War Policy.

20. The Judge recorded that ABNIC sent the letter from Horizon of 25 October 2021 to AWRIS on 3 November 2021.

21. The Judge found that on 10 November 2021 lawyers representing ABNIC wrote to Horizon purporting to avoid the Hull and War Policies on the grounds of misrepresentation, denying that it had been established that the loss occurred during the period of cover, and further denying that ABNIC was obliged to indemnify Horizon because Horizon had failed to give timely notice of the loss. The Judge noted that AWRIS contended that it was entitled to avoid the Reinsurance Policy on similar grounds.

22. The Judge noted that during a challenge to the jurisdiction of the DIFC Courts, ABNIC submitted that the Reinsurance Policy was governed by English law although it now asserted that this submission was an error.[2]

23. The Judge dealt with the issues presented for determination in the following order.

The governing law of the Reinsurance Contract

24. The Judge noted that the choice of the law governing the Reinsurance Contract was governed by Article 8 of the Law on the Application of Civil and Commercial Laws in the DIFC.[3] He rejected AWRIS' submission that the parties had agreed that the Reinsurance Policy would be governed by English Law and in particular rejected the contention that because the underlying War Risks Policy was expressly governed by English law, it followed that the same law would govern the Reinsurance Policy.

25. It followed that under Article 8 the relevant law was the law of "any jurisdiction which appears to the DIFC Court . to be the one most closely related to the facts of and the persons concerned in the matter".[4]

26. The Judge summarised the competing contentions of the parties on this subject. He then observed:

> *"There are good practical and commercial reasons why these insurance and Reinsurance Contracts should be interpreted in accordance with English law, as Mr Williams put it "ultimately, the risks end up in the London market -- or the War Risks" (Day 3, 99:14-15). He noted that London is probably the leading market in the world for War Risks (ibid., 101:8). Mr Hamama stated that AWRIS had little choice but to follow the Institute Clauses and the other London Market Clauses:*
>
> *Q. Okay. On the facultative side, back in 2015 and 2018, did I understand that the underwriting guidelines required you to impose the Institute Clauses and the other London Market Clauses?*
>
> *A. Yes, yes.*
>
> *Q. Was it your understanding that the Institute Clauses specifically included English law and practice?*
>
> *A. Since inception of AWRIS, we followed Institute Clauses. And we continue. Why? Because the support from retrocessionaires, they give it on certain basis. We have to follow. It is not a matter of choice, no, always. Since inception, I told you, which I joined, until now. I left the underwriting side, but if we have to follow." (Day 3, page 80)*
>
> *This was consistent with Mr Abdeen's experience when he was at AIG:*
>
> *A. That question, thank you for raising it. We raised it at AIG. When we started the operation, we brought underwriters and everything. So what was the best approach was to introduce internationally recognised clauses for claims cooperation and claims control. As a reinsurer then, they need your prior consent, which lawyer to hire, what are the fees. So you control this process without destroying it. So the introduction of such clauses, we found it to be the best mechanism to control the concern you raised that the cedant might abuse, the cedant might go away for nothing, so those internationally recognised clauses will put some control in this process. That's how an underwriter, reinsurance underwriter, will react to such concern, valid concern you have." (Day 2, pages 213-214)".*[5]

27. It will be necessary to refer to the Judge's findings on this subject in the context of the issue relating to the alleged implied indemnity relating to Defence Costs.

28. The Judge concluded that the Reinsurance Contract had its closest connection to English law, and that it was governed by English law.

Insurable interest

29. The Judge noted that AWRIS submitted that because the Court had found that the War Policy had been validly avoided, ABNIC had no insurable interest in any of the relevant vessels, including the BETA. He further noted ABNIC's response to the effect that:

(a) ABNIC's insurable interest was its exposure under the original insurance, which remained a risk given the proceedings in Sharjah; and

(b) In any event, the Defence Costs incurred by ABNIC resisting Horizon's claim gave rise to an insurable interest.

30. Later in his reasons, after finding in favour of ABNIC in relation to the asserted implied term for the reimbursement of Defence Costs, the Judge found that the risk of incurring such costs created an insurable interest.[6]

Contingent liability

31. The issue which the Judge addressed under this heading was the question of whether ABNIC was entitled to a declaration that AWRIS was obliged to indemnify it against any liability which it might be found to have to Horizon/ABIS. The Judge noted that the declaration was sought on the basis of the pending proceedings in Sharjah. He considered that the relief sought required him to speculate with respect to the outcome of those proceedings. He concluded that there was no real or present dispute between the parties before the Court with respect to this issue, given that both parties accepted that the judgment of H.E. Justice French was correct and bound Horizon/ABIS.

32. As ABNIC's grounds of appeal relating to this issue were abandoned on the second day of the hearing of the appeal, it is unnecessary to consider the Judge's reasons on this topic in any detail.

Defence Costs

33. The Judge noted that ABNIC contended that it was uniformly accepted market custom and practice in the reinsurance market in the UAE and Middle East to the effect that any litigation fees incurred by a re-insured (together with any other associated costs incurred in dealing with the claim) would be reimbursed by re-insurers in accordance with their respective shares of the risk, unless such costs and associated expenses are expressly excluded or limited by a re-insurer.

34. The Judge summarised the evidence given on this topic, and in particular, the evidence of the experts called by the parties - Mr Abdeen on behalf of ABNIC, and Mr Williams, on behalf of AWRIS. The Judge accepted the evidence of Mr Abdeen and considered that Mr Williams was unable to give any evidence relating to the reinsurance market in the Middle East and UAE, because of his lack of experience in those markets. He concluded that ABNIC had succeeded in establishing the implied term relating to Defence Costs.

35. It will be necessary to consider the expert evidence and the Judge's reasoning in more detail in the context of AWRIS' challenge to the Judge's conclusion.

Misrepresentation/non-disclosure

36. After reviewing the evidence the Judge concluded that AWRIS was not entitled to avoid the Reinsurance Contract for misrepresentation or non-disclosure. As permission to appeal from that conclusion was refused, it is unnecessary to consider the Judge's reasons for his conclusion in any detail.

Time bar/late notification

37. After reviewing the evidence the Judge concluded that AWRIS had failed to establish that it was entitled to deny ABNIC's claim under the Reinsurance Policy because of a time bar or late notification of the claim. As permission to appeal from that conclusion has been denied, it is unnecessary to consider the Judge's reasons for his conclusion in any detail.

