

## INSURANCE UPDATE

### Contract Certainty, Anti-Suit injunctions and Forum Shopping; the impact of EU law

#### Context

In this Bulletin I shall focus mainly on jurisdictional difficulties where a policy of insurance contains an English jurisdiction clause and where an opponent has commenced or threatens to commence proceedings in another EU Court, in breach of that jurisdiction provision.

At the end I will touch on the situation where an opponent has commenced or threatens to commence proceedings in another EU Court in breach of a London Arbitration Clause.

I will not be dealing with threatened or competing proceedings commenced in a non-EU Court, whether in breach of a jurisdiction clause or a London Arbitration Clause; nor will I consider those policies which contain no provisions for dispute resolution.

#### Contract Certainty

Contract Certainty is intended to eliminate the “*deal now, terms later*” culture in the insurance market. In some categories of business policies of insurance and reinsurance have for many years been written in London on the basis that the risk will be bound now and the precise terms negotiated later. This is both a great strength and an enormous weakness. A risk or a complex package of risks could by this means be bound extremely quickly (“*wording to be agreed Leading Underwriter*”). But whilst both parties (or at least the broker and the underwriter, or perhaps one of the underwriters) might have a clear view of what they **intended** in respect of terms when the deal was struck, the path to hell is paved with good intentions. Nothing is worse than a loss and then a coverage dispute arising when the wording has reached no more than the first travelling draft. To take the analogy to extreme, there are parallels to domestic building contracts, written in half a page of manuscript by the builder. It can all end in tears, or at the very least a costly legal battle with more than average uncertainty of outcome.

Winning battles is not just about the rules of engagement, but where you fight. The Contract Certainty initiative is designed to attempt to deal with both. But will it be effective and what other steps could or perhaps should be taken?

So let’s assume the policy is to be a slip policy, cover being made up of several sets of standard terms and endorsements, some London Standard Wordings but some again “manuscript” or “purpose built” (which may be favoured underwriters or brokers clauses). The bigger and more complex the package, the larger the number of wordings and clauses assembled to evidence cover. Let’s assume they are all appended to the slip when each underwriter signs for his line. That should satisfy the requirements of Contract Certainty and should diminish uncertainty, should it not? Well yes, in part. It might go a long way to reducing uncertainty about which terms the contract should **contain**, but difficulties will remain about how they will fit together. It will not, first, eliminate the confusion caused by contradictory provisions contained in standard clauses, standard endorsements and further clauses or endorsements “added on”. Consequential amendments may be needed in order that the contract of insurance should be a coherent whole.

But, even if those consequential amendments are made problems will not end there. This will not eliminate any differences that might exist between what the insured and the insurers (and perhaps the brokers, if they find themselves caught in the middle) think the terms **mean**. (It is appreciated that Contract Certainty is not intended to attempt to resolve this difficulty). Hence the importance of ensuring, and this is a Contract Certainty requirement, that the policy documentation evidencing cover includes both an express choice of law and jurisdiction in which any dispute might be heard (see Contract Certainty Checklist, Contract Certainty Attributes point 2, V1.1. 10/10/05).

Here there is a distinction to be made between insurance and reinsurance. In reinsurance policies it is often the case that disputes are to be referred to arbitration. In insurance policies disputes are often to be referred to the jurisdiction of the English High Court of Justice in London. For example, the MAR 91 Form contains an exclusive English jurisdiction clause.

So let’s assume (in a hypothetical example) that English law is thought in a particular case to best reflect the bargain that

the parties have struck. English law has a system of binding precedent. Over a substantial period of time a large body of common law has been created in a catalogue of reported cases, so that at least there is extensive guidance as to what particular clauses might mean in particular circumstances of loss. (Although of course there is rarely absolute certainty of meaning and a guarantee of result. And litigation is not a discipline of perfection, there are almost always surprises).

## European Law

This brings me to forum shopping and the impact of European law. When the contract was made, and long before any dispute had arisen, the parties chose to refer any dispute to the exclusive jurisdiction of the English Court, for the reasons given above. Does this then guarantee that that dispute will be decided by an English Court? No it does not.

