Case No: A3/2009/2376

Neutral Citation Number: [2010] EWCA Civ 1052
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
MR JUSTICE HAMBLEN
[2009] EWHC 2388 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2010

Before :

LORD JUSTICE WARD
LORD JUSTICE THOMAS
and
LORD JUSTICE RICHARDS

- -

Between :

Gard Marine and Energy Ltd	**Respondent**
and	
Lloyd Tunnicliffe (sued on his own behalf and all other members of Syndicate 780)	
and	
Glacier Reinsurance AG	**Appellant**
and	
Agnew Higgins Pickering & Company Limited	

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Dominic Kendrick QC and Peter MacDonald Eggers (instructed by **Barlow Lyde & Gilbert LLP**) for the **Appellant Glacier**
Guy Philipps QC and Andrew Hunter (instructed by **Clyde & Co**) for the **Respondent**

Hearing date: 10 June 2010

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Judgment

Lord Justice Thomas:

1. In this appeal Glacier Reinsurance AG (Glacier), a reinsurance company incorporated in Switzerland challenges the decision of Hamblen J permitting Gard Marine and Energy Ltd (Gard), a Bermudian company, to bring proceedings under their participation in a contract of excess of loss reinsurance against it in the Commercial Court in London.

2. Gard had invoked the jurisdiction of the Courts of England and Wales under Article 6 of the Lugano Convention, as incorporated into law by the Civil Jurisdiction and Judgments Act 1991. It contended that it was entitled to do so, as it had brought proceedings against a London domiciled participant in the excess of loss reinsurance and it was expedient to hear the claims together in order to avoid the risk of irreconcilable judgments. Glacier contended that there was no such risk as its agreement for participation was governed by Swiss law and that there was for that and other reasons no risk of irreconcilable judgments, giving that term its proper meaning.

3. It is first necessary to set out the background to the placement of the reinsurance of Gard by Glacier.

The factual background

(i) The insurance and reinsurance

4. Devon Energy Corporation was insured under a primary package policy against property and business interruption risks with a combined single limit of $400m any one accident or occurrence excess of a self insured retention in respect of losses arising out of a named windstorm in the Gulf of Mexico. This primary insurance was led by Syndicate 457 at Lloyd's. Gard became a participant in that insurance for a line of 12.5% from August 2004.

5. Gard renewed its participation on 18 August 2005 for the period commencing 1 September 2005, having agreed earlier to do so on the basis that its entire line would be protected by excess of loss reinsurance; they gave an order to Agnew Higgins Pickering & Co Ltd (the brokers) for the reinsurance at the end of July 2005.

6. The excess of loss reinsurance, which reinsured some of those (as agreed by the leading underwriter) who had participated in the insurance of Devon, had been placed in the London market since 2003 and was led by Syndicate 1183 at Lloyd's. Gard became one of those reinsured on the renewal in September 2004.

7. The excess of loss reinsurance provided that it would "pay up to the original Package Policy limits/amounts/sums insured excess of US$250,000,000 (100%) any one occurrence of losses to the original placement".

8. In the renewal for the period commencing in September 2005, the leading underwriter renewed its subscription on 19 July 2005 by subscribing to a slip (the main slip). The brokers needed extra participants as some of the existing reinsurers had reduced their lines. They spoke to Glacier on the phone on 5 August 2007. On 8 August 2005, the brokers sent the placing information to Glacier by e-mail stating:

> "We place a reinsurance for certain participants on the primary package... Due to certain participants reducing their line size, we are looking for more capacity and would be delighted if you would take a look at this reinsurance. Please find attached a copy of the reinsurance slip (and renewal endorsement)…"

The reinsurance slip sent was the original London market slip for the period commencing in 2003 with the renewal endorsements.

9. On 11 August Glacier offered to underwrite a line of 5% on the excess of loss reinsurance, subject to discounts (for brokerage and commissions) of 10% as opposed to the 15% allowed by the leading underwriter. The e-mail stated:

> "Referring to our conversation earlier today, we thank you for offering us a share on the XS Fac R/I Policy for the Primary Package Policy. As discussed we are pleased to offer you a line of 5% subject to a total discount of 10%."

10. On 12 August 2005, the brokers accepted that offer and sent Glacier a separate slip for a line of 5% of the reinsurance which Glacier signed for 100%.