Proof of loss

38. Under this heading the Judge referred to AWRIS' submission that ABNIC was required to prove that the loss of the BETA was a risk insured by both the underlying policy and the Reinsurance Policy and had made no attempt to prove either. The Judge noted that this issue went only to ABNIC's claim for a declaration that it was entitled to indemnity in respect of Horizon's claim for the loss of the vessel. As he had decided that he would not grant the declaratory relief sought by ABNIC in this regard, he considered that it was unnecessary for him to determine the issue raised by AWRIS.

39. As ABNIC abandoned its grounds of appeal relating to the claim for declaratory relief in respect of any liability ABNIC might be found to have in relation to the loss of the vessel, similar considerations apply and it is unnecessary for this Court to determine the issue relating to proof of loss.

Relief

40. The Judge declined to grant any of the relief sought by ABNIC other than a declaration to the effect that:

> "It is an implied term of the Reinsurance Contract that AWRIS is liable to indemnify ABNIC against costs and expenses properly incurred in claims brought by or against the insured arising out of or in connection with the underlying policy."

41. The relief granted was limited to the declaration above. No attempt was made to assess the amount which AWRIS was required to pay pursuant to the indemnity found.

42. On the subject of costs, the Judge considered that although ABNIC had not succeeded on every issue, it had been substantially successful, and should be awarded its costs without reduction by reference to the issues on which it had failed. The Judge assessed the quantum of those costs in the amount of AED 4,563,051.74 on the basis of submissions that had been made to him.

The grounds of appeal

ABNIC's appeal

43. ABNIC was granted permission to appeal on four grounds:

> (a) The Judge erred in determining that there was no real or present dispute between the parties in relation to the grant of declaratory relief in relation to AWRIS' obligation to indemnify ABNIC in the event ABNIC is found liable to Horizon/ABIS under the underlying policy.
>
> (b) The Judge erred by failing to carry out the necessary analysis pertaining to the utility of the declaratory relief sought in relation to indemnity for loss of the vessel.
>
> (c) The Judge erred in finding that the Placement Document did not form part of the Re- insurance Contract.
>
> (d) The Judge erred by deciding that the Re-insurance Contract was governed by English law, when he should have found that it was governed by UAE Law.

44. Permission to appeal in respect of the fourth ground was only sought contingently upon the grant of permission to appeal to AWRIS. As that permission was granted, ABNIC was granted permission to appeal in respect of the issue concerning the governing law of the Re- insurance Contract.

45. As already noted, grounds 1 and 2 were abandoned on the second day of the hearing of the appeal. It follows that the only continuing relevance of those grounds is in relation to the costs of the appeal.

AWRIS' grounds of appeal

46. AWRIS was granted permission to appeal on three grounds, although in refusing AWRIS permission to appeal in respect of the Judge's order as to costs, it was noted that if there was a material change in the disposition of the case following the appeal, the Judge's order with respect to costs could be revisited.

47. AWRIS' grounds of appeal are:

> (a) The Judge erred by failing to find that ABNIC had no insurable interest for the purposes of the Reinsurance Policy.
>
> (b) The Judge erred by finding an implied term to the effect that AWRIS was obliged to indemnify ABNIC in respect of Defence Costs.

(c) The Judge erred by failing to find that ABNIC had failed to establish that the loss of the BETA was caused by a risk covered by both the underlying policy and the Reinsurance Policy.

48. As already noted, the Judge considered that he need not determine the issue raised by AWRIS' third ground of appeal because he had decided not to grant ABNIC declaratory relief in respect of its claim for indemnity relating to the loss of the vessel. The Judge was correct to conclude that the issue raised by AWRIS' ground 3 is only relevant to ABNIC's claim for declaratory relief in relation to indemnity for loss of the vessel. As the grounds of appeal relating to that issue have been abandoned, it follows that AWRIS' ground 3 need not be determined for the purposes of the appeal.

AWRIS' Notice of Contentions

49. AWRIS has served Notice of Contentions to the effect that the decision of the Judge should be upheld for reasons other than those which he gave. Many of the contentions which are contained in the Notice pertain to issues raised in connection with grounds of appeal which it is unnecessary to determine, being grounds 1 and 2 of ABNIC's appeal and ground 3 of AWRIS' appeal. To the extent that contentions within the Notice are relevant to grounds of appeal which remain to be determined, they will be considered in that context.

50. It is convenient to deal first with ABNIC's ground of appeal relating to the governing law of the Re-insurance Contract, as the outcome of that issue will determine the law to be applied in the determination of the other grounds of appeal.

The governing law of the Re-insurance Contract

51. ABNIC submits that the Judge erred by not concluding that there was an implied agreement between the parties to the effect that the governing law of the Re-insurance Contract was UAE Law. Obviously if there was such an agreement, under Article 8(2) of the Law on the Application of Civil and Commercial Laws in the DIFC, the agreement would take precedence over, and exclude any determination by the Court with respect to the laws of a jurisdiction which appeared to be most closely related to the facts of and the persons concerned in the matter.

52. ABNIC submits that the Re-insurance Contract contained an exclusive jurisdiction clause in favour of the UAE and that this choice of jurisdiction should be taken to embody an implied choice of law, as a matter of contractual interpretation relying, somewhat contradictorily, upon an English decision and text.[7]

53. ABNIC further relies upon evidence given by Mr Saleh to the effect that he understood a choice of jurisdiction as being equivalent to a choice of law, although noting that the Judge did not consider that evidence to carry any weight.

54. In the alternative ABNIC submits that if the "closest connection" provision of Article 2 is applicable, the Judge should have found that the jurisdiction with the closest connection to "the facts of and the persons concerned in the matter" is the UAE. ABNIC submits that:

(a) The exclusive jurisdiction clause creates a direct connection with UAE Law;

(b) The majority of the risk covered by the Reinsurance Policy is located in the UAE, as 11 of the 17 vessels insured by the underlying policy were flagged in the UAE;

(c) ABNIC is located in Sharjah and more generally in the UAE, and Horizon is a UAE company;

(d) The UAE is the place in which the Re-insurance Contract was partly performed, by the payment of premium;

(e) The Re-insurance Contract was formed or concluded in the UAE;

(f) Disputes relating to the underlying policy were to be resolved in the Courts of the UAE; and

(g) The relevant documents are in the UAE.