Matters of jurisdiction and recognition/enforcement of judgements as between the Member States of the European Union are regulated variously by the Brussels Convention of 1968 (as amended), and European Regulation (EC) 44/2001. These make substantially similar but not identical provision on the points which arise here. The intention was to create a set of simple mechanistic rules to reduce if not eliminate jurisdictional battles. Broadly the Convention and Regulation guarantee the validity and enforceability of choice of jurisdiction clauses (Brussels Convention Article 17, Regulation Article 23); so far so good. But where there is competition between two sets of proceedings brought in respect of the same cause or matter between the same parties, any action in the court "second seized" (i.e. second in time) **must** be stayed, while the court "first seized" decides whether it has jurisdiction. And if that court decides that it **does** have jurisdiction, the matter must be resolved on the merits there and the Court "second seized" must decline to hear the matter. Further, where the Regulation applies, when that court reaches a decision that judgment can be readily enforced elsewhere in the EU under Article 34.

So which provision has primacy:-

1. Article 17/23 (which protects choice of jurisdiction)? or
2. Article 21/27 (which effectively protects proceedings where the action is first started; court "first seized")?

The European Court of Justice has decided in Gasser v MISAT [2003] AER 148 that Article 21/27 *trumps* Article 17/23. So, if an action is started in Court X in breach

of a jurisdiction agreement to sue only in Court Y, no action can be started or proceed in Court Y unless and until Court X declines jurisdiction (if it does), even if delays in Court X might be egregious.

To take a concrete example, if an action is started in say Poland in breach of an English jurisdiction clause, before any action is started in England, the Polish proceedings must be allowed to run their course before any action could be brought in England between the same parties on the same matter.

## What are Anti-Suit Injunctions?

Anti-Suit Injunctions are a key tool in the armoury of a litigant. Anti-Suit or restraining injunctions have been granted by the English Courts for approximately 170 years. The modern jurisdiction is conferred on the English Courts by section 37 of the Supreme Court Act 1981. An Anti-Suit Injunction can restrain a party from either commencing or pursuing proceedings in a foreign Court.

Anti-Suit Injunctions are a discretionary remedy. They are not directed at or effective against a foreign Court but rather against individuals or companies. They take effect **in personam**. But in reality, if a party can be effectively restrained from commencing or pursuing an action in the foreign Court by an injunction issued by the English Court, can it be said that the English Court is effectively purporting to police the exercise of jurisdiction by that Court? In any event, I believe they were never welcomed by the Courts of Member States of the European Union (nor perhaps elsewhere).

What are the consequences of breach of an Anti-Suit Injunction? In other words what if the defendant, notwithstanding the granting of that order, decides to commence or pursue an action abroad? This would certainly amount to a contempt of the English Court and the consequences of contempt may be that the non-compliant party could be arrested or alternatively fined. But if that party is domiciled abroad, never comes within the physical jurisdiction of the English Court and has no cash or assets here (and never will) could it be said that the consequences of breach are illusory?

In any event, despite the ruling of the European Court in Gasser it had been thought that the English High Court of Justice could continue to issue restraining orders (Anti-Suit Injunctions) to prevent the "offending" party from continuing to pursue his action in Court X in breach of his previous agreement to sue in Court Y. But, it is now equally clear from the later ECJ decision in Turner v Grovit [2004] AER485 that such injunctions are no longer available. It is said that for the English Courts to continue to grant such injunctions would be "*contrary to the spirit and intention of*

*the Brussels Convention*” (although perhaps not its express terms). The European Court considers that such an injunction would run counter to the principle of “*mutual trust*” in the legal and judicial systems of other Member States which underpins the whole fabric of the Convention (and therefore the successor Regulation).

Moreover, the European Court was at pains to point out in **Turner** that it would be **irrelevant**, whether the opponent, who had commenced proceedings in breach of the jurisdiction clause, was acting in bad faith, expressly for the purpose of frustrating any legitimate proceedings commenced pursuant to the jurisdiction clause.

### Implications of Gasser & Turner

To recap, the Court “second seized” **must** stay its proceedings and await the outcome of the proceedings of the Court “first seized”, even if the delay is egregious. And no anti-suit injunction can be granted by the English Court to restrain proceedings already commenced in the first Court, even if the competing proceedings were brought abroad in bad faith, deliberately to frustrate legitimate proceedings.

Obviously, these two decisions create a risk of tactical litigation.

First, there is the hazard that the Court “first seized” may be persuaded to accept jurisdiction in the first instance (by fair means or foul – see further below).