11. On 17 and 18 August 2005 and 2 September 2005, the first defendant (Advent Syndicate 780), Map Syndicate 2791, Ascot Syndicate 1414 and Axis Re subscribed to the excess of loss reinsurance on the main slip. Under the terms of that slip, the brokers were entitled to allocate the subscriptions; they allocated proportions of the subscriptions to Gard, so that it was reinsured for 7.5% of the capacity on that slip. With Glacier's 5%, Gard therefore had excess of loss reinsurance for the whole of its line.

(ii) The loss

12. Devon sustained damage to its interests in the Gulf of Mexico from Hurricane Rita which hit the Gulf on 23 September 2005.

13. The loss was agreed on the direct policy at $365m, Gard's share being $46.625m. Claims were presented by Gard and the other participants to the excess of loss reinsurers. The claims were calculated on the basis of what is called "scaling". Under this process the excess point under the excess of loss reinsurance was taken as representing the total value of the assets insured under the primary policy and not Devon's interest in the assets; this therefore reduced the point at which the excess of loss reinsurance started to cover the loss to $115m as opposed to the $250m specified in the slips. Glacier's share on this basis was approximately $13.050m.

14. Two of those reinsuring Gard (Ascot Syndicate 1414 and Axis Re) shortly thereafter agreed to settle on that basis, but Advent Syndicate 780, Map Syndicate 2791 and Glacier did not; they contended that the claim should be calculated on the basis that the point at which the excess of loss reinsurance paid was $250m as set out in the slip and not the lower figure. Glacier paid $5.75m in January 2007 on this basis under a reservation of rights. Advent Syndicate 780 and Map Syndicate 2791 paid on the same basis.

(iii) The proceedings

15. On 23 March 2007, Gard commenced proceedings against Advent Syndicate 780, Map Syndicate 2791 and Glacier for the balance of the amount claimed to be due on the basis that the claim could be scaled. Map Syndicate 2791 agreed to pay and the proceedings were discontinued against them. The proceedings were not served on Glacier at its offices in Pfäffikon, Switzerland until 26 June 2007; the Commercial Court became seized of the matter on that date. On 23 April 2008 Gard amended its claim to add the brokers; the claim against Advent Syndicate 780 remained outstanding.

16. Glacier had on 14 May 2007 issued proceedings against Gard in the Swiss District Court at Höfe in the Canton Schwyz seeking repayment of U$5.75m. Glacier denied liability and sought repayment of what it had paid. It contended that, as both parties had a different understanding of the meaning of the reinsurance, there was no meeting of the minds and the reinsurance was null and void; it contended in the alternative that there was a material error in entering the reinsurance which made the reinsurance null and void, alternatively that the claims were void, as there was late notification and as there had been negotiations with Devon without notification to Glacier. Under the law of Canton Schwyz, the court became seized of the action on that day by consignment to the Swiss postal service. Gard contested the jurisdiction of the Swiss court on the basis that it should be sued in Bermuda.

17. Glacier also applied to the Commercial Court for the dismissal of the action brought against them on the basis that, under the Lugano Convention, the District Court at Höfe was the court first seized of the matter and there was therefore *lis alibi pendens*. Glacier also contended that, in any event, under Article 2 of the Lugano Convention, the claim should have been brought in the state of Glacier's domicile, Switzerland. That application was stayed pending the determination of the Swiss court as to whether it had jurisdiction over Gard.

18. On 10 December 2007, the District Court at Höfe held that it did not have jurisdiction, as Gard was not domiciled in Switzerland; appeals were made to the Cantonal Court of Schwyz and then to the Federal Court which in June 2009 affirmed the decision of the District Court at Höfe.

19. The application by Glacier to dismiss the claim was then restored before Hamblen J. On 10 October 2009 he dismissed the application on the basis that there was jurisdiction under Article 6(1), but granted permission to appeal. He rejected Gard's contention that there was jurisdiction under Article 5(a), on the basis that the contractual obligation under the reinsurance was to be performed by Glacier in London (see paragraphs 35-44). Gard do not cross-appeal against that part of the decision.

The applicable legal regime

(i) The provisions of the Lugano Convention

20. The provisions of the Lugano Convention applicable to these proceedings are in all respects identical to the provisions of the Brussels Convention of 1968 before the making in 2001 of Council Regulation (EC) 44/2001 (the Judgments Regulation).

There is one material difference; the ECJ has no jurisdiction under those provisions in respect of disputes as to the meaning of the Lugano Convention; there is no procedure for making a reference.

