

## re:insurance

# Corporate governance for financial institutions – The Basel way

John Barlow examines the latest addition to the corporate governance landscape.

Financial institutions are subject to considerable corporate governance legislation e.g. the Companies Act 2006 and the Financial Services and Markets Act 2000 (and the derived legislation produced by the FSA).

However, the Basel Committee on Bank Supervision resolved in light of the credit crunch, to publish their own principles for enhancing corporate governance (October 2010). The Committee's commentary is not intended to establish a new regulatory framework, but is obviously intended to provide guidelines (and has been followed in many financial jurisdictions<sup>1</sup>).

The committee initially reviewed the question of corporate governance in

2006, drawing upon the principles enunciated by the Organisation for Economic Cooperation and Development (OECD), published in 2004. The OECD defined corporate governance as:

*'A set of relationships between a company's management, its board, its shareholders, and other stakeholders. Corporate governance also provides a structure through which the objectives of the company are set, and the means of obtaining these objectives and monitoring performance are determined.'*

Subsequent to the publication of the committee's principles, a number of corporate governance failures came to light which involved, for

example, *'insufficient board oversight of senior management, inadequate risk management and unduly complex or opaque bank organisational structures and activities'*. It was against this background that the committee revisited enhanced and republished its principles in October 2010.



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## Welcome

Welcome to the summer 2011 edition of re:insurance.

In this issue we look at the continuing development of corporate governance which serves to overlay the considerable corporate responsibilities affecting directors and officers. Whilst the developments may not affect directors immediately, they will undoubtedly serve as benchmarks by which directors will be judged.

Meanwhile, Patrick Hann considers the complex area of exclusions under French law which can serve to trap the unwary and the issues surrounding forum shopping in insurance and reinsurance disputes.

Finally, Rhys Clift has produced a booklet (in English and French (further languages will be available in due course)) which explores the mechanics, advantages and the future of mediation in England and Wales. The booklet contains a forward by Sir Henry Brooke, Chairman of the Civil Mediation Council (“... this excellent short book .....”). The hyperlinks to the booklets are set out below. Hard copies are available on request.

### Mediation in England and Wales

### Modes Alternatifs de Résolution des Conflits en Angleterre

We would invite readers to contact us with any queries on the issues discussed within the newsletter, suggestions for future article topics or with any specific questions on insurance/reinsurance matters.

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Partner

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The new guidance sets out 14 principles, intended to form the bare minimum in terms of governance applicable to the boards of banks and supervisors (the committee acknowledged that in certain jurisdictions the requirements placed on boards/senior management would be more stringent).

The board's overall responsibilities are set out in principle 1, which provides that the board has responsibility for *'approving and overseeing the implementation of the bank's strategic objectives, risk strategy, corporate governance and corporate values. The board is also responsible for providing oversight of senior management'*. It is from this first principle that many of the other principles are derived; thus, in addition to approving the overall strategy of the financial institution, the board must give thought to risk tolerance/appetite, risk management, compliance, internal control systems, the corporate governance framework and compensation. Internal structures are required to provide the necessary information to the board, in order that the board can make informed decisions and to delegate effectively to senior management. For example, where oversight of senior management is concerned, the board is required to:

- monitor senior management's actions to ensure that they are consistent with the strategy and policies approved by the board; and
- meet regularly with senior management and question and critically review explanations.

The board is required to ensure that senior management is suitably staffed and resourced (particularly with regard to risk management), to ensure that the necessary control functions can be exercised and that there are suitable lines of communication between senior management and the board (senior management should feel free to bring to the attention of board members areas of concern).

One of the key areas where banks have suffered significant losses is the mismatch in authority between, for example, the trading platform (or the front office) and the back office (which is often supported by the risk management/treasury function). Many losses have occurred in financial

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institutions because of back office authority being insufficient to overrule what appear to be the profitable activities of traders.

In this regard, principle 6 requires banks to have an effective internal control system, and a risk management function with sufficient *'authority, stature, independence, resources and access to the board'*. It is suggested that the chief risk officer (CRO) should be distinct from the other executive functions (i.e. he should not be a COO or CFO), and whilst reporting lines can be flexible, the question of his independence should be without doubt. In order to achieve this level of independence, a CRO would not be expected to have any financial responsibility in connection with, for example, revenue generating functions. It is clear, in the eyes of the committee, that the role of the CRO is particularly important given the seeming lack of weight given to the warnings of CROs before and during the credit crunch. It is further suggested that if CROs are removed or resign, the reasons for their removal/resignation should be published.

