THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

GLOBEMED GULF HEALTHCARE SOLUTIONS L.L.C.

Claimant

and

OMAN INSURANCE COMPANY PSC

Defendant

JUDGMENT OF H.E. JUSTICE SHAMLAN AL SAWALEHI

Trial : **18 May 2023 - 26 May 2023**

Counsel : **Mr. Tom Montagu-Smith KC and Mr. Edward Knight, instructed by Clyde & Co for the Claimant**

Mr. Rupert Reed KC and Mr. Timothy Killen, instructed by Al Tamimi & Company for the Defendant

Judgment : **30 January 2024**

UPON the Part 7 Claim Form dated 16 November 2017 (the "Claim")

AND UPON the Trial held before H.E. Justice Shamlan Al Sawalehi on 18 May 2023 to 26 May 2023

AND UPON reviewing all material added on to the Court file

AND UPON reviewing the Rules of the DIFC Courts (the "RDC")

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The Claimant is valid.

2. The TPA Agreement is valid.

3. The period over which the provision of services under the TPA Agreement would run if the Defendant lawfully terminated the agreement at the earliest time possible is three years including the notice period.

4. The OIC Losses are to be calculated on the basis that Bupa would have consented to its portfolio being administered by the Claimant and that 50,000 lives would not have been excluded from the Claimant's administration.

5. The Non-OIC Losses are assessed as being 25% of the Claimant's total claim for Non- OIC Losses for each year for the duration of the TPA Agreement.

6. The Claimant's losses in relation to volume rebates are to be assessed on the basis that the Claimant would not have obtained better rebate rates than the Defendant in fact obtained in the relevant period.

7. In relation to the interest calculation, revenue is to be counted on the entitlement basis.

8. In relation to payroll and general costs, to the extent there is any difference between the parties or the Defendant's expert's evidence is silent on a relevant matter, the calculation shall be based on the Claimant's evidence.

9. In relation to rent, the Claimant's expert's approach shall be adopted.

10. In relation to amortisation, the two relevant assets shall be disregarded from the Claimant's savings.

11. In relation to royalties, these shall be treated as savings.

12. No 51% reduction shall be made to the Claimant's damages to reflect the Defendant's subsidiary's shareholding in the Claimant as contemplated in the MOU.

13. Text BoxThe Defendant shall pay a percentage of the Claimant's costs proportionate to the percentage of the amount awarded to the Claimant out of the Claimant's total claim.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 30 January 2024
At: 4pm

SCHEDULE OF REASONS

1. The Claimant's case ("GMG"), in outline, is as follows. On 13 January 2015, it, a provider of third-party administration ("TPA") services to health insurers, and the Defendant ("OIC"), a major insurer, entered into an agreement (the "TPA Agreement") for the provision by GMG of TPA services to OIC in the UAE. On the same day, a separate contract (the "MOU") was executed by GMG's parent company ("GlobeMed") and OIC's subsidiary ("Synergize") and, on 16 January 2015, by a corporate shareholder in GMG ("Kharma") for, amongst other things, the assignment of 51% of the shares of GMG by Globemed and Kharma to Synergize. In other words, not only was OIC to be a client of GMG in relation to TPA services, but it was to be an indirect majority shareholder in GMG also.

2. Then, on 21 May 2015, OIC's CEO informed GMG that OIC had "received instruction from our Board to cancel our joint activities, in respect to the Joint Venture as well as [the TPA Agreement]" (the "Notice"). GMG's case is that the TPA Agreement was valid and binding and that OIC had no right of termination. GMG claims for lost profits which it says arose from OIC's failure to perform the TPA Agreement: lost profit which it would have earned under the TPA Agreement (the "OIC losses") and lost profit which would have derived from other business GMG would have attracted from third parties as a result of its "strategic partnership" with OIC (the "non-OIC losses").

3. OIC's case, in outline, is as follows. First, OIC contends that GMG is a nullity (the "Nullity Issue") with the consequences that any contracts it entered into, including the TPA Agreement, are void and that it has no standing to bring this claim. Second, OIC says the TPA Agreement never became binding or commenced (the "Commencement Issue") in any event, such that OIC was perfectly entitled to walk away from the proposed joint venture when it did. Third, OIC avers that any lost profit claimed by GMG is not sufficiently certain (the "Certainty Issue") to form the basis of a claim in damages as a matter of UAE law, the law which governs the TPA Agreement.

4. The foregoing accounts for the issues going to liability. There are further issues between the parties, if OIC's liability is established, on quantum (the "Quantum Issues"). I will deal with the Quantum Issues after deciding the issues on liability.

The Liability Issues

The Nullity Issue

5. GMG, an "onshore" Dubai-incorporated company, is governed by UAE company law. Under that law, a company exists as a matter of contract between its "partners." At the time of GMG's incorporation, in 2013, the law, specifically Federal Law No. 8 of 1984 on Commercial Companies (the "CCL 1984"), provided that not less than 51% of the shares of any UAE company must be held by UAE national partners (the "Ownership Rule") and that any agreement in the company contract which excluded a partner from profit rendered the company null and void (the "Profit Rule"), pursuant to Articles 22 and 18, respectively. Article 22 does not spell out that nullity of the company is a consequence of breach of the Ownership Rule, but it seems clear on the UAE cases, and not disputed by GMG in any event, that that is the case.

6. OIC's case is that GMG's incorporation fell afoul of both the Ownership Rule and the Profit Rule with the result that GMG was void ab *initio*. It is not pleaded by OIC that GMG's company contract, an Agreement of Incorporation dated 7 October 2013 (the "Company Contract"), is, absent any other arrangements, objectionable. It is said, instead, that GMG's nullity arises by way of a side agreement dated 6 October 2013 (the "Side Agreement") between the parties to the Company Contract.

7. There were four parties to the Company Contract. One of them was one Adel Ibrahim Ali Al Helou, a UAE national, and the others were non-UAE nationals. Article 6 of the Company Contract states that Mr Helou held 25,500, being 51%, of GMG's shares (the "Shares"). So far so good as far as the Ownership Rule is concerned. In determining whether the rule has been complied with, however, the UAE court is concerned with the genuine rather than the mere apparent holding of shares. The company contract is not necessarily a record of the true position.

8. OIC says that the Side Agreement discloses that Mr El Helou was not a genuine partner in GMG. There were no other UAE nationals involved in the ownership of GMG, which is to say that GMG was not, on OIC's case, in compliance with the Ownership Rule at the time of its incorporation and was therefore void.

9. OIC highlights the following content of the Side Agreement. The preamble states that:

> "The distribution of shares in the manner contained in the Company's Memorandum of Association [i.e. the Company Contract] is a formal distribution that does not reflect the actual partnership between the parties. The actual partnership between the parties is determined under the current Agreement."

As to that, Article 10 stipulated that Mr El Helou "undertakes to waive his profits in [GMG] in favour of [Mr Mounir Kharma, the chairman of Kharma and the chairman and CEO of GlobeMed] exclusively in consideration of a lump sum valued at fifty thousand Emirati dirhams . that exclusively represents the value of his annual partnership in [GMG] ." and Article 12 stated that Mr El Helou:

> "declares that he does not own any share or percentage in [GMG's] tangible or intangible assets or its capital that is deemed as part of [GMG's] assets, which entirely belongs to [Mr Kharma] exclusively. In addition, [Mr El Helou] has pledged, in advance, not to claim any share of any kind from amongst [GMG's] assets and capital, especially that [Mr El Helou] has not contributed thereto. [Mr El Helou] acknowledges that [GMG] has been financed and its capital has been formed by the other parties in [GMG]."

Mr El Helou's involvement in GMG was explained at Article 24:

"It is understood and agreed, hereunder, that [Mr El Helou] has been designated as a national partner for the mere purpose of incorporation of [GMG] inside the United Arab Emirates, under Federal Law No. (8) of 1984, not as an actual partner in the Company."

The parties to the Side Agreement referred here, of course, to the Ownership Rule. OIC says that, as a consequence of the Side Agreement, Mr Helou was not a genuine partner in GMG and instead held shares in GMG on behalf of GlobeMed rather than for his own account, with the result that GMG is void.

10. As a preliminary point, I do not think the partners of GMG can be criticised for attempting to "merely" comply with what the law requires, which clause 24 of the Side Agreement makes clear was the case. That attempt necessarily meant, after all, that the parties had set out to comply with the law, which is commendable. I am reminded of an incident that took place at the advent of Islam. A bedouin came to the Prophet Muhammad and asked him what God had made compulsory for him as regards prayer, fasting, almsgiving and so on. The Prophet, who was himself much given to the performance of supererogatory deeds in addition to obligatory deeds, set out what might be described as the bare minimum obligations as regards acts of worship under Islamic law. After the Prophet had finished, the bedouin declared, "By the One Who has honoured you, I will not volunteer anything [over and above this minimum] but nor will I fall short in what God has made obligatory upon me," to which the Prophet famously remarked, "If he keeps his word, he will enter paradise."

11. To proceed, does the preamble and do Articles 10 and 12 and of the Side Agreement disclose that Mr El Helou was not a genuine partner in GMG and that he was excluded from profit, as OIC contends? I respectfully do not think so. While the part of the preamble cited above suggests that the Company Contract does not record the true position in terms of the distribution of shares between the partners, it is necessary to look at the terms of the Side Agreement, as the preamble itself indicates, to determine what exactly the parties meant by that suggestion. In other words, what was the "actual partnership" which the parties referred to, and insofar as the Side Agreement, and not the Company Contract, records that "actual partnership," is the Company Contract thereby falsified and GMG accordingly nullified?

12. The starting point, in my view, is that the Side Agreement recognises throughout that the Shares are owned by Mr Helou. For example, Articles 5, 6, 9 refer expressly to "his," that is, Mr Helou's, "shares." OIC has highlighted part of the preamble of the Side Agreement, cited above. It continues, *"The parties agreed to exercise their rights and duties in respect of the Company* pursuant to the provisions of the current Agreement." (emphasis added) The Side Agreement seems to me to be concerned with how rights are exercised, not with establishing new rights, or with affecting pre-existing ones. This conclusion is reinforced, in my view, by Article 24 which provides that, "This Agreement shall not be considered, interpreted or construed in any case whatsoever as an actual contract between the parties." The Side Agreement appears simply to be a written record of an unenforceable understanding between its parties. In other words, it seems to me that what Mr Helou gave in the Side Agreement were not undertakings in a legal sense, but rather his word.