21. It is common ground that the general rule under Article 2 is that a defendant must be sued in the state of its domicile. However, if Gard can establish that the conditions in Article 6(1) are met, then Glacier Re can be sued in England and Wales:

> A person domiciled in a Contracting State may also be sued:
>
> 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled;"

22. In *Kalfelis v Schroeder, Muenchmeyer, Hengst & Co* [1988] ECR 5565, the ECJ decided that the equivalent provision under the Brussels Convention of 1968 applied only where

> "it was expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings."

It was for the national court to verify in each individual case whether that condition was satisfied (see paragraph 12 of the judgment).

23. When the Judgments Regulation was made in 2001, additional wording was added to Article 6(1) to codify the condition that the ECJ had stipulated in *Kafelis.* Although the Lugano Convention as applicable to this claim has to be applied with Article 6 in the form it was in Brussels Convention of 1968, it is common ground that the condition stipulated by the court in *Kalfelis* applies.

24. In a number of decisions, the Commercial Court has applied the Judgments Regulation to cases where the risk of irreconcilability arises from potentially conflicting findings of fact or potentially conflicting decisions on questions of law by applying a broad common sense approach and avoiding an over sophisticated analysis – see for example *ET Plus SA v Weller* [2005] EWHC 2115 (Comm) [2006] 1 Lloyd's Rep 251 at paragraphs 57-59 and the cases there cited.

(ii) The decision in Roche Nederland BV v Primus

25. It might have been thought that the approach of the courts in following the decision in *Kalfelis* and the wording of Regulation was clear, though in some cases susceptible of difficult application. However, it is contended by Glacier that the approach a court should take has been modified by the decision of the European Court of Justice in *Roche Nederland BV v Primus* [2006] ECR 1-6535; it contended that it was clear from that decision that the term "irreconcilable" should be given a narrow rather than a broad meaning. The issue had arisen in that case because the term "irreconcilable" is used in two Articles in the original Convention (Articles 22 and 27.3) and the ECJ had in *The Tatry* [1994] ECR I-5439 decided it had a different meaning in those two articles.

26. In *The Tatry* the court had to consider the meaning of Article 22 which makes provision for the application of the principle of *lis alibi pendens* in the case of related

actions which are defined as follows for the purposes of that Article in its third paragraph:

> "For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

27. The Advocate General and the Court in *The Tatry* concluded that the term "irreconcilable" should for the purposes of Article 22 not be given the meaning of the term as used Article 27.3:

> "27.3. If the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought."

The meaning given by the court to "irreconcilable" as used in Article 27.3 in *Hoffman v Kreig* [1987] 1 ECR 645 was that the decisions had to be mutually exclusive. In *The Tatry* the Advocate General and the Court considered that Article 27.3 provided for a derogation from the general principle that judgments should be recognised and therefore required a narrow interpretation. Article 22, in contrast, was intended to improve the coordination of judicial functions and to avoid conflicting and contradictory decisions, even if the separate enforcement of them might not be precluded. The Advocate General gave as an illustration two claims by different persons arising out of the same accident against the same defendants; even though each would be enforceable under Article 27, they should be treated as giving rise to the risk of irreconcilable judgments under Article 22 as conducive to the substantial uniformity of judicial decisions. The court held that the object of the third paragraph of Article 22 was to avoid the risk of conflicting judgments and to facilitate the proper administration of justice in the Union and concluded at paragraph 53 that the interpretation should be broad and

> "cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive."

28. In *Roche Nederland BV v Primus*, the claimants contended that they could bring patent infringement proceedings in the Hague District Court not only against the Roche Group Netherlands subsidiary but also, under Article 6 (1), various other Roche Group subsidiaries incorporated in other States to which the Brussels Convention of 1968 applied. The Dutch Supreme Court referred the question of the scope of Article 6(1) of the Brussels Convention to the ECJ. It was contended that irreconcilable as used by the court in *Kafelis* should bear the meaning used in Article 27.3 and not the meaning given by the ECJ to the term in *The Tatry*.

29. The Advocate General agreed with that contention. In his view, Article 6 derogated from the general rule under Article 2 and took away from a defendant the right to be sued in his national forum. If Article 6.1 was not strictly confined, it could be used by a claimant for forum shopping by picking the forum suited to his own interests to the prejudice of the defendant and not in the light of objective considerations such as the provision of evidence or good organisation or trial.