In larger organisations, the committee expects a risk committee to be established, the purpose of which is to:

- advise the board on the overall current and future risk tolerance/appetite and strategy; and
- formulate the strategy for capital and liquidity management, as well as for credit, market, operational, compliance, reputation and other risks.

The risk management function is broadly drawn, and requires processes for identifying, monitoring and controlling risk exposures (which should encompass all on and off balance sheet exposures). As with the CRO, the risk management function should have sufficient stature so that any issues that are raised receive the necessary attention from the board/senior management. The committee did note that whilst the risk management function was central to banks' activities, ultimate responsibility rested with the board.

As one might expect, risk management requires a quantitative, as well as qualitative, analysis and clearly certain banking activities attract greater risk

(for example mergers and acquisitions; trading) than others (retail banking). It is perhaps interesting to note that, whilst the engagement of a risk management function is important, the emphasis remains with the board; for example, whilst the committee notes that banks may make use of certain information from internal and/or external providers in order to identify and assess risk, it is the board which should give special attention to the quality of the information. In addition, in relying on historic information, banks should be able to *'stress test'* the information and adopt a forward-looking approach to risk management (as well as *'back testing'* the information), for the purpose of identifying new or emerging risks.

Whilst the committee acknowledged the usefulness of obtaining information from third parties (i.e. external credit ratings), there can be no effective substitute for the bank assessing its own unique risks (which will depend on the nature of its activities, the geographical areas in which it operates etc) as well as testing its own risk profile against external models and, if necessary, recalibrating that risk profile. The committee noted that the risk management function should be capable of directing the reduction in risks (i.e. credit risks) or hedging to limit exposure. Further, the function should also have input in relation to new products. Other functions within a bank can play their part in controlling risk, i.e. a bank's treasury/financial function can promote bank-wide risk management through internal pricing of risk - a business unit's internal cost of funds should reflect the risk of its activities to the bank.

Finally, as part of the risk management function, principle 9 states that the *'board and senior management should effectively utilise the work conducted by internal audit functions, external auditors and internal control functions'*. The committee has advised that it is incumbent upon the board and senior management to ensure that the internal audit function is sufficiently independent; requiring the timely correction of identified internal audit issues and encouraging internal audit to back up the risk management function. It goes without saying that some of the aspects of internal controls (or lack thereof) identified by the

committee have, over the years, been indicators of significant operational risks/losses within financial institutions; i.e. failure to comply with local laws, lack of effective segregation between front and back offices and the failure to question *'star employees'* who generate significant revenues out of line with reasonable expectations. As noted, whilst the committee's recommendations do not have the force of law, much of what is recommended is either (a) obvious; (b) covered by UK legislation; or (c) exists within the realms of directors' and officers' responsibilities. It is perhaps the latter, where responsibilities are not fully articulated (and we only need to consider the vagaries of section 172<sup>2</sup> of the Companies Act 2006), where the traps for directors may lie.

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<sup>1</sup>For example, the role of Approved Persons performing Controlled Functions under FSA Handbook requirements.

<sup>2</sup>(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.





# Policy exclusions under French insurance law

By Patrick Hann

**In his second article on French insurance law, Patrick Hann explores the complex area of exclusions which can serve to trip up unsuspecting insurers. This exposition is by no means exhaustive, but will serve to identify the more frequent pitfalls.**

## The insurer's obligation to explain the policy terms

Article L112-2 of the French Insurance Code obliges the insurer to provide an information sheet before the policy is entered into, which should accompany a draft policy wording. The information sheet must describe precisely the scope of the cover, including exclusions and the insured's obligations.

A Cour de Cassation decision of 17 July 2001 emphasises the necessity for clarity and precision in the information sheet, and this obligation is illustrated by a further 2004 Cour de Cassation decision. The policyholder of a health policy approached his insurer to broaden the cover, and a new policy was substituted for the old. When the insured subsequently sought to claim under the new policy, the claim was refused on the grounds that the illness had arisen during the first six months of the new policy, and was expressly excluded. The court held that in order to appreciate the existence of the exclusion, the insured would have had to study both the general conditions and the exclusion clauses which were separated by some eight pages in the policy. In the circumstances, (and given the characterisation of such a clause) it was incumbent on the insurer to draw the insured's specific attention to the existence of the exclusion, which the insurer had failed to do. Thus, the exclusion was inapplicable.