13. Moreover, while in the Side Agreement provision was made for Mr Helou to waive his profits, that does not, in my judgment, itself amount to a waiver of the profits or an exclusion from them. The Side Agreement even provided for the consequences if Mr Helou did not waive his profits. Article 10 has been partially cited above. It continues: ". Such lump sum shall be paid at the beginning of each fiscal year. If [Mr Helou] fails to adhere to this obligation, for any reason whatsoever, [Mr Helou] shall pay [Mr Kharma] a sum of money equivalent to the triple amount of last fees received by [Mr Helou]." And so Mr Helou apparently retained the power to waive or not waive his share in profit from GMG.

14. GMG advances a further point. It says that even if it was unlawful for the parties to agree to the future waiver of profits, that would simply result in the specific clause being ineffective as a result of Article 22 of the Side Agreement: "If any clause or paragraph set forth herein becomes invalid due to its violation of law, this Agreement shall remain valid and enforceable as if such clause or paragraph has been omitted from the Agreement." Any unlawful provision, GMG submits, would be severed and have no effect. On my reading of Article 22, however, the provision does not itself effect the nullification of any provision of the Side Agreement. Instead, it makes provision for the consequence of any nullification which might occur on account of violation with the law. It follows, in my view, that for a provision of the Side Agreement to be rendered ineffective, there would have to be something which brings that result, Article 22 itself not being that thing. But this does not matter, because of my other conclusions.

15. During the trial, the Dubai Court of Cassation issued a judgment in Cassation Appeal No. 439 of 2023 (the "Caf&#65533; Rider case") which OIC's leading counsel, Mr Rupert Reed KC, described as "bang on point" in terms of the issues being discussed presently. I turn to that case now.

16. The dispute concerned a biker caf&#65533; in the Al Qouz area operated by the Caf&#65533; Rider LLC. Caf&#65533; Rider LLC was owned by three shareholders, Mr and Mrs Moloy, whom together owned 49% of the shares, and a UAE national, Mr Omary, who owned the remaining 51% of the shares, or so the company contract stated. Mr and Mrs Moloy issued proceedings against Mr Omary, seeking an order that he be removed as a shareholder in the company on the basis that his shareholding was "fictitious." As in the present case, his shareholding was necessary at the time of the company's incorporation because of the Ownership Requirement. In a side agreement, Mr Omary had acknowledged that he did not own any share in the assets, funds and profits of the company provided the Moloys paid him AED 25,000 annually. Before proceedings were issued, Mr Omary had demanded an annual payment of AED 35,000, the claimants alleged, and had refused to renew residence visas for employees, presumably until his demand was met. Mr Omary counterclaimed for an order that his annual fee be increased to AED 50,000 and for AED 40,000 "against his fees for the period from 2018 to 2022."

17. The claim and counterclaim were dismissed at first instance, for reasons unexplained in the cassation judgment. Both sides to the dispute appealed. The Court of Appeal set aside the first instance judgment and, no doubt to the parties' surprise, went on to dissolve and liquidate Caf&#65533; Rider LLC on its own motion. The purpose of the company contract, the court found, was to circumvent the Ownership Requirement. For example, notwithstanding that the company contract stated that the company's capital was AED 300,000 divided into 300 shares of which Mr Omary owned 153 shares, amounting to 51% of the shares, the side agreement showed that Mr Omary did not pay any share of the company's capital. Moreover, the side agreement stated, and the Court of Appeal acknowledged, that Mr Omary was required to facilitate the Company's business including by obtaining licenses and renewing and terminating the company's staff visas, which Mr Omary claimed amounted an in-kind contribution to the company. However, no such contribution was reflected, the court found, in the company contract. The Court of Appeal had found that the company contract was therefore "fictitious."

18. The Court of Cassation agreed. The side agreement rendered the company contract a sham in that, in the former agreement, there were

provisions contrary to those of the latter agreement; differences which meant the company contract was in reality in breach of the Ownership Rule.

19. In my judgment, the Caf&#65533; Rider case is distinguished. I do not have the benefit of sight of the side agreement in that case, but, relying on the judgment, it seems to me that there is a critical difference between that side agreement and the Side Agreement in the present case. There is no suggestion in the Caf&#65533; Rider case that the side agreement there was not a binding agreement between the parties. In the present case, as we have seen, the Side Agreement was expressly said not to be a contract. In my judgment, this neutralises the effect of the provisions in the Side Agreement which have parallels with the provisions in the side agreement in the Caf&#65533; Rider.

20. Even if the Side Agreement was an agreement properly so called, another important difference between it and the side agreement in the Caf&#65533; Rider case is, in my view, that while Mr Helou ultimately retained the power waive or not waive his profits from GMG, Mr Omary was, the judgment explains, said not to be "entitled to any percentage of [the company's] profits . provided that [Mr and Mrs Moloy] pay [Mr Omary] an annual sum of twenty-five thousand (25,000) UAE Dirhams." And so, apparently, Mr Omary did not have control over his entitlement to profits. In my judgment, this is a type of exclusion from profit in the company.

21. In terms of the Profit Rule, OIC's case has a further obstacle. In order to offend the CCL 1984, the agreement excluding a partner from profit must be contained in the company contract itself. There is no prohibition on any side agreement, such as the Side Agreement, depriving a partner of profit. Article 18 of the CCL 1984 states: "If the company contract excludes a partner from profit or exempts him from loss, the contract shall be null and void." (emphasis added) OIC contends that the Side Agreement is not separate from the company contract in circumstances where the Side Agreement is executed between the very same individuals as the Company Contract and expressly purports to amend the Company Contract by stating in the preamble in terms that "the actual partnership between the parties is determined under the current Agreement."

22. I respectfully disagree with OIC. In my view, the Side Agreement was not the Company Contract or even an amendment to it. This follows from the fact that the Side Agreement was not an actual contract, pursuant to Article 24, and also from the definitions in Article 2:

> "Partnership Agreement: the Memorandum of Association of GlobeMed Gulf Healthcare Solutions LLC, executed before the Notary Public.
>
> Agreement: *the Agreement of the present partners which differs from the Partnership Agreement* of GlobeMed Gulf Healthcare Solutions LLC (Memorandum of Association) which is executed before the Notary Public." (emphasis added)"

The Side Agreement therefore defines itself as being a separate arrangement from the Company Contract.

23. A new case emerged during the trial. OIC contended that the Company Contract, which as we have seen recorded that Mr Helou held 51% of GMG's shares, was falsified by the Side Agreement in that in the Side Agreement Mr Helou declared that he did not own any share in GMG's capital and had not made any contribution to it (Article 12). In my judgment, this case should have been pleaded. While it was not disputed by GMG that Mr Helou had not contributed to GMG's capital, there may well be a legitimate explanation for this. I have concluded that the Side Agreement in fact affirms Mr Helou's ownership of the Shares, and to the extent it suggests that he does not, the Side Agreement is not a contract in any event. It may be that Mr Helou was gifted the Shares, and I am not aware of any rule that would render his ownership thereby invalid.

24. Fundamentally, I see no reason to conclude that the Company Contract did not correctly reflect the rights and obligations of the partners of GMG insofar as they affect third parties. It seems to me that the point of notarisation and registration of company contracts is to provide a public record of a relationship which gives rise to third party rights. I see nothing objectionable in partners of a company entering into arrangements or giving their word on how they will exercise their rights, so long as they comply with the relevant governing rules. In the present case, I think the partners did.

25. Something else emerges from the Caf&#65533; Rider case. A ruling as to the invalidity of the company memorandum under CCL 1984 does not necessarily invalidate contracts made by the Company. This is because of the legal construct adopted in UAE law of the *"de facto company."* In the Caf&#65533; Rider judgment, the court stated that the judgment invalidating the company "entails the company's dissolution and liquidation." Where a company is declared invalid, the liquidator collects in its assets and pursues its rights. A company's assets and rights must include many that are derived from contracts. In my judgment, there is no suggestion in any law or judgment that a debtor can be released from a debt to a company, or any contract set aside or avoided, owing to a declaration of invalidity. As such, even if GMG was invalid on account of a breach of the Ownership and Profit Requirements or on any other basis, that would not release OIC from any liability it has towards GMG.

The Conditions Issue

Introduction

26. OIC does not deny that the TPA Agreement existed as an agreement, subject to GMG itself existing. But it says that the agreement was subject to two "suspending conditions" and one "cancelling condition." These expressions, which correspond to condition precedent and condition subsequent, respectively, are not used in the Civil Code. They emerge, however, from Article 420: "A condition is a future matter upon the materialisation of which the coming into force or ceasing to be of the governing force [of a disposition] depends."

27. The two purported suspending conditions were: (i) that the share transfer be completed and (ii) that GMG be licensed to carry out the TPA services. The purported cancelling condition was that the BUPA portfolio be included. None of the purported conditions were, OIC accepts, express. Each was, it is said, implicit in the TPA Agreement, or in the wider transaction, but no less clear and obvious in the parties' intentions.

28. My view is that the TPA Agreement was not subject to any of the purported conditions. For starters, the entire transition process was well underway by the time of OIC's purported cancellation. It involved the transfer from OIC to GMG of highly confidential information both about the medical circumstances of insured lives and about GMG's own commercial activities and pricing structures. OIC's position is that this was all protected by Article 10 of the TPA Agreement. On OIC's approach, that was not a binding provision and therefore OIC was providing this highly confidential information without the protection of any binding confidentiality provisions. That seems to me to be altogether unlikely.

29. Moreover, Article 16.1 of the TPA Agreement provides that "This Agreement embodies the entire agreement between the Parties. No

changes, amendments or modifications of the terms and conditions of this Agreement shall be valid unless reduced to writing and signed by the Parties." In my view, Article 16.1 is all but fatal to OIC's case that the TPA Agreement had non-express conditions.

The Share Transfer

30. The Share Transfer was provided for by the MOU. The MOU and the TPA were related agreements and all the parties to them no doubt anticipated that, having been executed, they would both be performed, conferring upon their respective parties the benefits which they provided. There was no necessity for performance of the MOU to be made a suspending condition. OIC's affiliate, Synergize, had an enforceable right to the transfer of 51% of shares in GMG upon payment of USD 1.