55. ABNIC further submits that the incorporation of Institute Clauses does not evince an intention by the parties to choose English law to govern their agreement. ABNIC further asserts that the Judge erred by taking into account the developed English jurisprudence relating to insurance law in general, and the Institute Clauses in particular, as the content of the law in the jurisdictions potentially chosen is irrelevant - under Article 8 it is the connection to the facts and the parties that is relevant - relying on *The Industrial Group Limited v Abdelazim El Shikh El Fadil Hamid*.[8]

56. AWRIS submits that the Judge was wrong to conclude that the parties did not agree that the Reinsurance Policy would be governed by English Law. It submits that the incorporation of the Institute Clauses, which contemplate by their terms the application of English Law and the fact that the underlying policy is expressly governed by English Law sustains the conclusion that the parties impliedly agreed that the Re-insurance Contract should be similarly governed.

57. AWRIS further submits that ABNIC is bound by its submission which it made in the course of the argument with respect to jurisdiction to the effect that the Reinsurance Policy was governed by English Law, and should not now be permitted to resile from that position.

58. AWRIS contends that the Judge was correct to conclude that the expression of the Reinsurance Policy in English, incorporating standard London marine market clauses and Institute Clauses which have been the subject of a long line of judicial analysis in England supports the Judge's conclusion that the jurisdiction with the closest connection to the Reinsurance Policy is England.

59. In support of the proposition that the parties impliedly agreed to adopt English Law as the governing law of the Re-insurance Contract, AWRIS relies upon *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*.[9] In that case the relevant policy was written between a Kuwaiti insurance company and a Liberian vessel owner. The form of the policy was based upon the Lloyds standard form of marine policy with modifications. The House of Lords held that the provisions of the policy taken as a whole, by necessary implication led to the inevitable conclusion

that it was the parties' intention that their rights under its terms should be determined in accordance with the English Law of marine insurance. Contrary to ABNIC's submission with respect to the irrelevance of the content of the law of any particular jurisdiction, in Amin the lack of a developed Kuwaiti Law of marine insurance was considered "crucial" to the conclusion that the parties had implicitly adopted English Law.[10] Further, in that case, the adoption of clauses utilising language developed and construed in accordance with English Law was considered to be an important indicator of the parties' intention to choose English Law to govern their contract.

60. In relation to the "closest connection" issue, AWRIS points to:

(a) The fact that all relevant documents relating to the Re-insurance Contract were written in the English language;

(b) The Re-insurance Contract expressly incorporates various Institute Clauses and London Market wordings;

(c) The underlying insurance policy issued by ABNIC was expressly governed by English Law and expressly incorporated the same Institute Clauses and London Market wordings;

(d) ABNIC has made submissions to the Court to the effect that the Reinsurance Policy was governed by English Law, including submissions based upon the incorporation of standard London Marine Market clauses and Institute Clauses that were developed over a long period of time and which are the product of, among other things, decisions of the English Courts; and

(e) Contrary to ABNIC's submission, the parties did not agree to confer exclusive jurisdiction on the UAE Courts, but rather conferred non-exclusive jurisdiction on those Courts, and that sheds no light upon the parties' intentions with respect to choice of law, given that the DIFC Courts and DIFC Law are part of the legal system of the UAE.

61. AWRIS also relies upon *Faraday Re-insurance Co Ltd v Howden North America Inc*[11] in which it was held that the use of London Market forms and reference to London Market institutions and features and the use of London Market abbreviations indicated an intention that the relationship was to be governed by English Law.

62. To the same effect, reliance is placed upon *FR Lurssen Werft GMbH & Co v Halle*[12] in which it was held that the use of a standard form known to be governed by a particular system of law, such as a Lloyds policy of marine insurance, indicates the parties' intention that the contract by governed by that system of law.

63. The Judge rejected AWRIS' submission that there was an express choice of English Law in the Reinsurance Policy. However, he relied upon many of the matters which AWRIS submits compel the conclusion that there was an implied choice of English Law to sustain his conclusion that the transaction between the parties had its closest connection to English Law.[13]

64. The Judge also noted AWRIS' submission to the effect that the Reinsurance Policy re- insured an internationally mobile fleet of vessels registered all over the World, including in Liberia, Panama and Pilau. The BETA was flagged in Liberia and ABIS is incorporated in Liberia.

65. The Judge noted AWRIS' submission to the effect that Marine War Risk reinsurance is generally written and underwritten on back-to-back Institute Clauses which are expressly governed by English Law and practice and which have evolved under the terms of the Marine Insurance Act of 1906. He noted the further submission to the effect that both ABNIC and AWRIS hold themselves out to the world as being providers of war risk insurance and reinsurance using London Market wordings subject to the Institute Clauses, which everybody in the market knows are governed by English Law.

Analysis and Conclusion

66. The appropriate scope of appellate review of decisions of Judges at first instance was recently reviewed by this Court in *Krystal Financial Consultants LLC v Nextgen Robopark Investment LLC*.[14]

67. In very general terms, the Court held that the degree of deference to be given to a first instance decision depends upon a variety of circumstances, including the nature of the decision and the extent to which the Judge had an advantage over the appeal court by reason of his or her conduct of the proceedings at first instance. The ascertainment of the governing law of a contract is not a decision of a character which invokes appellate restraint, unlike decisions of fact based on contested testimony, discretionary decisions, case management decisions or decisions with respect to costs etc. Further, in this case, none of the matters upon which the assessment depends involve contentious issues of fact. In such circumstances, the Judge was in no better position than this Court to determine the governing law of the Reinsurance Policy. It follows that this is an appropriate case in which this Court should make its own determination of the issue.

68. The Judge was correct to conclude that there is no express provision of the Reinsurance Policy specifying the governing law. However, with respect to the Judge, there is much to be said for the proposition that the terms of the Reinsurance Policy, and its incorporation of London Market wordings and Institute Clauses compel the conclusion that it was the common intention of the parties that the policy would be governed by English Law - in accordance with the decisions in Amin, Rasheed, Faraday etc. Article 8(2)(c) of the Law of Application of Civil and Commercial Laws in the DIFC is not limited to express agreements between the parties, but is expressed in terms which would include an agreement between the parties which arises by necessary implication. This is such a case.