## Exclusion clause or policy condition?

The importance of distinguishing between a policy condition (sometimes, in English terms, a warranty) and an exclusion, lies in the burden of proof that results. Article 1315(1) of the Code Civil states that it is for the insured to prove that the circumstances of its claim fall within the policy conditions. Article 1315(2) provides that it is for the insurer to establish that an exclusion applies (the same burden of proof as under English law).

This distinction was addressed by the Cour de Cassation in November 2007<sup>1</sup>, when the court considered a requirement that an insured vehicle be kept in secure premises. The court regarded such a requirement as constituting a condition precedent, such that the cover would only take effect when the condition was complied with (and the burden to ensure compliance fell on the insured). The Cour de Cassation refused to find that such a provision should be regarded as an exclusion, and found in favour of insurers.

Further examples of condition precedents are:

- A clause providing that cover for machine breakdown will only commence if the insured enters into a maintenance contract for the equipment.
- Fire cover for business premises, expressly made subject to the insured arranging for regular inspections of the electrical installation.

Insurers are free to include clauses of this nature in their policy wording, but they must be clear and precise.

## Indirect exclusions

An exclusion may be direct or indirect. However, with an eye on the resulting burden of proof, the courts sometimes characterise certain terms as 'indirect exclusions'. It is direct where the policy wording expressly identifies all matters excluded from cover. It is indirect where the wording expressly identifies the cover, in which case it is to be implied that all other risks are excluded. By way of example:

- If premises are stated to be insured when they are guarded, there is an implied exclusion that they are not insured when not guarded.
- Where the cover relates to works undertaken by the insured, this may be regarded as an indirect exclusion of any works which are sub-contracted by the insured.
- An insurance of contractual liability may only be regarded as an indirect exclusion of liability in tort.
- Where a policy wording requires the insured to undertake to keep equipment in full working order and condition, a provision which states that no claim will be accepted if the insured fails to comply with the requirement to maintain the equipment is regarded as an exclusion<sup>2</sup> and, therefore, the burden falls on the insurer to establish its applicability.

As illustrated, the requirement for clarity and certainty applies whether the exclusion is direct or indirect.

However, the Cour de Cassation approved<sup>3</sup> an 'exclusion' in a contractor's liability policy of the cost of replacing or repairing the property or the works supplied or effected, as well as the consequential losses arising out

of the insured's failure to perform his contractual obligations. On this occasion, the court characterised the provision as defining the scope of cover (i.e. an indirect exclusion) and not as an exclusion clause.

## The necessity for exclusions to be clearly defined and precise

Article L113-1 of the Insurance Code provides that an exclusion must be *'formelle et limitée'*.

The significance of this requirement of clarity in the policy can be seen from a Cour de Cassation decision<sup>4</sup>, which states that an exclusion cannot comply with this requirement if an interpretation of the clause by the court is necessary. The mere fact that the clause has to be construed prevents it from being clear and precise, as required by the Insurance Code.

General exclusion of any language is unacceptable. For example, a clause which requires the installation of security devices which are to be approved by the insurer, without setting out the nature of the protection required or the means by which the insurer's approval must be obtained, fails to comply with the requirement for precision under article L113.

## An exclusion of risk must be of limited effect

An exclusion must not defeat the object of the policy, i.e. it must not permit the insurer to take back surreptitiously with one hand the cover which has been openly provided with the other hand. Accordingly, French jurisprudence is very wary of clauses designed to limit the scope of cover.

In 2009, the Cour de Cassation struck out as being too broad an exclusion clause in a health policy where the insured suffered from depression and the exclusion clause excluded 'mental problems'.

However, an exclusion was upheld by the Cour de Cassation<sup>5</sup> in the context of a multi-risk policy in favour of a garage. The case concerned the extent of third party liability cover following an error made by the garage when repairing a vehicle. The Cour de Cassation upheld the exclusion of costs arising from the replacement, repair, refund or

consequential loss. The Court of Appeal below held that this clause was too wide, as it effectively deprived the insured of the benefit of the cover – the Cour de Cassation held that the wording was acceptable as it left the garage with cover for third party bodily injury.