31. It is no answer to say that the MOU and the TPA Agreement were part of a single wider transaction. They were different agreements between different parties. As counsel for OIC conceded, the two agreements could have been part of a single agreement. The fact that they were not, then, is significant and makes it difficult to treat the border which separates them as permeable. If the TPA Agreement were intended to be contingent upon performance of the MOU, it could and no doubt would have said so.

32. It is instructive that Article 3(b) of the MOU provides for the sale of shares to be completed "within a maximum period of 6 months as of signature of the MOU" i.e. by 13 July 2015. This was long after the parties contemplated services being provided under the TPA Agreement at the time that agreement and the MOU were executed. This is difficult to reconcile with a claim that the Share Transfer was a suspending condition of the TPA Agreement. It would seem that the purported suspending condition would need to be limited to a certain point in time (at the latest until the services were being provided), which has not been explained much less demonstrated to the Court, or else remain effective even after services were being provided under the TPA Agreement, which seems to me to be unlikely in the extreme.

33. GMG was protected by the exclusivity provision in the TPA and OIC by this same provision had every interest in its subsidiary, Synergize, purchasing 51% shares in GMG, Synergize itself being protected by an enforceable right under the MOU to the shares. It is unclear why, in these circumstances, the parties might have intended that the TPA Agreement nevertheless be subject to a suspensive condition in relation to the share transfer and one the fulfilment of which could be blocked unilaterally by a subsidiary of one of the parties. It seems to me to be rather unlikely that the parties intended this.

34. This seems different in degree but not completely in nature from a hypothetical situation where a party's performance under a contract is a suspensive condition of the contract which, I think, would mean, for all intents and purposes, that the contract was more akin to a draft rather than an in-force contract.

Licensing

35. The issue of licensing is dealt with in a number of places in the TPA Agreement. OIC relies principally on recital (B) which along with the other recitals, Article 1.2.4 provides, "form[s] part of.this Agreement." Recital (B) states as follows:

> "GlobeMed is a duly licensed third party administrator (TPA) that has the know-how, expertise, technology, and solutions to assist the Client in the management of its medical portfolio, Beneficiaries' claims, and related services, according to the terms and conditions of the Health care Programs issued by the Client."

OIC contends that it was an integral part of the TPA Agreement, therefore, that GMG should be a duly licensed TPA. Moreover, the agreement required GMG to provide TPA services, which required the relevant licensing. The result of all this, OIC says, is that the TPA Agreement was plainly conditional upon GMG having been licensed.

36. I disagree. In my view, recital (B) of the TPA Agreement is in fact antithetical to OIC's case. It states that GMG "is a duly licensed.TPA." (emphasis added) Recital (B) described, therefore, and irrespective of whether or not that description was correct, GMG's status *at the time the TPA Agreement was executed*. Even if recital (B) was intended to be an operative provision, it is difficult to see how it might have been intended to introduce a suspensive condition of the TPA Agreement. Recital (B) does not concern itself with the future much less any dependency of the TPA Agreement on a future matter for its force.

37. OIC's case is further undermined by the fact that the TPA Agreement deals with the matter of licensing in the main body of the agreement. Article 16.9, entitled "Regulatory compliance," provided that GMG was required to, as material:

> "(a) comply with and shall ensure that it complies with all Relevant Laws which may be applicable to the performance of the services and or to the Client.
>
> (b) provide the services in a way which enables the Client at all times to comply with all applicable relevant laws, regulations, circulars including but not limited to those issued by Insurance Authority, Dubai Health Authority, Health Authority of Abu Dhabi.; and
>
> (c) notify the Client immediately on becoming aware of any breach or suspected breach by GlobeMed of any relevant applicable laws.[and] do all such things as are necessary at its own cost in order to minimise the impact of such breach."

In my view, Article 16.9 has the following consequences on OIC's case. First, it undermines any case that recital (B) was intended to be an operative provision, inasmuch as the same subject matter is dealt with elsewhere in unmistakeably operative language and in a more obvious place in the agreement. Second, and more importantly, Article 16.9 situates GMG's obligation to be duly licensed in time, and that is when the services under the TPA Agreement were to be provided. It is difficult to accept that the parties intended that an obligation which could only kick in once services were being provided doubled up as a suspensive condition upon which the entire TPA Agreement depended for its force.

38. If GMG represented that it was duly licensed at the time of the TPA Agreement but was not or if GMG was required to be duly licensed at the time of provision of services but was not a cause of action might have accrued in OIC's favour. But OIC has failed to demonstrate how the requirement that GMG be duly licensed went further than that to the enforceability of the TPA Agreement at large. It may not be insignificant in this

regard that Article 16.9(c) apparently contemplates a situation where GMG provides services without being duly licensed.

BUPA

39. By Article 15 of the of the MOU, GlobeMed Limited, Kharma Holding and Synergize agreed that:

> "This MOU is subject to BUPA 's written approval to transfer its portfolio (UAE local claim related). Such approval shall be obtained by the Investment Entity within a period of one month from the date of signing this MOU. In the event that said approval is not obtained, the parties hereby agree that the terms of this MOU and its fee structure shall be entirely discussed and renegotiated."

OIC accepts that Article 15 is not in its wording a cancelling condition. But it says that if BUPA's portfolio was not transferred to GMG within the relevant time, and if the parties subsequently failed to reach a negotiation, there would be no fee structure and the agreement would effectively fall apart. In other words, the BUPA clause would cause the whole transaction to be reopened. OIC says that it is implicit that the transaction would not have binding force until successful renegotiation of the fee structure. It says that OIC clearly viewed BUPA's transferral as a condition of the agreement, and hence Ms Fadel's email.

40. This aspect of OIC's case faces several hurdles. First, it was not pleaded that the BUPA clause constituted a cancelling condition to which the TPA Agreement was subject. Second, the BUPA clause is not in the TPA Agreement and is instead a term of the MOU. Third, the MOU is between parties different to those of the TPA Agreement. Fourth, on Article 15's own terms, if the BUPA's portfolio was not transferred to GMG, the consequence would be that the terms of the MOU and the MOU's fee structure would be renegotiated, not the TPA Agreement. Fifth, BUPA coming across was OIC's responsibility (Article 5.1 of the TPA Agreement).

41. Sixth, even if it is supposed that the TPA was intended to be subject to Article 15 of the MOU and was, I do not think that Article 15 would have had the effect that OIC contends for. OIC argues that as a consequence of Article 15 the whole transaction was vulnerable to falling apart. That may have been so, but the question OIC has invited the Court to address is whether the parties intended the TPA Agreement to be subject to a cancelling condition, not whether a provision of the agreement would potentially or even inevitably lead to the cancellation of the TPA. Addressing that question, I do not see any evidence that the parties intended BUPA's non-approval to be a cancelling condition to which the TPA Agreement was subject. To the contrary, Article 15 of the MOU discloses an intention that the TPA Agreement would be preserved notwithstanding BUPA's non-approval.

The Certainty Issue

42. The parties disagree about what UAE law requires for a claim for lost profit to succeed and about the extent to which those requirements apply in DIFC Court proceedings.

Must future loss of profit be certain or inevitable to be recoverable under UAE law?

43. In Union Supreme Court Case No. 621/23 (27 June 2004) (**"USC 621/23"**), the defendant had caused injury to the claimant by reckless driving. The court below had found that the claimant was rendered unable to earn a living as a result of the accident and awarded him compensation for future loss of earnings. The defendant appealed, arguing that there was no evidence that the defendant was unable to work. In giving its judgment, the Union Supreme Court outlined several principles which are relevant to the present case. These are, in poor translation, as follows:

> "Estimating the remedial compensation for this damage falls within the authority of the trial court as long as the elements of the damage are established, and no provision in the law requires certain criteria to be followed in determining the same.
>
> It has also been established in the case law of this Court that the determining factor for entitlement to compensation is the actual damage occurring *[al darar al muhaqqaq al wuqu']* at present or in the future as a direct result of the fault and not the potential damage *[al darar al ihtimali]*, and concluding that the occurrence of damage *[wuqu' al darar]* in the future is established *[muhaqqaq]* falls within the authority of the trial court as long as its judgment is based on plausible reasons."

I have included transliterations in order to demonstrate that the Arabic judgments put before the Court in fact employ common terms of art, contrary to the impression given by their English translations.

44. In USC 621/23, the Union Supreme Court found that the lower court's judgment was sound. Certain medical reports demonstrated for the lower court that the claimant had become incapable of working. This, the Union Supreme Court held, was a plausible reason for its judgment.

45. The distinction between "actual" and "potential" injuries is important. The Union Supreme Court elaborated on this distinction later in USC 621/23. The translation of this passage is particularly incoherent. Expounding on the meaning of Article 389 of the Civil Code, the court stated that:

> "This means that the entitlement of an injured party to compensation is based on the condition that damage is a direct result of the fault and actually occurs *[muhaqqaq al wuqu' bil fi'l]* at present or in the future. As for the potential damage *[al adrar al muhtamalah]* that is not certain to occur *[ghayr muhaqqaqah al wuqu']* in the future, no compensation shall be payable therefor unless it actually occurs *[waqa'at bil fi'l]*, which means that an injured party may claim compensation for future damage if it is certain to occur *[muhaqqaq al wuqu']*."

A paraphrasing of this passage is warranted. The Union Supreme Court in its judgment stated that the entitlement of an injured party to compensation arises where there is injury which is the direct result of the wrong and which has "actually occurred," whether in the present or the future. As for "potential" injuries other than those certain to occur in the future, no compensation is due for them unless and until they occur, and in which case the injured party may proceed to claim compensation for the injury.

46. The distinction between "actual injury" and "potential injury" has been dealt with in other cases. In Dubai Court of Cassation Case No. 371/2004 ("DCC 371/2004"), the court stated as follows:

"It is established that the compensation shall not be established unless there is a breach to the right or a financial interest to the damaged, the damage shall be established that it shall be actually occurred *[muhaqqaqan bi'an yakun qad waqa'a bil fi'l]* or its occurrencei [wuqu'uhu] in future shall be inevitably *[hatmiyyan]* as the possibility *[ihtimal]* of the damage shall not be valid to be the base for claiming the compensation."

