NEWSSTAND

Reinsurance in the Lloyd's Market: Governing Law and Jurisdiction

December 2010
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In *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 the Commercial Court ruled that the parties to a reinsurance contract placed at Lloyd's using a typical London market slip policy form had impliedly chosen English law as the governing law of the contract. As a result, England would be the proper place to hear a dispute under the contract as there was a distinct advantage in having issues of its construction decided by the Commercial Court.

Background
Ontario Municipal Insurance Exchange (OMEX) was a not-for-profit reciprocal insurance exchange owned and governed by Ontario municipalities.

Two of the insurance programs run by OMEX were reinsured under an excess of loss policy placed on the London market by a London broker, JLT Risk Solutions, with a Lloyd's underwriter, Stonebridge Underwriting Limited, on behalf of the members of Lloyd's Syndicate 990. The syndicate was managed by XL London Market Ltd (XL).

The Issues
The dispute arose when XL refused to pay claims made by OMEX under the policy. The parties disagreed on two issues:

- The proper construction of the policy's excess provisions. The parties contested whether the policy's annual aggregate deductible (AAD) must have been exhausted before any claim could be made.

- Whether OMEX had complied with a claims co-operation clause, which was worded as a condition precedent, requiring it to notify XL within 30 days of becoming aware of any loss which could give rise to a claim. XL contended that OMEX had breached the clause as it was significantly late in notifying XL in respect of several very large claims and had not provided notice of exhaustion of the AAD.

The policy was silent on the matters of governing law and the jurisdiction in which any disputes were to be resolved. As a result, OMEX issued proceedings before the Ontario Superior Court of Justice on 18 January 2010 for payment of the claims. In response, XL issued proceedings in London on 17 February 2010 for a declaration that it was not liable to pay the sums claimed.

The Application
Pursuant to CPR r.6.37(3), a court will not grant permission to serve a claim form out of jurisdiction unless the claimant can show that England is the *forum conveniens* (the proper place in which to bring the claim). OMEX made an application on 6 May 2010 for an order that service of XL's claim form in Ontario be set aside on the ground that England was not the proper place for the dispute between the parties. The application was heard before Mr Justice Clarke.

In his judgment Clarke J set out the factors that a court would take into account when determining the question of *forum conveniens*. These were the applicable law, the nature of the dispute, the location of the parties and any considerations as to costs.

Applicable Law
The parties agreed, albeit on different grounds, that the governing law of the contract under the Rome Convention was English law.

XL argued that Article 3(1) of the Rome Convention applied as it could be "*demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case*" that the parties had made an implied choice of English law. It emphasised that the policy incorporated a number of standard London market clauses and was placed in London by a London broker with a London underwriter.

OMEX argued that there was no implied choice of English law, but accepted that an English court would apply English law under Article 4(1) of the Rome Convention as the characteristic performer of the contract, the party providing an indemnity, was XL and XL was domiciled in England.

Clarke J agreed with XL's argument, ruling that there would be "*something surprising about a policy on a Lloyd's slip, broked through a Lloyd's broker with a Lloyd's underwriter on behalf of a Lloyd's syndicate, being governed by a law other than that of England*."

English Law, English Jurisdiction?
XL submitted that once the Commercial Court had accepted that the contract was governed by English law, it was of the utmost importance that the case was heard in England. There were two reasons for this.

First, there was a real risk that an Ontario court would apply Ontario law. Section 123 of the Insurance (Ontario) Act 1990 stated that where the policy was "*to be delivered or handed over to the insured ... in Ontario [it] shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof*."

The court heard how the application of Ontario law would have a significant impact on the case. Section 129 of the 1990 Act allowed an Ontario court to block avoidance for non-compliance with a condition if it regarded it as being just to do so. Under English law XL would be able to avoid the contract, and therefore not be liable to pay the claim, if it could show that OMEX had breached the claims co-operation clause. Therefore, one consequence of applying Ontario law might have been to prevent XL from relying on a defence open to it under English law.

Clarke J agreed that this carried a significant risk to XL which was not alleviated by the fact that it would have the opportunity to persuade an Ontario court not to exercise its powers under section 129.

The second reason advanced by XL was that the expertise of the Commercial Court would be required to interpret the relevant policy provisions in their context and with an appreciation of the manner in which this kind of reinsurance operated.

Clarke J agreed that there was a "*distinct advantage*" in having the issue of construction of this policy determined by the English Commercial Court which is the court *"(a) whose law applies (b) which has power to determine what are the relevant principles ... (c) which regularly applies them and (d) which has a particular degree of experience and expertise in reinsurance matters, particularly those concerning Lloyd's*."

He added that any evidence was likely to be located in London where the underwriters and placing brokers were located and where any expert as to London, and, in particular, Lloyd's, market practice was likely to be found. Moreover, any Canadian witnesses would be able to give their evidence by video-link in accordance with standard Commercial Court practice.

Ontario Arguments
Clarke J went on to dismiss a number of submissions by OMEX that Ontario was the proper forum for the dispute:

- The existence of the Ontario proceedings was not a reason for the Commercial Court to decline jurisdiction. While the Ontario proceedings were indeed commenced first in time, the proceedings in England were at a more developed stage.

- The possibility of a third party claim by OMEX against its Canadian broker was not a ground for declining jurisdiction as OMEX would be able to join the broker to the English proceedings.

- There was nothing sufficiently special in the circumstance that the reassured was a Canadian mutual to mandate Canadian jurisdiction as a great deal of London reinsurance was of an international nature.

Commentary

The decision provides an insight into the approach that the Commercial Court will adopt when determining the governing law and jurisdiction of a reinsurance contract which is silent on these points.

It confirms that the parties to a reinsurance contract placed at Lloyd's are likely to be regarded as having made an implied choice of English law. This implied choice will then be significant in determining whether the Commercial Court in England is the proper place for any dispute to be heard. Clearly, the parties to a contract should not, however, rely on this approach being taken by the Courts. The preferable course is for the parties to make their choice of law and the relevant jurisdiction explicit in the contract.