## Article L113-11 of the French Insurance Code - prohibited exclusions

This article invalidates all general exclusions of liability by reason of the insured's failure to comply with laws and regulations other than those constituting criminal offences.

Sub-section 2 of the article invalidates clauses which exclude liability by reason of delay on the part of the insured in notifying losses to the authorities, without prejudice to the insurer's rights to claim compensation for loss suffered by the insurer attributable to that delay.

In the context of professional indemnity cover, the Cour de Cassation held that, where the business of the insured consisted of undertaking soil studies, an exclusion of indemnity for losses caused to construction works undertaken in reliance on the soil studies was null and void.

Other examples of exclusion clauses that have been struck out by the court include: an exclusion where works undertaken by the insured did not comply with specifications, nor with regulations in force<sup>6</sup> and an exclusion relating to the use of non-traditional materials, which contravened regulations in force<sup>7</sup>.

## Exclusions expressly permitted by statute

1. War risks
2. Losses resulting from the deliberate intention to cause loss on the part of the insured

Article L121-8 of the Insurance Code provides that the insurer will not be liable for loss resulting from a foreign war, civil war, riot or 'mass movements', unless otherwise agreed. However, in 1983, the authorities required insurers to extend their fire and property covers to losses caused by fire or explosion attributable to riots, terrorist activity and sabotage; this concerns direct physical loss only, and not loss of profit

or personal injury. The law of 9 September 1986 provides that property covers cannot exclude liability for damage attributable to terrorism taking place on French soil.

Further examples of other exclusions that have been upheld by the French court include:

- A provision excluding liability for non-compliance with specific (as opposed to general) professional standards as identified in official technical documentation<sup>8</sup>.
- In relation to third party/product liability risks: the exclusion of losses attributable to a defect in the goods supplied, losses suffered by the goods supplied or the costs of repairs or of ensuring that the goods comply with regulatory norms or specifications.

## Exclusion clauses must be clearly visible (article L112-4 of the Insurance Code)

By virtue of article 112-4 of the Insurance Code, policy provisions that deal with exclusions and circumstances in which an indemnity will be refused must be printed in such a way as to be clearly apparent.

In practice, this requirement means that exclusion clauses must be highlighted in bold, block capitals or in a different colour.

## Effect of exclusion

The successful exclusion denies the right of the insured to an indemnity in respect of the particular claim only.

## Concluding comments

Certain French legal commentators consider the jurisprudence in this area to be inconsistent, in particular because of the conflicting manner in which the Cour de Cassation has chosen to characterise provisions in different cases. However, two themes operate throughout: the need for visibility of the provisions defining the risk and scope of cover, and most importantly, the need for clarity in these provisions. Any ambiguity is likely to result in the offending clauses simply being struck out or disregarded.

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# The English hypermarket

## Forum shopping in insurance and reinsurance disputes

By Patrick Hann



### Stonebridge Underwriting Ltd -v- Ontario Municipal Insurance Exchange [2010] EWHC 2279

Recent decisions involving contracts of reinsurance have emphasised the importance of applicable law and jurisdiction clauses – particularly given differing outcomes in certain jurisdictions.

The reassured, Ontario Municipal Insurance Exchange (OMEX), applied to the English court to set aside service of a claim made by reinsurers for negative declarations on the ground that England was not the proper forum for the dispute.

OMEX is a Canadian reciprocal insurance exchange, providing primary insurance cover to a number of municipalities in Ontario. OMEX ran two separate risk pools, one of which was administered by Jardine Lloyd Thompson Canada. JLT Canada arranged for reinsurance cover on the London market for both programs. The reinsurance was placed by JLT Risk Solutions Ltd (JLT London) in various layers.

Stonebridge, a Lloyd's underwriter, declined to pay claims made by OMEX under an excess liability reinsurance slip policy. The policy was on a typical London market slip policy form which provided:

*'Interest: To indemnify the reinsured in respect of liability which arises out of or in connection with the original insured's activities and/or as original policy.*

*Conditions: 1) To follow the full wording, terms, clauses, conditions, exceptions and settlements of the original policy... as far as applicable hereto'*

and which incorporated a number of standard London market terms.