Here the Court of Cassation stated that a right to damages does not arise unless there is a breach of a right or the injured party has a relevant financial interest and the injury is established in that it has occurred or inevitably will occur, the mere possibility of injury not providing a basis for a claim for damages.

47. In Dubai Court of Cassation Cases Nos. 46 and 49 of 2006 (Commercial) ("DCC 46 and 49"), the court stated:

"It is settled by this Court, pursuant to Article 292 of the Civil Code, in all cases the compensation is assessed on the basis of the amount of damage sustained by the victim, together with the loss of earnings, provided that it is a consequent result of the wrongful act and damage has occurred or will certainly occur in the future *[muhaqqaq al wuqu' bil fi'l halan aw mustaqbalan]*. Nothing in law prohibits awarding the injured party against the loss of earnings he expected if his expectation is based on reasonable grounds. The onus rests on the plaintiff to prove the lost earnings. It is also settled that the trial court has discretionary authority to assess the amount of damage and relevant restitutio in integrum; however, the trial court must demonstrate the elements of damage against which it awarded those damages."

48. In Dubai Court of Appeal Case No. 1477/1999 (Civil) ("DCA 1477/1999"), it was stated:

"Article 292 of the Civil Transactions Code provides that if the compensation for the damage is not estimated in the contract or by law, the judge would assess it according to the damage that actually occurred *[al waqi' fi'lan]* at the time inclusive of loss the aggrieved party incurred and the lost profits, provided that the damage is recoverable by nature and was directly caused by the error of the debtor, and has in fact occurred or will occur *[muhaqqaq al wuqu' bil fi'l halan aw mustaqbalan]*. There is nothing legally which prevents calculating from the lost profit the profits the creditor would have hoped to make provided that the hope is reasonable. In this case the burden would be upon the aggrieved party to prove loss and lost profits as claimant in the liability proceedings."

49. I have included relevant transliterations in the above translations in order to demonstrate that the courts were in fact deploying only a few terms of art in their analyses, notwithstanding the various and at times confusing formulations of these terms in the English translations. It will be noted that the term al *muhaqqaq al wuqu*' (in this or other forms, depending on the context) can describe both an existing or a future injury and in the case of the former has been translated along the lines of "an injury which has been sustained" while in the case of the latter it has been translated along the lines of "an injury which will certainly be sustained." This difference is plainly a consequence of the word *muhaqqaq*, which shares a trilateral root with the word haqq (meaning, amongst other things, "true" and "real"), and which means, amongst other things, "existent, "realised," "established," "verified," "certain to happen" and "inevitable," depending on the context. So when applied to the past it describes straightforwardly something which has already taken place and when applied to the future it describes something that is certain to exist, and hence the distinction in the authorities, when considering future harm, between "inevitable injury" and mere "potential injury."

50. In my view, the above judgments are authorities for the following relevant propositions. First, UAE law does not make provision for or otherwise regulate the assessment of damages for an injury. If the elements of injury are established, the court is empowered to determine compensation for the injury. Second, in all cases an injured party will be entitled to damages for an "actual injury" which is the direct result of the wrong. Third, an actual injury may occur in the future but such an injury is distinct from a mere "potential injury" in the future. It must be inevitable in the sense that it is certain to occur. And fourth, it is a matter for the court to ascertain whether or not actual injury has occurred in the future, but the court's finding should be based on "plausible reasons."

Must there be certainty or inevitability at the time of the breach or instead at the time of the assessment?

51. GMG argues that any certainty or inevitability which a future loss is required to have must be so at the date of assessment rather than the date of breach. In the present case, all of the losses which GMG claims are no longer future losses. The Court is therefore looking backwards to ascertain what losses OIC has already suffered. OIC's position, on the other hand, is that it is the hypothetical nature of a loss, not whether the loss is in the past or in the future at the time it is assessed, which is important. In other words, the law requires a distinction between a loss in the counterfactual which is certain or inevitable as opposed to speculative or, in the language of the authorities, "potential."

52. Based on the authorities which the parties have taken me to, I do not think it makes a difference either way. This is because it is the same test whether the injury is present or future. In the second citation from USC 621/23 above, what the translator has translated as "not certain to occur" in relation to non-compensable future losses is literally "other than *muhaqqaqa al wuqu*'." As such, in the language of USC 621/23, a present loss which is *muhaqqaq al wuqu*' is compensable and similarly a future loss which is *muhaqqaq al wuqu*' is compensable. Indeed, in the first citation from USC 621/23, DCC 46 and 49 and DCA 1477/1999, only one test is mentioned for both present and future injury: injury is compensable if it is "*muhaqqaq al wuqu*' . halan [presently] aw mustaqbalan [or in the future]." In DCC 371/2004, the court did, however, use a different word for compensable future injury. It stated that a future injury must be "inevitable" to be compensable. However, it is clear that this term was used to distinguish compensable injury in the future from non-compensable mere "possible injury." In USC 621/23, the same distinction from mere possible injury was made instead with the term *muhaqqaq al wuqu*'. In other words, it appears DCC 371/2004 merely provides an alternative formulation of the test seen in the other judgments without attempting to introducing a special one for future injury.

53. It follows, in my view, that whether the losses GMG claims are past or future losses, under UAE law they must be *muhaqqaq al wuqu*' to be compensable. And if "certain to occur" or "inevitable" are acceptable alternative formulations of *muhaqqaq al wuqu*' when applied to the future, I see no reason why they are not acceptable if applied to past events within a counterfactual. In both scenarios, the task is to identify an injury which is *muhaqqaq al wuqu*' but which is not qualified by existence. In the counterfactual, it might be asked whether the injury would have been certain to occur or inevitable rather than merely possible. But I do not think any further qualification or reservation in terms of applying the test is necessary.

Is certainty / inevitability a requirement of substantive or procedural law?

54. The classification of the UAE rule as substantive or procedural in the DIFC Court is a question of DIFC law. The leading English case on the distinction between rules of substance and rules of procedure is Harding v Wealands [2006] UKHL 32. Lord Hoffman stated the common law principle as follows:

> "In applying this distinction to actions in tort, the courts have distinguished between the kind of damage which constitutes an actionable injury and the assessment of compensation (ie damages) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy." (original emphasis)"

And so the distinction is between rules which identify actionable damage and which determine the scope of liability and rules which dictate how the damage is to be remedied.

55. Applying this principle, I consider that the rule under UAE law that future loss must be certain or inevitable to be compensable is substantive. This, in my view, is because it determines the scope of liability. Its effect is that the extent of a defendant's liability for future losses is confined to only those losses which are bound to occur. Such a rule does not appear to me to be of a different order to the rule governing remoteness which is, as Lord Hoffman indicated, a rule of substance. That rule envisions that there will be losses which are either foreseeable or unforeseeable and dictates that only the former losses are recoverable notwithstanding that the latter losses exist. In my judgment, the certainty or inevitability rule in UAE law comparably envisions that there will be future losses of differing degrees of likelihood to occur and dictates that a defendant is only liable for those future losses which are certain to occur or inevitable. The result is that a defendant's liability and speculation about loss will generally have a negative correlation. Once the extent of the claimant's actionable injury and therefore the defendant's liability has been determined, the question of how the claimant is to be compensated arises. In my judgment, that is when, following Harding, procedural rules are engaged.

The Quantum Issues

56. The issues between the parties going to quantum fall into two categories: GMG's alleged losses and its alleged savings on account of the TPA Agreement not being performed. Any award of damages GMG receives will be in the amount of its losses minus its savings.

The Losses

57. GMG says that its losses are of three types: the OIC Losses, the Non-OIC Losses and losses of revenue it would have generated in the form of volume rebates.

The OIC Losses

58. The OIC Losses will depend on: the length of the contract period; whether or not OIC's Bupa portfolio would have been transferred to GMG, something that required Bupa's consent; and whether the TPA Agreement permitted OIC to use another TPA company to service up to 50,000 of its customers, such that the revenue reflecting 50,000 lives should be deducted from the total.

The Relevant Period

59. Both Parties have calculated GMG's lost profits by reference to the minimum period over which the provision of services under the TPA Agreement would run if OIC lawfully terminated the agreement at the earliest time possible. The duration of the TPA Agreement was governed by clause 12.1:

> "This Agreement shall begin as of ----/----/ , for a period of three years (Contractual Period) automatically renewable for a mutually agreed period or periods unless one of the Parties notifies the other of its intention not to renew, by providing to the other Party at least 1 year prior notarized notice period at the end of each initial or renewed contractual period. For the avoidance of doubt, [OIC] shall continue to renew in force business and place new one with [GMG] during the 1 year notice period."

GMG's position is that the TPA Agreement would have run for four years: three years (the "contractual period") plus one (the "notice period"). OIC says that the minimum period was three years: a three-year contractual period, with the third year being the notice period.

60. This has been a difficult issue to decide. Article 12.1 reminds me of the rabbit-duck illusion made famous by Ludwig Wittgenstein. The language of Article 12.1 supports two readings in terms of the contractual period: now four years, now three. Unlike the illusion, however, Article 12.1 cannot be both.

61. There are two cornerstones to GMG's case that the TPA Agreement would run for four years. First, that the notice comes at the end of the contractual period, not before the end. Second, that the second sentence of clause 12.1, from the words "For the avoidance of doubt," would be unnecessary if the notice period was already within the original contract period. GMG says the second sentence explains that the contract continue in force. In the end, and not without reservation, my view is that the minimum running period of the TPA Agreement was three years. I have come to this view for the following reasons.

62. First, clause 12.1 in fact says that either party could prevent automatic renewal of the contractual period by providing the other, not with notice, but with a "notice period." While this is, as far as I am aware, an unusual way of devising a provision dealing with notice in a contract, it is not unintelligible. By providing notice you give the other party, more figuratively, a notice period. And if it is said that a shorter period of time is to be provided at the end of a larger period of time, in my view the expectation is that the smaller period falls *within* the larger one, coinciding with its latter part. For example, "I will give you an hour at the end of the day" means an hour will be given *that day,* at the end. If an hour is not to be

given during the hours that make up that day, it should be said, instead, "I will give you an hour *after* today." Indeed, even if something which does not have duration, like a notice, must be provided at the end of a period of time, it must still be provided *within* that period or else it is provided *afterwards,* not at *its* end. However, to provide something like notice "at the end" of a period could mean "right at the end," such that if the provision of notice triggers a notice period, and if it is validly provided right at the end of a period of time, the notice period will necessarily exceed that period. But if what is provided is a period of time, in my judgment the expectation is that the whole period of time provided should fall within the period in which it was given.