69. There are of course some pointers to UAE governing law in the matrix of circumstances in which the policy was written, but there are also circumstances which point to other jurisdictions, such as Bahrain, where AWRIS is incorporated, Liberia, where the BETA is flagged and ABIS is incorporated, and the variety of jurisdictions in which various vessels the subject of the Reinsurance Policy were flagged.

70. Further, the parties' implicit choice of English Law to govern the Reinsurance Policy provides certainty with respect to the applicable laws and jurisprudence, by contrast to the UAE, which is a federation of different jurisdictions. The DIFC Courts are obviously Courts of the UAE, and the laws to be applied by these Courts are specified by DIFC Laws. Different laws would apply in other parts of the UAE.

71. Taking all relevant circumstances into account, if, contrary to this Court's view, the parties did not impliedly agree that the Reinsurance Policy should be governed by the Laws of England, the Judge was in any event plainly correct to conclude that England is the jurisdiction with which the agreement which the parties made had the closest connection.

72. For these reasons the Judge was correct to conclude that the Reinsurance Policy is governed by English Law. Ground 4 of ABNIC's appeal must be dismissed.

Did the Reinsurance Policy incorporate the terms of the Placement Note?

73. ABNIC contends that a note which it sent to AWRIS dated 28 June 2018, and which has been described in these proceedings as the Placement Note formed part of the relevant policy of insurance. It was in the following terms:

> "With reference to our prior agreement, we confirm the following Facultative Reinsurance Placement with you. Warranted all terms and conditions as per original Policy and facultative reinsurers to follow all decisions agreed between the ceding company and the insured in regard to all terms, conditions, exceptions, limitations, warranties [sic], return and additional premium. The facultative reinsurers shall also follow in every respect all settlements agreed between the ceding company and the insured. Kindly return a copy hereof duly stamped and signed in token of your acceptance for our records."

74. As will be seen, a note in identical terms was sent by ABNIC to AWRIS at the time the Reinsurance Policy was initially taken out, and at the time the policy was renewed each year.

75. The significance of the note in these proceedings lies in the term that requires AWRIS to "follow in every respect all settlements agreed between the ceding company and the insured" which is said to be relevant to AWRIS' obligation to indemnity ABNIC if ABNIC is held liable to ABIS in respect of the loss of the BETA. As the grounds of appeal seeking declaratory relief with respect to such obligation have been abandoned, the question of whether the Placement Note forms part of the Reinsurance Policy has lost its immediate significance.

76. However, ABNIC submits that if the Judge's decision to the effect that the note does not form part of the policy is allowed to stand, ABNIC will be bound by that decision should it be found liable under the policy at any time in the future, either in respect of the loss of the BETA or some other vessel. The Tribunal accepts that submission and considers that there is utility in the determination of the issue.

77. The Judge's reasons for concluding that the Placement Note did not form part of the Re- insurance Contract were expressed succinctly in the following passage:

> "The argument depends upon the Placement Document forming part of the Reinsurance Contract. AWRIS denies that it does and I agree. I consider that in each year the Reinsurance Contract was concluded by the confirmation of renewal of cover issued by AWRIS. The Placement Document was an attempt to incorporate additional terms and by its express terms requested specific agreement which was not forthcoming."[15]

78. Put another way, the Judge rejected ABNIC's contention that the Placement Note formed part of the Reinsurance Policy because:

(a) He considered that the terms of the policy were concluded before the Placement Note was sent to AWRIS; and

(b) He considered that the Placement Note required that AWRIS stamp sign and return a copy of the note as a condition of acceptance of its terms.

79. It is necessary to review the sequence of communications which constituted the placement of the Reinsurance Policy in order to assess this ground. That sequence started on 26 May 2015 when ABNIC sent an email to AWRIS advising that ABNIC had received a firm order from Horizon to insure its marine hull war and PI policy with ABNIC, the details of which were attached to the email. AWRIS was requested to confirm its "100% FAC. support at highest commission possible". It is common ground that the reference to "commission" is a reference to the portion of the premium which Horizon paid to ABNIC which would be deducted by ABNIC before remitting the balance to AWRIS in return for its agreement to reinsure the entire risk.

80. AWRIS replied to that email by an email of the same date confirming 100% facultative cover as per the terms submitted at a rate of commission of 20%. The email concluded:

> "Please advise attachment date and confirm defined cover."

81. On 31 May 2015 ABNIC sent an email to AWRIS confirming that the period of insurance was 12 months with effect from 10 June 2015. The email concludes "awaiting your Cover Notes".

82. AWRIS replied later that day in the following terms:

> "Cover bound WEF. 10/06/2015
> Await closings.
> Cover note will be sent to you soonest."

83. An undated Cover Note is in evidence. It can be inferred that it was provided by AWRIS to ABNIC, although the date of its delivery to ABNIC is not established by the evidence. ABNIC provided a Placement Note dated 8 June 2015 to AWRIS. The note was on ABNIC's letterhead and was signed and stamped. The note contained the number of the underlying policy and ascribed a number to the facultative reinsurance placement.

84. Following the salutation the note stated:

> "With reference to our prior agreement, we confirm the following facultative reinsurance placement with you."

85. Then followed various details with respect to:

> (a) The name of the insured;
>
> (b) The period of insurance;
>
> (c) The sums insured broken down as to total fleet value, and the liability limits for different components of the cover;
>
> (d) Location;
>
> (e) Details of cover;
>
> (f) Rate/annual premium;
>
> (g) Your/I share;
>
> (h) Your/I premium;
>
> (i) Reins. Commission; and
>
> (j) Net due to you.

86. Then followed the text set out above, including the provision with respect to AWRIS following the settlements.

87. It is common ground that AWRIS did not sign stamp and return the Placement Note either in 2015 or any other year. However, AWRIS received the premium for the Reinsurance Policy, being 80% of the premium paid to ABNIC in each year the premium was paid by Horizon. The same sequence was followed the following year. On 22 June 2016 ABNIC wrote to AWRIS confirming that the underlying policy and the reinsurance would continue for another year from 10 June 2016. The email concluded:

> "This email is final confirmation for your existing share. Our formal closing will follow shortly. Meanwhile, please confirm your share to enable us to proceed further."

88. AWRIS replied the same day by email, confirming the renewal of the policy. The email concluded:

> "Await your premium closings in due course."

89. There is in evidence the Placement Note for 2016 dated 9 June of that year. It seems a clear inference that the note was backdated, given that the policy cover commenced on 10 June 2016, although renewal was not confirmed until some time later.