There was a dispute as to the proper construction of the excess provisions in the reinsurance contract, and reinsurers also asserted that there had been a breach of the claims co-operation clause.

OMEX issued proceedings before the Ontario Superior Court of Justice, claiming damages. Its statement of claim asserted that the reinsurance contract was governed by Ontario law.

The English proceedings were issued simultaneously. Permission to serve out of the jurisdiction was sought, on the basis that the reinsurance contract was made in England through an agent trading in England (JLT London) and was governed by English law.

The court (applying the usual considerations) held that in identifying the appropriate forum it would take into account:

- (a) the place where the dispute had the most real and substantial connection;
- (b) the nature of the dispute and the law by reference to which the dispute was to be determined;
- (c) the location of the parties and of the likely witnesses and their availability; and
- (d) considerations of costs, convenience and expense.

The court considered Gan -v- Tai Ping, where the Court of Appeal held that since issues relating to avoidance and to the claims co-operation clause fell to be determined according to English law and "there is a strong case for saying that England is the natural and appropriate forum in which to resolve these issues". This was particularly so in the case of a claims co-operation clause, which is a standard London reinsurance market clause designed to protect the position of London market reinsurers and which, in particular, "utilises the English law concept of a condition precedent".

In Tryg Baltica -v- Boston Cia de Seguros, the court held:

*"Where points of construction of English law are involved, particularly those which involve reinsurance with conditions precedent, "full reinsurance" clauses and "follow the settlements" clauses, the natural expectation of the parties must be for the English courts to resolve such matters."*

In Dornoch -v- Mauritius Union Assurance the court considered the fact that English law may be the proper law of the contract as being "of very great importance". The court relied in particular on the facts that the competing forum, Mauritius, took a different approach to deciding the proper law of the reinsurance contract; that it would not apply the Rome Convention, and that it was likely to apply the law of Mauritius which would be "significantly different", being based on French case law.

The reinsurance contract in the Stonebridge case contained no express choice of law.

Under the Rome Convention, English law was likely to be the appropriate law. The Rome Convention provides:

*“Article 3**Freedom of choice*

*1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.*

*Article 4**Applicable law in the absence of choice*

*1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.*

*2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration...*

Reinsurers argued that the parties had impliedly chosen English law because:

(a) although the parties had not employed a standard form of Lloyd's policy, but a brokers' slip policy, the reinsurance contract incorporated a number of standard London market clauses such as the claims cooperation clause, the limit of indemnity clause, and the 'as original' wording;

(b) the policy was placed in London by London brokers with a London reinsurer and it was scratched and stamped in London in accordance with London market practice;

(c) the fact that the underlying policy may be governed by some other law does not prevent the Reinsurance Contract from being governed by English law. For example, in the Gan -v- Tai Ping case, there was an express choice of Taiwanese law in the

underlying policy, but this did not prevent the court from applying English law to the reinsurance.

OMEX submitted that to place a risk on the London market and/or to refer to standard London market wordings did not inevitably lead to the conclusion that the parties intended English law, but recognised that the characteristic performance of the reinsurance contract, namely the provision of an indemnity, was performed by reinsurers, domiciled in England.

OMEX contended that the absence of any express choice of law was significant. In not agreeing, expressly or impliedly, to any specific proper law, the parties must have been taken to be content to have the law applicable to their contract determined according to the private international rules applied by any court of competent jurisdiction before which a claim was brought.

However the judge agreed with Hobhouse LJ in Vesta -v- Butcher, that it would be surprising if a policy on a Lloyd's slip, brokered through a Lloyd's broker with a Lloyd's underwriter on behalf of a Lloyd's syndicate, was governed by a law other than that of England, particularly when the contract in question was replete with references to Lloyd's market clauses, and when the characteristic performance was to be by an English underwriter.

The court gave weight also to the fact that if the dispute was litigated before the Ontario court, the latter might apply the law of Ontario, in which case, OMEX might be able to recover under the reinsurance contract, even if it was in breach of the claims cooperation clause, because compliance would not be treated as a condition precedent to liability.

The court also emphasised the Commercial Court's expertise in resolving reinsurance disputes involving Lloyd's underwriters.

The judge would have reached the same decision, solely on the basis that English law was likely to be the applicable law, because England was the place of characteristic performance.