63. Second, a notice period is not a standalone period. If one exists, it does so within a contractual period. If the contractual period has ended, there is by definition no need for a notice period, the purpose of which is precisely to bring the contractual period to an end. The express terms of clause 12.1 do not account for any contractual period underlying the "plus one" notice period as conceived by GMG. It will be noted that clause 12.1 provides that the contractual period will renew "unless" valid notice is given. The implication here is that if valid notice is given the contractual period will not renew. The implication of that is that, if the notice period could commence as the contractual period ends, you would have a notice period without an underlying contractual period.

64. Third, it is not clear to me how, if the contractual period has ended, the TPA Agreement or obligations under it would continue in force. GMG does not say that this is the effect of the second sentence of clause 12.1 but does say that this sentence "clarifies" or "explains" (in written submissions) the continuance of the agreement or (in oral submissions) that the notice period features the same obligations as existed in the contractual period. I agree with GMG generally but arrive at a different overall conclusion. In my view, the words "For the avoidance of doubt" indicate that the obligations subsequently enumerated are not provided for by those words and are instead merely reiterated by them. The obligations therefore come from somewhere else. The parties did not discuss where exactly they originate from (clause 5.1 seems a likely candidate) but there can be no dispute that they come from the TPA Agreement. It is not insignificant in this regard that the term "contractual period" in Article 5 (whether "initial" or "renewed") appears to be used interchangeably with the term "Term" (see Article 12.2), which is defined in Article 1.1 as "the duration of this Agreement and any renewal thereof as identified under Article 16" (which may immaterially be a mistaken reference to Article 12). In other words, the obligations under the TPA Agreement continue throughout the notice period precisely because the contractual period continues, and on this basis the second sentence of Article 12.2 needs only to reiterate those obligations. As such, this sentence in fact weighs in favour of the notice period being within the contractual period rather than an additional year to it

65. Fourth, the second sentence of Article 12.2 does not even attempt to clarify that the obligations under the TPA Agreement, that is, generally, continue. It makes very specific reference to two obligations. If the second sentence of Article 12.2 was in fact attempting to clarify the parties' obligations throughout the notice period after the contractual period has ended, it fails entirely as it naturally invites doubt about the status of the rest of the suite of obligations under the TPA Agreement.

66. Fifth, clause 12.1 expressly provides that the initial contract period is three years. According to GMG's interpretation of the clause, however, there would be no scenario (unless, on my reading, pursuant to Article 12.2) in which services under the TPA Agreement would run for three years. This begs the question of why the parties negotiated and agreed that the contractual period be three years if what they wanted was that it be four years. There is no doubt that Article 12.1 is poorly drafted, on either interpretation, but it seems to me that on GMG's interpretation there is an additional conceptual flaw which adds another layer of difficulty in terms of explanation.

67. Sixth, pursuant to Article 12.2 of the TPA Agreement, if either of the parties wished to amend the agreement, that party was required to inform the other party of the proposed amendment six months before the renewal of a contractual period. If the proposed amendment was not agreed, the proposing party acquired an entitlement to terminate the agreement at the end of the contractual period with at least one month's notice. This is to say that the minimum contractual period where termination was under Article 12.2 would have been three years. According to GMG's interpretation, a termination under Article 12.1 would require the terminating party to remain in the contract for 33% longer. It is not clear to me why the parties would have intended such a different outcome for ordinary termination under Article 12.1.

68. Both parties have invited the Court to have recourse to the surrounding facts in order to ascertain the intention of the parties and both parties have asked the Court to have regard to the MOU. While the MOU has different parties to the TPA Agreement, both agreements were negotiated and signed at the same time and by the same people. GMG relies on Article 5(b)(i) of the MOU which stated that OIC shall sign what became the TPA Agreement with GMG "for a first contract period of 3 years and an additional one year being the notice period prior to termination." OIC relies on appendix 2 to the MOU which contains a projection of future profits, for three years, not four.

69. In my view, Article 5(b)(i) is the single most compelling evidence that the parties to the TPA Agreement intended it to run for four years. However, in the final analysis it falls short of evidencing that the parties intended the minimum contractual period (which is a different question) be four years. As we have seen, the TPA Agreement would renew unless either party gave valid notice of termination. As far as I am aware, no such notice was ever given. As such, as things stood, the TPA Agreement was on course to automatically renew three years after its commencement. Article 5(b)(i) of the MOU, therefore, merely recorded an intention about how long the TPA Agreement would run. That intention may have corresponded to the minimum term that was possible, but it could have been based on a different configuration. In all cases, further steps would have to be taken by the parties.

70. OIC's interpretation of Article 12.1 of the TPA Agreement is compatible with the intention recorded in Article 5(b)(i) of the MOU. All the parties would have to have done is agree that the initial contractual period of the TPA Agreement renews for a year (the agreement being ".renewable for *a mutually agreed period."* (emphasis added)) while either party provided the other with a year's notice of termination at the end of the renewed contractual period. On the other hand, according to GMG's interpretation of Article 12.1 of the TPA Agreement, to give effect to Article 5(b)(i) of the MOU either of the parties would have to provide the other with a year's notice at the end of the initial contractual period. In my view, that there were steps to be taken to give effect to Article 5(b)(i) according to either interpretation of Article 12.1 of the TPA Agreement, not to mention that those steps are similarly straightforward, and that if no steps were taken the agreement would renew, renders Article 5(b)(i) of the MOU more or less neutral in terms of indicating anything other than the term the parties intended the TPA Agreement to run.

71. On the other hand, the projections for three years at appendix 2 of the MOU are relatively difficult to explain if the starting position was that the contractual period was bound to run for at least four years. But they make perfect sense if the minimum running period of the TPA Agreement

was three years.

72. I find that the minimum period over which the provision of services under the TPA Agreement would run was three years.

Bupa

73. The starting position is that OIC had a positive obligation to work exclusively with GMG in relation to all TPA services and had a negative obligation not to provide such services itself or to work with other providers, unless the parties agreed otherwise. Both obligations arose under paragraph 5.1 of Article 5 headed "Exclusivity":

> "**5.1.** Subject to exception as mentioned in Articles 5.2, 5.3, 5.4 and 5.5 below, The Client shall contract and work exclusively with GlobeMed in all what relates to the third party medical claim administration services as agreed in this Agreement including the portfolio related to BUPA (UAE local claim administration only) which is currently being serviced by the Client; Accordingly, except as mentioned in Article 5.2 through 5.5 below, the Client shall not carry out personally and/or through a third party, any work or activity related to the Services, or issue any Healthcare Program outside the scope of this Agreement unless otherwise agreed to in advance and in writing between both Parties hereto."

It will be noted that the positive obligation expressly extended to OIC's Bupa portfolio.

74. It is not contended that any of the exceptions referred to in the opening words of Article 5.1 applied in relation to the Bupa portfolio. Article 5.3, for example, provides for a derogation from Article 5.1, generally where an insurer has refused to be serviced by GMG, but it applied expressly only to "future customers," defined as customers "that approach the Client after the date of this Agreement." Bupa was of course a current customer. The case takes us back to Article 5.3 in the next section of this judgment.

75. The Court was not taken to Article 5.2, but on my reading, it is helpful for understanding Article 5.1. It provides:

> **"5.2.** The Parties agree that exceptionally the Client shall carry out internally or through a TPA, all TPA related services for the compulsory business of the Dubai Health Authority until its renewal on May 2015, beyond which this portfolio will be transferred fully to GlobeMed unless the DHA refuses/declines such request, in which case, the Client shall continue providing such services internally or through a TPA)."

And so it seems the parties turned their minds to scenarios where a current customer refused to be serviced by GMG, and they agreed that only in the case of the Dubai Health Authority's portfolio would OIC have a right to continue to provide services itself or to work with another TPA provider in relation to the portfolio.

76. While Articles 5.1 and 5.2 do not necessarily add anything to the obligations of Article 5.1, on my reading they trace a situation where, absent GMG's agreement, OIC would be contractually bound to abandon the Bupa portfolio if it was unable to transfer it to GMG within the relevant time. This is not insignificant in terms of gauging OIC's impetus under the TPA Agreement to secure the transfer of the Bupa portfolio, which is itself not insignificant in terms of gauging the likelihood that it would have happened. And to the extent Bupa committed resources to the potential transfer, it would not be unreasonable to infer from that that it was Bupa's preference to maintain its relationship with OIC.

77. The above accounts for the legal situation in relation to the Bupa portfolio. In terms of the facts, the Court was taken through several emails and documents by both parties. This evidence showed that, while the parties plainly expected that Bupa might consent to the transfer within one month of the MOU, by at least 14 May 2015 Bupa had still not emerged from its due diligence review.

78. The Court was taken to OIC internal emails dated 12 April 2015 where one member of staff asked another if he had been contacted by the Bupa team to which the second replied, "There was no contact by the BUPA whatsoever." Mr Rupert Reed KC for OIC submitted that this, coming as it did after several rounds of due diligence, evidenced a decline in interest on the part of Bupa (day 1, page 171 lines 5-6, henceforth [day]/[page]/[line(s)]). But to the extent it did, it was made clear a month later that Bupa had not yet lost interest. In an email from Bupa to OIC, the former's Head of Operations wrote:

> "We have recently starting hearing rumours around a potential hold or delay to the transition to GlobeMed relation to the joining of the new CEO. Can you please clarify this further, its impact on the transition and finally on the mode from this office to another? Plainly put is the transition to GlobeMed still happening or is that stopped?
>
> *We have spent considerable amount of time and energy working against a deadline advised by OIC and if this has changed, we would then prioritize other projects to make use of the resources accordingly.* (emphasis added)."

According to this email, then, as at 14 May 2015, Bupa was still committing resources to the potential transition. This, in my view, could only be consistent with an interest- though not necessarily an unconditional one-in consenting to the transfer.