90. The Placement Note took the same form as the note provided in 2015 and contained the same information, including the details of the limits of the cover provided and the premium. It also contained precisely the same text as the previous year relating to the terms and conditions of the policy, including the provision relating to following the settlements.

91. In 2017 ABNIC sent an email to AWRIS on 11 June confirming renewal of the underlying policy and the reinsurance "on expiring terms and conditions". The email concluded:

> "Our closings will follow shortly. Meanwhile, kindly confirm the above noted and agreed for your share to enable us to proceed further."

92. AWRIS replied the same day confirming renewal of the reinsurance cover. The email concluded:

> "Await your premium closing."

93. The Placement Note for that year is dated 29 June 2017 and follows exactly the same format as the note issued in previous years. It included the same details relating to the extent of the cover and the premiums, and the same text relating to the terms and conditions of the policy.

94. In 2018 ABNIC sent an email to AWRIS on 2 May 2018 in the following terms:

> "Pending renewal terms to be agreed, please provisionally confirm your agreement to maintain your existing share for a further period of 12 months with effect from 10/06/2018 on expiring terms and conditions."

95. AWRIS replied by email dated 6 May 2018 in the following terms:

> "We are pleased to confirm our provisional agreement to renew the above policy for a further year as from 10/06/2018 at expiry terms and conditions.
>
> Await your final confirmation to bind cover."

96. On 7 June 2018 ABNIC sent AWRIS an updated schedule of the vessels to be covered and the amounts of cover in respect of the policy commencing on 10 June 2018.

97. AWRIS responded to that email confirming renewal of its 100% share of the risk for a further year with effect from 10/06/2018 "at expiry

terms and conditions". The email concluded:

> "Await your premium closing within 10 days period ."

98. The Placement Note for 2018 is dated 28 June 2018 and follows the same form as the previous Placement Notes. The details of the cover differ from previous years and accord with the revised schedule provided on 7 June 2018. The premium also differs from previous years. However, the concluding text, including the settlements clause is in identical terms to the notes provided in previous years.

99. On the same day, namely 28 June 2018, ABNIC issued AWRIS a credit note in the amount of the revised premium specified in the Placement Note, and an invoice in the amount of 20% of that premium, corresponding to the amount specified in the Placement Note as ABNIC's commission.

100. It is clear from the sequence of this correspondence that the Placement Note is the "formal closing" referred to in the preceding email communications. The Placement Note contained critical information not otherwise recorded in writing in the preceding email exchanges, including details of the cover provided and the premium. These are clearly essential terms. Without the Placement Note there would be significant gaps in the written record relating to the Reinsurance Policy. The Cover Note provided an assurance of interim cover pending completion of the contractual process, but by its terms, did not purport to embody or record all material contractual terms.

101. The Judge did not refer to the oral evidence on this subject in his reasons. That evidence is generally consistent with the characterisation of the communications contained in the preceding paragraph. Mr Hamama, an officer of AWRIS, confirmed that the expectation embodied in the correspondence was that the Placement Note would provide confirmation of the premium and a formal record of the reinsurance cover that had been placed.[16] Mr Hamama confirmed that the Placement Note was the "premium closing" referred to in the email correspondence, and was a document that was required for the records of AWRIS to ensure that there was a formal record of the terms of the Reinsurance Contract.[17] He specifically confirmed that the Placement Note dated 28 June 2018 was the "premium closing" to which AWRIS referred in its email of 7 June 2018.[18] Mr Hamama accepted that the Placement Note "was essential for the purposes of confirming the existence of reinsurance cover" for AWRIS' records. He also confirmed that if the Placement Note contained something which he considered to be incorrect, he would have contacted ABNIC to say so.

102. Mr Hamama also said, in re-examination, that the Placement Note went to the accounts department so that they could post the amount of the premium in the books of the company. His underwriting section did not keep a copy, but the Note could be obtained from the accounts department if required[19]. AWRIS relied upon this evidence in its submissions, but the internal treatment of the Note within AWRIS after its receipt from ABNIC is irrelevant to its contractual significance.

103. AWRIS submits that the Placement Note was not part of the Reinsurance Contract because:

(a) AWRIS never signed stamped and returned the Placement Note as requested;

(b) AWRIS expressly declined to sign and backdate the 2018 placement document when asked to do so by ABNIC at a later date;

(c) The Judge was correct to conclude that the Reinsurance Contract was completed by the issue of the Cover Note issued by AWRIS;

(d) In 2018 the Placement Note postdated the Reinsurance Contract by at least 18 days; and

(e) The Placement Note was inconsistent with the issue of the Cover Note and with AWRIS' careful and routine inclusion of the various London Market wordings and Institute Clauses.[20]

Analysis

104. The documentary evidence summarised above gives rise to two issues:

(a) Was the Reinsurance Contract complete at the time the Cover Note was issued, so that the subsequent issue of the Placement Note did not form part of the contractual terms; and

(b) Was the Placement Note an offer which could only be accepted by signing, stamping and returning a copy of the note.

105. Both of these issues turn entirely upon the proper characterisation of the communications between the parties, of which there is a complete and essentially self-contained documentary record. This is therefore one of those cases in which the trial Judge had no or, at most, very limited advantage over this Court in terms of the assessment and characterisation of the evidence. It follows that the constraints upon appellate interference identified in relation to other classes of case in *Krystal* do not apply to this issue.

106. In relation to the first issue, the evidence relating to the formation of the Reinsurance Contract over the four years in which it operated makes clear that the placement of cover was a process which had several stages. The last stage in the process was the issue of the Placement Note, referred to by the parties as the "formal closing". There is a clear inference to the effect that the parties considered the Note to have contractual significance - not least because it contained terms not otherwise found in the written communications, including, most significantly, the limits of cover and the premium, which are obviously essential terms.

107. As already noted, the Cover Note was provided in order to confirm that cover was provided from the date of the commencement of the underlying policy, notwithstanding that the process for the negotiation and finalisation of the terms of the reinsurance cover was not complete. While the Cover Note gave rise to an enforceable contract, each year it was ultimately overtaken by the contract in more detailed terms which the parties had in contemplation when the cover note was issued.

108. The second question turns upon the issue of whether the concluding sentence in the Note:

"Kindly return a copy hereof duly stamped and signed in token of your acceptance for our records."

embodied a condition to the effect that the only way the terms of the Placement Note could be accepted was by signing stamping and returning a copy of the Note.