The fact that OMEX was the first to commence proceedings in Ontario did

not carry great weight. OMEX had been able to issue and serve the Ontario proceedings, without a court order or consideration of the appropriate jurisdiction.

OMEX had also sued JLT Canada for alleged breaches of the insurance brokerage contract. However, this was not a ground for declining jurisdiction. It would be open to OMEX to join JLT Canada as a party to the English proceedings. Even if this did not happen, the risk of conflict between two different actions was limited because the construction of the reinsurance contract and the issue of claims notification depended on what had passed between representatives of OMEX and the reinsurers, whereas the negligence claim against the broker depended largely on communications between OMEX and its brokers.

OMEX expressed concern that the Ontario court might conclude that OMEX had complied with the notification requirements, leaving OMEX with no redress against JLT Canada, while the English court might hold that OMEX had not so complied, leaving it with no redress against reinsurers. The court held that this possibility could be avoided if JLT Canada was joined to the English proceedings. Alternatively, it would make sense for the English proceedings to be heard first.

The court did not ignore the fact that the underlying risk related to municipal insurance in Ontario effected by a corporation domiciled in Ontario. However, it considered that this was not of any significance by itself. After all, "A great deal of London reinsurance relates to risks in all four quarters of the habitable globe, and sometimes outside it, in relation to which disputes are often most appropriately litigated in London."

The judge therefore declined to grant an order, setting aside service of the claim form on OMEX.

The same result was reached by the Commercial Court in July 2010, in Royal & Sun Alliance Insurance Plc And Others -v- Rolls-Royce Plc [2010] EWHC 1869 in the context of direct insurance.

Here, the court refused to stay proceedings brought by Rolls Royce's

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insurers in England, in favour of an action in Florida, on the grounds of England being an inappropriate forum. Rolls Royce relied on the fact that its claims under its general liability risks, construction all risks and professional indemnity policies arose from legal actions brought against it in the Florida courts,

The insurance policies were expressly governed by English law, but did not



contain an exclusive jurisdiction clause. The issues between the parties concerned the interpretation of the insurance contracts, factual and technical issues, and notification issues.

Rolls Royce filed a complaint in Florida seeking declaratory relief that they were entitled to an indemnity, but before the US proceedings were served, the insurers began their own actions in the Commercial Court for negative declarations.

All of the insurers were either registered in the United Kingdom, or wrote the policies from branches in London. Rolls Royce was served in England, and none of the Rolls Royce companies were Florida companies. The location of the parties pointed to England as the appropriate forum, rather than Florida. The dispute had no real connection with Florida, except that underlying claims against Rolls Royce were brought in the Florida courts.

The court held that, whilst technical and factual issues would have a world-wide ambit since the underlying failures of the devices took place all over the world, the matters relating specifically to the insurance arose in England. Considerable weight had to be given to the fact that the dispute was between an English insured and predominantly English insurers under an insurance policy placed by London market

brokers. The fact that the contract of insurance was governed by English law was a factor pointing towards England as the most appropriate forum.

The claims in England and Florida were begun about the same time, and the respective dates of commencement should not be given any weight.

The court left open the question of whether a stay of the matter being heard in an inappropriate forum available in favour of proceedings already commenced outside the EU where an English insured is sued in England under EU Regulation 44/2001 art.12(1). This stipulates that: *'an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary'*. Previous first instance decisions have given conflicting answers to this question and it remains to be addressed by the Court of Appeal in future.

## Commentary

It may be thought that the outcome was more finely balanced in the Stonebridge case than in the Rolls Royce case, because in the latter, all the parties were based in the UK, and because there was an express choice of English law in the Rolls Royce policies. However, both cases demonstrate a clear inclination on the part of the English Commercial Court to assume jurisdiction over covers placed in the London market, on the grounds of the court's insurance expertise and knowledge of the market. The Stonebridge and Dornoch decisions both emphasised the risk of enabling foreign courts to interpret English wordings from the perspective of foreign law and practice. This factor clearly carries considerably more weight with the court than practicalities or tactical manoeuvring. While the attitude of the English court is comforting for UK insurers and reinsurers, one should not lose sight of the fact that the best way of achieving a familiar interpretation of a contract is to ensure that the wording incorporates both an English law, and an exclusive jurisdiction clause.

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