79. There is no need to go through the evidence. What it clearly reveals, in my judgment, is that Bupa was willing to consent to its portfolio being managed by GMG, albeit only in certain circumstances-including that the systems were well integrated and that customer experience would not be negatively affected by the transition-and hence the rounds of due diligence.

80. Was progress being made on this front? It clearly was. After three weeks of due diligence in early 2015, Bupa's "overall feedback has been positive," OIC explained to GMG in an email dated 11 February 2023. Furthermore, on 24 February 2015, after that same round of due diligence and a week before a second that had been organised, Lucien Letayf, a board member of GlobeMed Guld, felt able to write to Patrick Choffel of OIC that "Frankly, we have no reason to believe that [Bupa] will not join." It should be highlighted, insofar as this statement may seem self-serving, that while evidence that Bupa would consent to the transfer is in this case in GMG's favour, in 2015 the issue was of greater importance to OIC, not least because OIC would pay GMG the same fee for the first year whether or not the Bupa portfolio came across while if the portfolio did not come across OIC would incur its own expenses in administering it.

81. And on 1 March 2015, Bupa emailed OIC stating in relation to a proposal regarding one aspect of the transition, network contracting, "This is all fine and agreeable by Bupa Global." In the same email Bupa did highlight a serious concern it had about confidentiality if as part of the handover GMG had access to Bupa's pre-2015 claims. In what appears to be a draft reply to that email (it is not clear whether the draft was sent), which apparently Partha Panda composed and Hajar Fadel then reviewed, it was stated, in short, that the relevant data would not be accessible by GMG but that "before the relevant assignment of the said responsibility we can govern GM through an NDA or whichever mechanism you may find appropriate."

82. This (draft) response from OIC suggests that OIC was willing to accommodate Bupa. And what that brings into relief is the fact that in all the evidence shown to the Court there is nothing to suggest that Bupa was being unreasonable in its various requests and conditions nor, importantly, that OIC was unwilling to accommodate Bupa. Mr Rupert Reed KC took the Court to OIC internal emails in which Hajar Fadel asked Partha Panda if she had left out anything in a certain summary sheet that was to be shared with Bupa, to which Ms Panda replied, "Don't think we should add anything else till they ask very specific." Mr Rupert Reed KC stated that that comment showed frustration on the part of OIC; where OIC provided Bupa with information, Bupa was "continually drilling down into the detail and asking for further detail." (1/179/2-5) But in my view, even if OIC had become frustrated with Bupa's due diligence, that frustration is relatively neutral for present purposes: any frustration may have arisen because OIC considered Bupa's consent was becoming increasingly unlikely, or it could have arisen because OIC would inevitably have to go yet further in accommodating Bupa or commit yet more resources to Bupa's potential transfer as the latter requested more detail, insofar as the former was intent that the transfer take place; or indeed it could have arisen for some other reason. In other words, any frustration may disclose a decreasing likelihood of Bupa's transfer or the fact that OIC would do all it could to make it happen.

83. And one thing about which there is no doubt is that OIC was very keen that the transfer take place, and promptly. In an email from Hajar Fadel of OIC to Bupa personnel, Ms Fadel provided a summary of the run-off costs to be incurred by OIC to transition the administration of its medical portfolio to GMG. Included in the summary was a comparison between scenarios where Bupa transitioned in May 2015 and another scenario where Bupa transitioned six months later. Ms Fadel stated that "The 6-month gap is not the preferred scenario, rather an illustration of the additional costs that OIC would incur to transition Bupa at a later stage. Eventually, your decision would be based on your business requirements as well as the financial impact on OIC." As Mr Rupert Reed KC stated, Ms Fadel is here effectively pleading with Bupa not to transfer at a later stage (1/176/17-18) on account of the financial impact that would have on OIC.

84. I have come to the following conclusions. OIC had a positive obligation to work exclusively with GMG in relation the Bupa portfolio and a negative obligation not to service that portfolio itself or to outsource that work to another TPA provider. That means, as I understand it, that absent agreement from GMG for OIC to continue managing the Bupa portfolio or to hand over management to another TPA provider, OIC would be contractually bound to abandon that portfolio if Bupa did not consent to the transfer. Moreover, OIC was at financial loss if there was so much as a delay in Bupa's consent. This is because GMG's fee for the first year was not contingent on the Bupa portfolio being transferred and because OIC would incurs costs in maintaining its own claims administration. Meanwhile, while Bupa may not have rushed forward to consent to the transfer of its portfolio, the fact that it was actively conducting due diligence and committing resources to the potential transfer until at least just before the Notice evidences that, subject to certain requirements being met, it was willing to consent to the transfer. And there is no evidence that any of its requests were unreasonable or that OIC or GMG would be unable or unwilling to accommodate them. Indeed, nearly all of the evidence points towards Bupa consenting. Indeed, it would be difficult to support a proposition with the evidence before the Court that any of OIC, GMG and Bupa would not continue to put in effort until Bupa was content to give its consent to the transfer. These conclusions lead me to the following conclusion: it was inevitable that Bupa would consent to its portfolio being transferred to GMG.

85. Mr Rupert Reed KC contended, and I agree with him, that there is no evidence as to when the transferral of the Bupa portfolio would have taken place. That was a matter in Bupa's control. I am not sure what impact, if any, the date of transfer of Bupa's portfolio could have on GMG's damages award, but just in case it would have an impact I will attempt to identify a point in time at which it can be said that the transfer certainly would have happened.

86. At [88] of his witness statement, Mr Saliba stated "it is my understanding that, in circumstances where the parties understood the Launch Date to be 24 May 2015, OIC's complete portfolio (i.e. all lives) would be transferred to GMGHS in the first contractual year (i.e. by 15 January 2016)." He confirmed this understanding in his oral evidence (3/16/7). The complete portfolio of course included the Bupa portfolio. There is evidence before the Court, therefore, that the parties understood that the Bupa portfolio would be transferred to GMG by 15 January 2016 at the latest. When this evidence is combined with the fact that 15 January 2016 was two thirds of a year later than OIC was working for Bupa to consent and the conclusions I have come to generally, I think it is fair to conclude that Bupa would have inevitably consented by that point in time. If, however, the date of renewal for OIC's relevant contract with Bupa is ascertainable and was before 15 January 2016, then that is the date that shall be assumed for the transfer of the Bupa portfolio.

50,000

87. Article 5.3 of the TPA Agreement (2058) provided for a derogation from OIC's obligation under Article 5.1 to contract and work exclusively with GMG in relation to TPA services:

> "Notwithstanding anything to the contrary in the Agreement, the Parties agree that on exceptional basis, the Client shall have the right to contract and work with any other third party administration('TPA') company to be able to serve its future customers (that approach the Client after the date of this Agreement) who specifically request services by another TPA company, provided: (i) the Client performs best efforts to place this business with GlobeMed, and (ii) wherever possible, GlobeMed is given the chance to meet with this customer and present its services, prior to placing the business with another TPA).
>
> This exception, in all cases and at all times, is subject to a total number of individuals not exceeding 50,000 members."

And so there were three general conditions which were required to be met before OIC's obligation under Article 5.1 was derogated under Article 5.3: (i) the relevant customer was required to be a "future customer" that approached OIC after the date of the TPA and who specifically requested services by another TPA company; (ii) OIC performed its best efforts to place the business with GMG; and (iii) wherever possible, GMG was given the chance to meet with the customer and present its services before OIC placed the business with another customer.

88. OIC asks the Court to exclude 50,000 lives, representing the total number of lives it could have placed with another TPA under Article 5.3, from any award of damages. It accepts that there is no evidence that any of these conditions would have been met but says that that is necessarily the case as the deal was not pursued. OIC relies on the existence of the clause itself. Counsel argued that OIC would not have gone to the trouble of negotiating Article 5.3 unless there was reason to believe that some customers would wish to insist on the use of other TPAs (6/217/21). Counsel also relied on the fact that some customers had resisted being administered by GMG and queried how it can be said with any certainty that GMG would have been successful in persuading them otherwise. It was said that it was reasonable to assume that some 50,000 lives would not have been transferred to GMG's administration.

89. I disagree with OIC's position. I do not think that the mere existence of Article 5.3 provides OIC with much assistance. A contingency may be included in a contract to deal with exceptional circumstances. The presence of such a contingency would not, of course, be an indication that such a circumstance is more likely to happen. Article 5.3 is clearly concerned with exceptional circumstances (".on exceptional basis.") and inasmuch as it is I see no reason why it should be taken as a reliable basis for identifying the number of lives that OIC would have placed with other TPAs. Nor do I think OIC finds assistance in the reluctance of any of its existing customers transferring to GMG as Article 5.3 is expressly concerned with "future customers," those who "approach [OIC] after the date of [the TPA] Agreement," rather than existing customers, to whom Article 5.3's derogation from Article 5.1 clearly does not apply.

90. On my reading, Article 5.3 is a safety valve: it is designed to prevent OIC from having to forego business in circumstances where it has proved effectively impossible to bring that business within the ambit of Article 5.1, and even then, any rescued business has been capped to 50,000 lives. Its conditions would require three layers of speculative inquiry ((i) how many future customers would request services from another TPA provider, (ii) how many of those would OIC be unable to convince to be placed with GMG and (iii) how many of those would GMG also fail to convince?) to get to an answer on how many lives OIC might have placed with other TPAs if the contract had been performed. Looked at from this angle, I do not think Article 5.3 provides a sensible mechanism for estimating the number of lives that OIC would have placed with another TPA provider.

91. More importantly perhaps, 50,000 is the number of lives that OIC could place with another TPA provider, if the conditions of Article 5.3 were satisfied, *not the number of lives that OIC's customers might refuse to be administered by GMG.* If, for example, OIC's customers refused that GMG administered 100,000 lives, the fact that OIC might be entitled to contract with other TPA providers in respect of those lives in order to retain 50,000 of those lives is irrelevant in relation to the fact that GMG will be administering 100,000 less lives. In other words, 50,000 appears to be no measure at all of the amount of business GMG might lose and instead is a measure of the maximum amount of such business which OIC could retain.