109. The words used do not convey such a condition. Rather, they clearly indicate that the purpose of the request is to ensure orderly record keeping. The fact that the parties construed the words in this way is evident from the fact that in each of the four years in which reinsurance cover was provided AWRIS received payment of the premium at or after the time of receiving the Placement Note without either:

(a) Signing stamping and returning the Note; or

(b) Demurring from its acceptance of the terms of the Note.

110. The terms of the Note do not exclude acceptance of its terms by conduct, and that is precisely what occurred in each of the four years in which cover was provided.

111. AWRIS' reliance upon the request from ABNIC to AWRIS to sign the 2018 Note loses much of its force when it is appreciated that the request was made after the claim had been made under the underlying policy. The request is therefore readily explained by a desire to ensure that the documentary records were complete and sheds no light on the contractual intentions to be attributed to the parties at the time the policy was issued. In context (the claim already having been made), the refusal is likewise understandable and carries the argument no further.

112. For these reasons the terms of the Placement Note, including the provision relating to following all settlements, formed part of the Reinsurance Contract, and there should be a declaration to that effect.

Insurable interest

113. AWRIS submits that the Judge should have found, consistently with the decision of H.E. Justice French, that the underlying policies had been avoided with effect from their commencement, with the consequence that ABNIC had no insurable interest capable of sustaining a claim under the reinsurance policies.

114. The submission is, with respect, misconceived for reasons which can be shortly expressed.

115. The question of whether ABNIC has an insurable interest must be considered in the context of the claims for declaratory relief which were made against AWRIS. There were two such claims:

(a) A claim for a declaration that in the event that ABNIC is found liable to Horizon, AWRIS is obliged to indemnify ABNIC under the Reinsurance Policy; and

(b) A claim for a declaration that AWRIS is obliged to indemnify ABNIC in respect of Defence Costs.

116. The first claim was made because, notwithstanding the judgment in ABNIC's favour in this Court, Horizon/ABIS was pursuing proceedings against ABNIC in the Sharjah Courts. The claim was made, *ex hypothesi*, on the basis that ABNIC was found liable to Horizon/ABIS notwithstanding the decision in this Court, by reason of a decision of the Sharjah Courts and/or the Union Supreme Court.

117. In other words, the claim was made on the assumption that ABNIC had been found to have a liability to Horizon/ABIS under the underlying policy of insurance notwithstanding the decision of this Court. On that hypothetical assumption, clearly ABNIC would have an insurable interest sufficient to support its claim under the Reinsurance Policy.

118. ABNIC has an insurable interest in its claim for indemnity in respect of Defence Costs because of its obligation to act as a prudent self-insured would act in resisting the claim made by Horizon/ABIS under the War Risk Policy. ABNIC considered that such an obligation required it to commence proceedings in this Court confirming its effective recission of the underlying policies and to take steps in the Sharjah Courts to oppose the claims made by Horizon/ABIS. The expenditure incurred taking those steps provides quite sufficient insurable interest in its claim for indemnity.

119. This ground of appeal is dismissed. It is accordingly unnecessary to reach a final conclusion as to whether the feature that the underlying policies were voidable until avoided by the decision of H.E. Justice French, is itself a decisive pointer to ABNIC having an insurable interest capable of sustaining a claim under the reinsurance policies.

The indemnity in respect of Defence Costs

The Judge's reasons

120. The Judge noted that there were two pleaded bases for recovery of the Defence Costs. The first basis pleaded was an entitlement said to arise under the Institute Time Clauses and the second was a term to be implied by custom or practice in the UAE. The Judge upheld only the second basis for the claim and the first basis has not been pursued by ABNIC by way of Notice of Contention in this appeal. At first blush, and considered in isolation, the implied term found by the Judge has its attractions; whether, however, it is well-founded is another matter.

121. The Judge referred to the English authorities on the question of whether a term of the kind for which ABNIC contended could be implied into policies of reinsurance. Those authorities establish that a term to that effect could not be implied in order to give the contract business efficacy or because it was what the parties to the contract must, as reasonable people have intended, although the question of whether a term could be implied by reason of trade practice or usage in the London insurance market was left open.

122. The Judge then cited with apparent approval a passage from the judgment of Christopher Clarke J. in *Goshawk Dedicated Limited & Ors*

v Tyser & Co Limited & Anor,[21] which included the following:

> "I also reject the submission that there is, by the custom of Lloyd's, a contract between broker and underwriter to the effect alleged. A term may be implied in a contract if it is "*certain, notorious and reasonable*: see **Cunliffe-Owen v Teather & Greenwood** [1967] 1 WLR 1421, 1438 and **General Reinsurance Corp. v Fennia Patria** [1983] 1 QB 856, and the authorities cited at **Chitty Volume 113-018**. In other words, the term has to be sufficiently clear, invariable and well known that those who practice, or seek to practice, in the relevant market must be taken to know that it is implicit in the contracts that they make; and it must not be so lacking in reason that effect should not be given to it. If these three conditions are satisfied it may be that the term can arise by way of a freestanding contract. But it is not sufficient to show that, as a matter of practice, those concerned have often, or habitually, acted conformably to the term asserted."[22]

123. The Judge then reviewed the expert evidence which had been led on the subject. ABNIC relied on the evidence of Mr Abdeen, who expressed the view that there is a uniformly accepted market custom in the reinsurance market in the UAE and Middle East that in the event of a claim under an underlying policy, any litigation fees incurred by a reinsured will be reimbursed by reinsurers, in accordance with their respective shares of the risk, unless expressly excluded or limited by a reinsurer in the Reinsurance Policy. It was Mr Abdeen's view that the uniform practice was not affected by the nature of the underlying risk, whether war risk, hull risk or a non-marine risk.

124. AWRIS relied upon the expert evidence of Mr Williams, whose experience was centred on the London insurance market. He expressed the view that the UAE did not represent an established market for the reinsurance of marine war risks or reinsurance business more generally. The Judge found that proposition surprising, given the objective of AWRIS to protect the interests of the Arab insurance markets in the Arabian Gulf area and other Arab regions.