Secondly, the “offended” party might have considerable difficulty challenging the jurisdiction of the Court “first seized”. Some legal systems may link substantive proceedings and jurisdictional challenges. In these circumstances it could be exceptionally difficult to do no more in the local Court than preserve objections to jurisdiction. It may be a very fine matter to try to balance too little involvement in the local proceedings with the risk of a default judgment on the one hand and an unintended submission to the jurisdiction on the other hand.

Thirdly, the necessity of challenging jurisdiction in a Court “first seized” might lead to inordinate delay and injustice in itself. Certain jurisdictions are said by commentators to be notorious for delay.

Fourthly, on any view there will be duplicate expenses in seeking to resolve such jurisdictional disputes.

Finally, notwithstanding the fact that all Member States (with the exception of Denmark which remains bound by the Brussels Convention) are bound by Regulation 44/2001 and therefore **should** in the last analysis give effect to a choice

of jurisdiction clause, there is no certainty. There is the risk of what one might call “home advantage”, the risk of anomalous results. For example, a jurisdiction agreement might be found by the Court “first seized” to be non-existent, ineffective, or not binding for reasons which on an English legal analysis might be considered invalid. And the Court reaching that finding on jurisdiction might then go on to hear the case on the merits and reach an anomalous final result.

These factors can have a serious impact on the dynamics of commercial litigation and, therefore, on the settlement of disputes.

In all this, the work of the European Commission gives pause for thought. Prior to the accession of the ten new Member States the European Commission issued a Monitoring Report on the legal and judicial systems of each Accession State (but not on the original Member States). These reports need to be read in full for their findings and conclusions. Certain are very critical of delay. In respect of some states it is said that the legal and judicial systems lack the confidence of their own public/citizens. And worse in respect of certain states the Monitoring Reports express grounds for concern about judicial corruption. All this makes grim reading if the action is started first in such a state and the defending party had hoped to rely upon an English jurisdiction clause, but finds itself having to fight out a jurisdictional battle in the manner I have described.

### What can be done?

Against this background, a party (for example a London Underwriter) who fears commencement of proceedings in a dispute in breach of an English jurisdiction clause may well be advised to launch a pre-emptive attack by way of application for negative declaratory relief. This would necessitate vigorous early investigation of claims, and an early decision about commencing proceedings. In this way the “natural” defendant becomes the plaintiff. This should effectively prevent the opponent from commencing or continuing proceedings in the Court of another Member State. The negative declaratory relief proceedings would be commenced in the Court “first seized”. Proceedings in any other Member State would be treated as an action in a Court “second seized” and according to **Gasser** and Articles 21/24 of the Convention and Regulation, **must** be stayed.

Alternatively, perhaps those who would wish to have their disputes heard in England and Wales should consider putting arbitration clauses rather than jurisdictional clauses into their contracts (including policies of insurance). What difference would it make?

The key difference between jurisdiction clauses and arbitration clauses is that arbitration is excluded from the operation of the Brussels Convention and the Regulation

(Article 1 (4) of the Brussels Convention and Article 1 (2)(d) of the Regulation). In these circumstances, at least for the present, there is no requirement for the Court “second seized” to stay its process pending the outcome of proceedings commenced in a foreign court in breach of an arbitration clause. Further, it would appear that an anti-suit injunction can still be granted by the English Courts in London to restrain proceedings commenced in another Member State in breach of a London Arbitration Agreement (Through Transport v New India [2005 1 Lloyd’s Rep 67, the “FRONT COMOR” [2005] EWHC 454).

Whether arbitration proceedings are a suitable substitute for Court proceedings is a separate matter, beyond the scope of this Bulletin.

## Conclusions

To minimise the scope for misunderstanding and for dispute, care should be taken in drafting and finalising terms of insurance policies and it is wise to include a dispute resolution clause. The Contract Certainty initiative has been instigated for these purposes.

However, the mere inclusion of an English jurisdiction clause is no guarantee that any dispute will ultimately be decided by the English Courts, at least where competing proceedings are commenced in another EU Member State.

To maximise the prospect of resolving disputes in the forum of choice, underwriters should be alive to the need to take pre-emptive action and plan their case handling accordingly; alternatively perhaps they should consider including arbitration clauses in their policies.

**The contents of this Bulletin are not intended to be a substitute for specific legal advice on individual matters. If you wish to discuss any issues raised in this Bulletin or for further information please contact:**

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