92. If there was evidence before the Court as to the extent of business GMG might lose, my conclusion may have been different. But inasmuch as there is not, I think that fact as well as the language of Article 5.3 and in particular its conditions and the fact that both GMG and OIC were incentivised for customers to place their business with GMG all encourage a conclusion that no exclusion of lives should be made.

Non-OIC

93. Consistent with my earlier findings, for the alleged Non-OIC Losses to be compensable, they must have been certain to occur in the sense that they were inevitable rather than mere potential losses. While I am inclined to think, without deciding, that it is more likely than not that GMG could have built non-OIC business on the back of its OIC business to a significant extent, in my view the evidence before the Court does not support a stronger conclusion than that in relation to the whole of the claim.

94. In his report, for example, Mr Youssef states that he considered it "likely" that GMG would have been successful in attracting non-OIC business ([23]). Slightly stronger language is used at [23(b)]. There, Mr Youssef states his opinion that, had the TPA Agreement continued, GMG *"would* have seen additional growth in its business." (emphasis added) It seems to me that the statement in [23] was made in reference to the forecast of GMG's overall market share-as indeed a cross-reference in [23] to [38], which deals with that topic, suggests-while the statement at [23(b)] conveys Mr Youssef's opinion that GMG would inevitably have acquired some of that non-OIC business.

95. On page 17 of the experts' joint report, in row 13 of the table, which deals with the issue of whether GMG would be able to attract business from other Tier 2 providers- although on my reading it seems Mr Youssef was in fact addressing the wider issue of whether GMG would have been able to attract additional business, irrespective of whether it was from Tier 2 providers or not-Mr Youssef's opinion is articulated as follows: ".Therefore it would have been inconceivable that GMGHS would not have acquired some share of the Non-OIC business, purely due to the fact of their position as the number three TPA in the UAE market." In my judgment, this assertion is equivalent to one that the Non-OIC business referred to (i.e. "some" of the whole amount claimed) would have been certain or inevitable.

96. I do not think that OIC's expert's evidence displaced Mr Youssef's evidence that some of the non-OIC business was inevitable. The closest contrary evidence was in the form of Mr Ali's view, as stated in his report, that it was "highly unlikely that insurers would be willing to switch to a TPA that had a majority or significant ownership of a competing insurer. This would leave the insurer exposed to data and other sensitive information being potentially accessible to the competing insurer with a share in the JV TPA." ([6.2.2.II]) But it was never made clear how a majority or significant owner might use its position to effect a data breach. A shareholders' resolution was not suggested but in any event seems altogether unlikely.

97. There were no examples provided of TPA providers in the UAE which are majority owned by an insurer, which is to say that there was no evidence that providers in that category would necessarily fail to secure additional business. There was, however, the example of the TPA provider NAS Neuron Health Services LLC which was 34% owned by the insurer Cigna International and which had acquired business from other insurers. GMG's leading councel, Tom Montagu-Smith KC put it to Mr Ali that Cigna's shareholding in Neuron constituted a "significant" shareholding (4/85/5). Mr Ali disagreed (4/85/22) and finally suggested that "something . approaching 50% or 40%" would be significant (4/87/1-2). It is not clear what the basis of those percentages was, particularly as Mr Ali had previously said when asked what a significant shareholding was that "It becomes significant in the eyes of the insurance company that's judging this matter" (4/86/5-6) i.e. it was subjective to the insurance company. In the final analysis, I think Mr Ali's evidence in the round supports and certainly does not detract from a proposition that there is no rule that insurers would be unwilling to switch to a TPA provider on the basis of its shareholding and at most any undesirable shareholding would be one amongst other factors to be considered by an insurer when contemplating using the TPA provider.

98. Returning to my conclusion that Mr Ali's evidence does not displace Mr Youssef's evidence that some of the non-OIC business was inevitable, in terms of Mr Ali's report, it is sufficient to cite the following relevant conclusion at [7.6.V]: "I therefore believe that the predictions for growth, market share and revenues for GMGHS business are vastly overstated and unrealistic." In my view, it is clear from this statement that Mr Ali's disagreement with Mr Youssef's predictions did not concern them in their entirety. Mr Ali's use of the term "overstated" implies the possibility of other predictions which would correctly state the position and his use of the term "unrealistic" implies the possibility of predictions which would be realistic. Then in the joint report, in row 10 of the table which deals with the likelihood of GMG successfully attracting *significant* additional business had the portfolio transfer from OIC taken place, Mr Ali goes no further than stating his view that he disagreed that GMG would most likely have succeeded in this regard. In other words, the possibility of GMG attracting nonsignificant additional business was left open.

99. In my view, Mr Ali's evidence focuses on the upper part Mr Youssef's predictions, that part of it which in Mr Ali's view is "overstated" and "unrealistic," while Mr Youssef's evidence is that at the lower part of those predictions there is a portion of business the failure of which was "inconceivable"; a position which Mr Ali's evidence leaves room for. Nor do I think any disturbance of that position emerged in oral evidence. Any ground made against Mr Youssef's evidence affected the upper part and nothing said by Mr Ali suggested there was not a core of Mr Youssef's prediction which was characterised by inevitability. I think Mr Youssef's evidence was convincing and indeed consistent with the intentions and incentives of the parties going into the TPA Agreement. In other words, I accept that the Non-OIC Losses were all more likely than not and, importantly, that some of those losses were inevitable.

100. In conclusion, I find that there is undisputed and convincing evidence that some of the non-OIC losses claimed would have been inevitable. I am, however, unable to isolate that part of the non-OIC losses claimed from the part which Mr Youssef does not opine is inevitable.

101. The word "some" is necessarily unspecific. I value GMG's inevitable Non-OIC Losses at 25% of GMG's total non-OIC claim for each year for the duration of the TPA Agreement. "Some" of something would usually be between 1% and 49% of it, 0% being "none" of the thing and 50% being "half." 25% is the midpoint between 1% and 49%.

Volume Rebates

102. This issue turns in part on the rates that would have been achieved in relation to the volume rebates. The other factors that determine GMG's volume rebate revenue, if any, are the contractual period, the inclusion or exclusion of the Bupa portfolio and the 50,000 lives and any revenue from non-OIC business, which have been decided already. In this section of the judgment, I will deal only with the volume rebate rates that would have been achieved. The question is whether GMG would have obtained better rebate rates than OIC in fact obtained in the relevant period.

103. GMG's case that it would have obtained better rates relies on the evidence of Mr Saliba. He says that GMG would have been able to achieve volume rebates with healthcare providers in the range of at least 2-3% after the first six months of operation of the TPA Agreement ([103]). This conclusion is based on three assertions. First, that TPA services providers have the ability to negotiate higher volume rebates with healthcare providers than their underlying TPA clients because they can leverage the high volume of claims generated by their larger portfolio of TPA clients ([95]). Second, that at the time the Agreement was being negotiated, OIC had not obtained the level of volume rebates with healthcare providers that it possibly could have and the parties' considered that GMGHS would be able to negotiate and agree more preferential and lucrative terms which would apply to the OIC portfolio ([97]). This was partly because GMGHS as a TPA took an aggressive approach to negotiating successful rebates from providers ([98]). Third, GMGHS had, at that time, already secured better volume rebates for its existing (i.e. non-OIC) portfolio notwithstanding that GMGHS portfolio comprised a significantly lower number of lives ([97]).

104. Mr Saliba's explanation in his witness statement on GMG's ability to secure better volume rebate rates did not take into account the fact that, while GMG had secured better volume rebates than OIC, OIC had secured better tariffs than GMG. The bottom line as between a healthcare provider and an insurer is the combination of the tariff, which is the amount paid by the insurer to the healthcare provider, and the volume rebate, which is the amount paid back by the healthcare provider to the insurer. In his report, Mr Burrows explained his understanding that tariffs and volume rebates are negotiated together and that lower tariffs likely result in lower volume rebates ([5.06.45(iii)]). While this was not put to Mr Saliba directly in cross-examination, he did have opportunity to meditate on the issue twice in his oral evidence. Mr Saliba explained that it was the parties' intention and plan that GMG combine GMG's better volume rebate rates with OIC's better tariffs (3/18/24-19/3 and 3/22/22-25).

105. In other words, the critical questions of whether GMG could negotiate better volume rebate rates, and if so to what extent, notwithstanding, and while maintaining, OIC's better tariffs, and if so how, went unaddressed in Mr Saliba's evidence. The issue was put to GMG's market expert, however:

> "Q. . If you had negotiated a particularly low tariff, say, with a provider, they would be less likely to give you a high volume rebate in addition, wouldn't they, because they would already be charging a fairly modest price?
>
> A. I mean, again, that is between the provider, the TPA and the insurer, so it all depends on how much negotiations and what ultimately transpires within those negotiations between the parties. Again, I can just throw in my commercial sense here is it all depends on how hungry the parties are in terms, you know, if the provider needs more business and they are already breaking even or making money, then they will go for lower, better rates and higher rebates, but again, theoretically speaking, your point of view is correct. (3/156/19-3/157/8)"

GMG's own evidence supports a conclusion that the starting position is that there is a positive correlation between tariffs and volume rebate rates i.e. as one increases or decreases so does the other, albeit that ultimately the figures will depend on factors including the need of healthcare providers for more business.

106. I do not think that GMG's evidence supports a conclusion that GMG would certainly or inevitably have obtained better rebate rates than OIC in fact obtained in the relevant period. GMG's revenue from volume rebates is, therefore, to be determined with reference to the rates in fact secured by OIC.

Interest

107. The experts disagree on the approach to be adopted to the timing of revenues i.e. whether administration fee income should be recognised on an entitlement basis or an accruals basis. The Experts agree that the only impact this has on the quantum of the claim is through the timing of when revenue is recognised and when the loss occurs which in turn has an impact on the calculation of interest.

108. GMG's expert, Mr Cottle, considers that the accounting basis adopted when preparing audited financial statements, the accruals basis, is irrelevant when putting an injured party in the same position it would have been in if the breach had not occurred. Mr Cottle considers that the inclusion of revenue on an entitlement basis more closely reflects the timing of cash flows that would have been received by GMG as OIC was contracted to pay GMGHS in quarterly instalments based on a forecast year-end number of lives with a "true up" adjustment shortly thereafter.