125. The Judge accepted without hesitation Mr Williams' evidence in relation to London Market practice, but did not consider that he was qualified by experience to express an expert opinion on the Arab insurance or reinsurance markets. By contrast, Mr Abdeen was "a man of the Region whose CV indicates that he has contributed to the growth of the emerging insurance markets in the Middle East for more than 25 years".[23]

126. The Judge then reviewed the cross-examination of Mr Abdeen, noting his evidence to the effect that AWRIS would seek retrocessional reinsurance at Lloyds. In that context the Judge observed:

> "It was suggested that there would be a problem if there was a market practice, either in the UAE or the wider Middle East, that in every situation, in every case, every reinsurer has to pay an unlimited amount of legal fees in circumstances where they will never be able to get retrocessional cover from London given the terms and conditions of both the reinsurance and the retrocession. He gave the answer set out at paragraph 110 above. He said that the market practice can be excluded by agreement."[24]

127. The Judge rejected the contention that reference to the Institute Clause imported London Market practice.[25]

128. The Judge accepted Mr Abdeen's evidence - he considered that it was credible and impressive, and that he was unshaken by cross-examination.

129. The Judge considered that the criteria enunciated in *Goshawk* were satisfied "by the critical fact that if reinsurers in the Middle East market wished to avoid liability for legal fees and other associated costs incurred in dealing with the claim, they contract out of the liability".[26]

130. The Judge considered and rejected AWRIS' contention that the term said to be implied was inconsistent with clause 5.1 of the Institute War and Risk Strikes Clauses Hull-Time. He construed the provision as excluding cover for a loss occasioned by, relevantly "any financial cause", such as, for example, failure to pay a fine or penalty. In his view, the clause had no application to the issue relating to indemnity for legal costs. Although AWRIS contended otherwise on appeal (albeit lightly), the Court considers this aspect of the Judge's reasoning to be clearly correct.

131. In light of his conclusions the Judge granted declaratory relief in the following terms:

> "It is an implied term of the Reinsurance Contract made between the Claimant and the Defendant that the Defendant is liable to indemnify the Claimant against costs and expenses properly incurred in defending claims brought by or against Horizon Energy LLC and Al Buhaira International Shipping Inc arising out of or in connection with Marine Hull War Policy No.: SH- HULL/000114/18/SH."

The Judge considered that the qualification to the effect that the expenses must be "properly incurred" addressed issues which had been raised by AWRIS relating to the difficulty of identifying the expenses properly attributable to the claim to avoid the War Risk Policy in the proceedings before H.E. Justice French when the claim in those proceedings was combined with a claim to avoid the Hull Risk Policy, which had other reinsurers. In short, in the Judge's view, the quantum of the claim was a matter for another day.

AWRIS' submissions

132. AWRIS advanced various criticisms of the Judge's acceptance of Mr Abdeen's evidence. It was submitted that Mr Abdeen's evidence:

(a) Was insufficient to establish the existence of an identifiable Middle Eastern market for war risk insurance, or reinsurance generally;

(b) Provided inadequate evidence of payments having been made pursuant to the asserted uniform practice;

(c) Did not establish that the practice is notorious in the asserted market;

(d) Did not establish that the practice was universal in the asserted market; and

(e) Was diminished in weight because Mr Abdeen's experience related primarily to Takaful insurance.

133. Appellate submissions of this kind fall squarely within the class of case identified in *Krystal* as a challenge to findings of fact made on the basis

of contested testimony in which the Trial Judge had the advantage of observing the witnesses under cross-examination. Consistently with long established principle in most common law jurisdictions, an appellate court will not interfere with such findings unless they were not open on the evidence or are so unreasonable that no reasonable Judge could have made them.

134. This Court has carefully reviewed Mr Abdeen's reports and his oral testimony with a view to the criticisms made by AWRIS. Forceful though those criticisms were, it is sufficient for present purposes to observe that the Court is not satisfied that the findings made by the Judge were not open on the evidence, or that his conclusions were outside the range of conclusions open to a reasonable Judge.

135. However, other aspects of AWRIS' submissions do not fall within the area of appellate constraint, because they involve contentions which this Court is in as good a position as the Trial Judge to assess and determine. Those are submissions to the effect that the asserted implied term was:

(a) Uncertain;

(b) Inconsistent with the express terms of the Reinsurance Policy; and

(c) Unreasonable.

Uncertainty

137. First, as already mentioned, ABNIC contends that the term would be uncertain in its application, relying upon the example of the costs incurred by ABNIC prosecuting the proceedings in this Court which were determined by H.E. Justice French. In those proceedings ABNIC claimed to be entitled to set aside both the Hull Policy and the War Risk Policy. AWRIS only reinsures the War Risk Policy. AWRIS assumes that the Hull Policy is reinsured by other reinsurers, although it does not know who they are. AWRIS contends that apportionment of the costs incurred as between costs incurred in respect of the attack upon the War Risk Policy as compared to costs incurred in the course of the attack upon the Hull Policy would be problematic. If there are multiple reinsurers of the Hull Policy, the costs referable to the attack upon that policy would have to be apportioned between those reinsurers in accordance with their proportionate risk.

138. AWRIS further points to the problems that might arise after the reinsurers reimbursed ABNIC for those costs in relation to the exercise of rights of subrogation in respect of the costs order made in ABNIC's favour by H.E. Justice French.

139. The Court accepts that these issues would have to be addressed and resolved if there is an implied term as asserted by ABNIC. However, while not or not necessarily straightforward, the Court does not consider the problems to be insuperable. Apportionment of costs as between issues is undertaken from time to time, and once the apportionment of costs has been made amongst the various reinsurers who might be involved, their rights as subrogee would be determined by reference to their proportionate liability for ABNIC's costs.

140. Second, AWRIS submits that the asserted implied term has no limit on the amount of cover which it provides, nor any constraints upon its scope, such as a requirement that the reinsurer authorise or at least consent to the steps being taken by the primary level insurer in the defence of claims.

141. The Court accepts that these observations are accurate, but does not consider that of themselves they result in the term being insufficiently certain. The requirement that the costs be properly incurred imposes a limitation upon the costs falling within the scope of the indemnity which can be applied at the point at which the primary level insurer seeks reimbursement. At all events, the Court does not rest its decision on uncertainty.

142. However, the fact that the cover provided under the term is potentially unlimited is relevant to the next issue to be addressed - inconsistency.

Inconsistency

143. As noted, the Court considers that the Trial Judge was correct to conclude that there is no inconsistency between the asserted implied term and the Institute Clause upon which AWRIS relies for the reasons which the Judge gave.

144. However, AWRIS submits that there is a further inconsistency between the implied term and the terms of the Reinsurance Policy as evidenced by the Cover Note and the Placement Note. Each of those documents specifically identifies the sum insured in respect of each category of risk, including:

(a) Total fleet value

(b) Limit of liability per crew member

(c) Maximum liability for crew per vessel; and

(d) Maximum liability for crew in respect of the fleet.

Thus, those contractual documents clearly identify the reinsurers maximum exposure under the policy.

145. ABNIC contends that there is an implied term exposing the reinsurer to unlimited liability for Defence Costs, even though no reference whatever is made to that potential liability in any of the contractual documents. On the other hand, AWRIS contends that the asserted implied term would be inconsistent with the provisions of the Reinsurance Policy which limit and define its maximum exposure as reinsurer.

146. The Court accepts AWRIS' submission on this topic. It is supported by the decision of the English Court of Appeal in *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd*[27] where Robert Goff LJ[28] observed:

"Furthermore the implication contended for would give rise to an open ended promise of indemnity, when the contract of indemnity contained

in the policy is expressly limited to $3,500,000; I do not think that it is possible to accept an implication which is inconsistent with that express term of the policy."

Unreasonableness

147. AWRIS contends that the term asserted by ABNIC is unreasonable because, being entirely implied, it would not be evident on any of the Reinsurance Policy documents and would therefore not be evident to any retrocessionaires who accept a share of the risk borne by AWRIS. AWRIS further relies upon the Judge's acceptance of evidence to the effect that "ultimately, the risks end up in the London market --- or the war risks".[29] As the Judge accepted Mr Williams' evidence to the effect that there is no certain, notorious and reasonable practice in the London market whereby reinsurers indemnify the reinsured in respect of Defence Costs, it would follow that the risk borne by a reinsurer in the Middle East market in relation to Defence Costs would remain with that reinsurer and would not be passed on to retrocessionaires in the absence of an express provision so that effect.

148. In other words, AWRIS contends that imposition of the risk of Defence Costs upon the primary lawyer of reinsurers because they happen to be in the Middle East, rather than upon the primary level insurer or subsequent layers of reinsurer is unreasonable.

149. As noted, the Judge addressed this issue by relying upon Mr Abdeen's evidence to the effect that it was open to a reinsurer to exclude or limit the implied term with respect to Defence Costs should it wish to avoid that liability. However, this Court does not consider that possibility provides a satisfactory answer to the problem.

150. Mr Abdeen's evidence was to the effect that the practice applies to every contract of reinsurance, of any class, written in the Middle East.[30] This would mean that in order to avoid bearing sole responsibility for Defence Costs, all reinsurers in the Middle East would have to either include terms in all of their policies excluding or limiting liability for Defence Costs or alternatively, obtain higher level reinsurance expressly including such Defence Costs. Unless a Middle Eastern reinsurer takes one or other of those steps they will be liable to indemnify its insured in respect of Defence Costs, and will have no entitlement to indemnity from its reinsurers in respect of that liability. The Court does not consider that the imposition of such a burden upon reinsurers merely because they write business in the Middle East is reasonable.

151. The difficulty is that a retrocessionaire in the London market may not have notice of the term implied by custom in the Middle Eastern market because, as is the case here, the customary term is not apparent on the face of the written policy constituting the primary layer of reinsurance. The problem is acute because, as the Judge accepted in his reasons excerpted at (26) above, "ultimately, the risks end up in the London market." In determining whether the implied term propounded by Mr Abdeen is reasonable, the Judge has failed to appreciate the significant bearing which the facts he found as to the interaction between the Middle East market and the London market have upon the reasonableness of the implied term in the policy of reinsurance. That is especially so where, as the Judge rightly concluded, that policy is governed by English law. This Court's decision in Krystal does not require deference to the primary judge's conclusion in such a case.

152. For these reasons the Court considers that the Judge erred by finding that a term was implied into the contract of reinsurance which is inconsistent with the express terms of that contract and unreasonable. Accordingly, ground 2 of AWRIS' appeal must be upheld and the declaration made by the Judge set aside.

Relief

153. It follows from the reasons above that there should be a declaration to the effect that the Reinsurance Contract contains the relevant text in the Placement Note, and the declaration made by the Judge with respect to the implied term relating to Defence Costs must be set aside.

154. As ABNIC's grounds of appeal relating to a declaration of its entitlement to indemnity in the event that it is found liable for the loss of the BETA have been abandoned, there will be no judgment of the Court creating an issue estoppel in respect of matters necessarily decided in order to make that declaration, such as the dismissal of AWRIS' claims that there was a breach of duty of good faith or fair presentation, or that notice of ABNIC's claim was not given in time. In order to ensure that there is an issue estoppel in respect of those determinations, appropriate declarations should be made dealing with those issues.

155. ABNIC has also sought a declaration in relation to its insurable interest in the Reinsurance Policy. Although the Court has rejected AWRIS' ground of appeal on that subject, it does not follow that there should be a declaration. The consequence of ABNIC's abandonment of its grounds of appeal relating to indemnity for the loss of the vessel and the success of AWRIS' ground of appeal relating to the indemnity for Defence Costs is that ABNIC has not established any entitlement to indemnity under the Reinsurance Policy. As noted above, the question of insurable interest must be assessed in the context of the risk which is said to have given rise to the entitlement to indemnity. As no entitlement to indemnity has been established, any declaration with respect to insurable interest would be hypothetical.

156. As foreshadowed, each party has had a measure of success and a measure of failure in respect of the issues raised in the appeals. ABNIC withdrew grounds 1 and 2 on the second day of the hearing and failed on ground 4. It succeeded on ground 3. AWRIS failed on its ground 1 and it was unnecessary to decide its ground 3 after ABNIC withdrew its relevant grounds of appeal. AWRIS succeeded on its ground 2.

157. The Court will invite submissions from the parties as to the appropriate orders that should be made with respect to:

(a) The costs of the proceedings at first instance;

(b) The costs of the Initial Application for Permission to Appeal;

(c) The costs of the Renewed Application for Permission to Appeal; and

(d) The costs of the appeal,

in light of the outcome of the appeal. Those submissions should be limited to issues of liability for the costs, and should not extend to the quantum

of those costs. After the Court has determined responsibility for the costs of the various steps in these proceedings, directions can be made for the assessment of quantum.