109. I agree with Mr Cottle. If GMG is to be compensated for being kept out of its money, in my view it is the time when GMG would have received that money, when it would have been able to invest that money or pay off some of any debts, that is relevant. As such, we are interested in when the money would have been or should have been paid, not when it was earned for the purposes of an accounting assessment. OIC's expert, Mr Burrows, agreed with that in principle (5/127/23).

110. Revenue is to be counted on the entitlement basis in relation to the interest calculation.

The Savings

Payroll and General Costs

111. I understand that if the experts assume the same contractual period, the transfer of the Bupa lives and no exclusion of 50,000 lives, they will arrive at the same figure for payroll and general costs. The experts are to calculate these costs taking into account my findings on these issues. To the extent there is any remaining difference between the parties on payroll and general costs or OIC's expert's evidence is silent on a matter, the calculation shall be based on GMG's evidence.

Rent

112. OIC's expert stated in his evidence that the majority of the difference between himself and GMG's expert stemmed from the number of lives (5/111/29). GMG's expert's calculation of rent is higher than OIC's expert's. This means that GMG's calculation of its costs is higher than OIC's and, in turn, GMG's loss of profits claim on the like-forlike basis is lower than OIC's in relation to this issue. I will adopt GMG's expert's approach on this issue.

Amortisation

113. On amortisation, the issue concerns two assets which were on the books of GMG, namely know-how and network (the "Network") on the one hand and a license (the "License") on the other. Notwithstanding that the costs for these assets occurred before the TPA Agreement was entered into, OIC's expert has taken the costs into account when calculating the costs of the business.

114. In 2017, that is, after the TPA Agreement was cancelled, the Network was transferred back to the parent company carrying a value of AED 6,911,734 and the License was written off. OIC infers that the transfer back of the Network was related to the cancellation of the TPA and that it could have been transferred sooner to mitigate loss. Therefore, OIC assumes savings in relation to Network from 2016 onwards. And in relation to the License, while OIC accepts that that expense was a sunk cost, inasmuch as some of the elements of the licence fee pertain to maintenance, upgrade and other services which appear not to have been availed as a result of the cancellation of the OIC portfolio, OIC assumes This a saving on the portion of services GMG was not able to benefit from in relation to their contract with OIC.

115. The issue comes down to whether GMG could and should have dealt with the Network and the License sooner and whether that would have resulted in some saving to GMG. In other words, the issue is about mitigation. In my view, the point needed to be pleaded and proved and it should have been put to the relevant factual witness. But none of this occurred. Moreover, there is no evidence that cash ever changed hands between GMG and its parent company in relation to the Network and the License, and GMG says that it did not. In conclusion, I do not think there is evidence to support a finding that GMG failed to mitigate losses in relation to these two assets.

Royalties

116. GMG had a pre-existing contractual obligation to pay royalties to its parent, GlobeMed, under a Franchising and Licensing Agreement dated 31 December 2013 (the "FLA"). This was recognised in Appendix 2 to the TPA Agreement. Under the FLA, royalties are payable by GMG at "8% of annual net revenues of [GMG] irrespective of the annual profits." The issue that needs to be decided is whether the royalty fee was avoided as a result of the termination of the contract, thereby being saved costs, or whether instead the royalties will fall to be paid on the damages awarded in this claim, such that no deduction of profits is appropriate. In other words, would a damages award amount to revenue for the purposes of the FLA?

117. Mr Montagu-Smith KC, arguing that it would, drew an analogy from the tax treatment of damages where, generally, if damages compensate for loss of income they are treated as income for tax purposes. Mr Rupert Reed dismissed this comparison. The FLA is governed by Lebanese law. The question, Mr Rupert Reed contended, is whether an award of damages in respect of lost profit falls within "annual net revenues" as a matter of Lebanese law. The Court could not answer this question as no Lebanese law evidence had been put by GMG. Mr Montagu-Smith KC's reply to this contention was that where there is no evidence of foreign law and no suggestion that the foreign law is different, an assumption arises that it is the same as DIFC law. It is for the party saying the law is different to demonstrate that.

118. In my view, guidance from the tax treatment of damages in England is only of partial assistance. According to my understanding, English law is primarily concerned with the nature of a payment rather than the payment's specific categorisation. So damages awarded in lieu of a taxable payment will generally be taxable notwithstanding that they are damages rather than the taxable payment itself. But in the present case, the question appears to me to be whether GMG's damages are "annual net revenues," not whether they are in the nature of such revenues. The Court has not been shown any rule, whether from Lebanese or DIFC law, which renders the nature of GMG's damages a relevant factor when determining

GMG's liability to pay royalties to its parent. There is a further question indeed as to whether damages for loss of future profits are in the same category as an award for payment of money already earned.

119. GMG's damages may of course be revenue, as GMG argues in the alternative, such that they directly fall within the FLA. I am not, however, certain that they are, whether as a matter of Lebanese law or DIFC law in its stead. As a result, I am unable to arrive at a conclusion that, if the royalties are treated as avoided, GMG will certainly be deprived of compensation or, put differently, that if the royalties are treated as payable and GMG's award is accordingly grossed up, that GMG will not thereby be compensated for uncertain losses. In other words, I do not think that the portion of GMG's losses corresponding to the amount it may be liable to pay to its parent in the form of royalties are certain. Accordingly, they shall be treated as savings.

51%

120. As explained above, the TPA Services were to be provided as part of a wider transaction by which Synergize, OIC's wholly owned subsidiary, would take 51% of any profit generated by GMG. OIC says that GMG would not have been in a position to begin providing services to OIC unless OIC was, through Synergize, a 51% shareholder in GMG. In other words, there was no realistic scenario, OIC says, where GMG would have generated profit from OIC but would not paid 51% of those profits back to OIC, through Synergize.

121. This case is premised on OIC's case that the Share Transfer was a suspensive condition of the TPA Agreement, which I have rejected, and more generally on principles relating to the assessment of damages. Regarding the latter, OIC says that insofar as the Court finds that there was profit which would have been earned by GMG, it is a necessary corollary of such a finding that GMG would in fact have kept only 49% of it. That is the position that GMG would have been in but for the alleged breach, and to award GMG any profit without such a reduction would be to leave GMG with a very significant windfall and an improvement of the position in which it would have been.

122. I accept that GMG will ultimately end up with a windfall unless a 51% reduction is applied to its award of damages. However, it does not necessarily follow that that should be prevented. There would have to be some basis, in my view, for depriving GMG of this windfall. It seems to me to be obvious that, had OIC gone ahead with performance of the TPA Agreement, Synergize would have exercised its right, under OIC's control, in respect of the Share Transfer. While I have found that the Share Transfer was not a suspensive condition of the TPA Agreement, this is in part because OIC's advantage in respect of the Share Transfer was so straightforward, via Synergize, that any intention that the TPA Agreement nevertheless depended on it for its effectiveness is, in my view, farfetched. But for the same reason, it seems to me to be equally unlikely, which is to say not even remotely likely, that had OIC gone ahead with the TPA Agreement it would have, via Synergize, effected the Share Transfer. That much is straightforward. The difficulty comes from elsewhere.

123. In a sense, the Share Transfer is one foot in the counterfactual and one foot out, so to speak. It is *in* insofar as it is one of the events which may or may not have occurred in the future had OIC opted to perform the TPA Agreement and which may or may not have had an impact on GMG's losses OIC having opted not to; matters which the Court is asked to determine. It is out of the counterfactual, however, inasmuch as Synergize in fact failed to effect the Share Transfer in reality. It does not help OIC's case, in my judgment, that OIC asks the Court to apply a reduction to GMG's losses which is based on a hypothetical event which is in fact inconsistent with reality, namely Synergize's failure to effect the Share Transfer.

124. Moreover, the claim is made by GMG for lost profits. This is not a claim by GMG's shareholders, from whom GMG is legally distinct. Furthermore, Synergize was party to the MOU, not OIC. This claim concerns GMG's losses. It is not clear on what basis the Court might take into account what GMG would have done with its money or any dividends that might have been paid out ultimately. The difficulty here is that it is inconceivable that OIC would have performed the TPA Agreement without the Share Transfer having taken place. However, Synergize did not avail itself of its right to the Share Transfer. Synergize would therefore clearly be unentitled to a 51% share in any business which GMG entered into after the cancellation of the TPA Agreement with another insurer. And by the same token Synergize would not be entitled to such a share in GMG's business with OIC. There seems to be no basis for OIC to take advantage of indirect rights to share in GMG's profits that Synergize, a third party, deliberately abandoned, without indeed any fault on the part of GMG, nor for reducing GMG's recovery because its shareholders might have changed. While the result is not untroubling, it flows, in my judgment, from TPA Agreement and the MOU and gives effect to their terms.

Costs

125. Inasmuch as OIC has been successful on several issues, I think it appropriate that it only pays GMG's costs in an amount proportionate to GMG's success. To this end, OIC shall pay GMG a percentage of its costs proportionate to the amount awarded to GMG out of GMG's total claim.

Conclusion

126. For the foregoing reasons, I make the following orders:

a) GMG is valid.

b) The TPA Agreement is valid.

c) The period over which the provision of services under the TPA Agreement would run if OIC lawfully terminated the agreement at the earliest time possible is three years including the notice period.

d) The OIC Losses are to be calculated on the basis that Bupa would have consented to its portfolio being administered by the Claimant and that 50,000 lives would not have been excluded from GMG's administration.

e) The Non-OIC Losses are assessed as being 25% of GMG's total claim for NonOIC Losses for each year for the duration of the TPA Agreement.

f) GMG's losses in relation to volume rebates are to be assessed on the basis that GMG would not have obtained better rebate rates than OIC in fact obtained in the relevant period.

g) In relation to the interest calculation, revenue is to be counted on the entitlement basis.

h) In relation to payroll and general costs, to the extent there is any difference between the parties or the OIC's expert's evidence is silent on a relevant matter, the calculation shall be based on GMG's evidence.

i) In relation to rent, GMG's expert's approach shall be adopted.

j) In relation to amortisation, the Network and the License shall be disregarded with respect to GMG's savings.

k) In relation to royalties, these shall be treated as savings.

l) No 51% reduction shall be made to GMG's damages to reflect Synergize's shareholding in GMG as contemplated in the MOU.

m) OIC shall pay a percentage of the GMG's total costs proportionate to the amount awarded to GMG out of GMG's total claim.