30. At paragraph 113 of his opinion he expressed his view:

> "We have trouble conceiving that a judgment may be considered as conflicting with another for the sole reason there would be a mere divergence in the solution of the dispute, that is at the end of the trial. For there to be conflicting judgments, it would require, in our opinion, that such a divergence fell within a same situation of law and fact. It is only on that hypothesis that one can conceive the existence of conflicting judgments, in so far as starting from the same situation of law and fact, the court reached diverging or even totally contrary solutions."

31. The court reached its decision without resolving the question as to the meaning of "irreconcilable". It decided that the claimants could not bring proceedings against all the companies in the Netherlands, as there was no risk of irreconcilable judgments. First, it was not possible to infer the same factual position as the defendants were different and the infringements of which they were accused were not the same. Second, as the patent in each state continued to be governed by the law of each state, any divergences between decisions would not arise in the context of the same legal situation. Any divergent decisions could not be treated as irreconcilable, whether that term was interpreted broadly or narrowly.

32. The court declined to decide whether the adjective "irreconcilable" should be interpreted in the sense of contradictory as used in the *Tatry,* as even on that view there was no risk of irreconcilable judgments in the context of patent proceedings. The court added:

> "As the Advocate General observed in paragraph 113 of his Opinion, in order that decisions may be regarded as contradictory it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise from the same situation of law and fact."

(iii) Conclusion

33. In *Freeport v Arnoldson* [2007] E.C.R. I-839, [2008] QB 633, the ECJ returned to Article 6 (1). A claim was brought in Sweden against a Swedish subsidiary in delict and against the English parent company in contract in reliance on Article 6(1). The Supreme Court of Sweden referred the question as to whether claims on different legal bases fell within Article 6(1). The Court's response was:

> "38. It is not apparent from the wording of article 6(1) that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have identical legal bases.
>
> 39. As the court has already held, for article 6(1) of the Brussels Convention to apply, it must be ascertained whether, between various claims brought by the same plaintiff against different defendants, there is a connection of such a kind that it

> is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings: *Kafelis*, paragraph 13.
>
> 40. The court has had occasion to point out that, in order that decisions may be regarded as contradictory, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact: *Roche* paragraph 26.
>
> 41. It is for the national court to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court."

34. The court referred to and explained an earlier decision in *Reunion European v Spliethoff* [[1998] ECR I-6511; it is therefore not necessary to refer to it.

35. In the light of the judgments of the ECJ and in particular *Freeport*, I consider that the court should approach the matter in the light of the policy of the Convention to produce predictable results and on the principle of the Convention that jurisdiction is generally based on the defendant's domicile. In seeing whether an exception to this general rule exists in a given case, the court must assess the connection between the claims to see whether there is a risk of irreconcilable judgments arising out separate proceedings such that there may be a divergence in the outcome where there is "the same situation in law and fact." In so doing, it is necessary for a national court to look at all the factors. Beyond this, I do not think it is desirable to go in the light of the established case law. It is not necessary to discuss or decide the precise meaning of "irreconcilable judgments" to decide this case: cf. *Briggs and Rees: Civil Jurisdiction and Judgments (2009)* para. 2.203) or enter into a wider debate on possible problematic results that might arise in practice (cf. *Fentiman: International Commercial Litigation* at para. 9.78).

The factors to be considered

(1) The applicable law

36. The first factor to consider is whether the law governing the subscription by Glacier to the slip is English law, as that is the law that expressly governs the subscription of Advent Syndicate 780 to the excess of loss reinsurance under the main slip. If the proper law is Swiss law, as Glacier contended, then, as Gard accept, there is no risk of divergence, as the divergence would not arise from the application of the same law. Construction of the slip under English law would not necessarily be contradictory to or irreconcilable with a different construction under Swiss law. The determination of the choice of law of the Glacier slip must be made under the provisions of Articles 3 and 4 of the Rome Convention (as incorporated by the Contracts (Applicable Law)

Act 1990) – a demonstrable choice of law or the law of the state with which the reinsurance had its closest connection.

There was a demonstrable choice of English law

37. Glacier in its argument that there was a demonstrable choice of Swiss law, contended that the presentation had been made to, and the acceptance had been given by, Glacier's underwriter at its office in Pfäffikon, Switzerland. The brokers' approach to Glacier in Switzerland was therefore an approach to the Swiss market. The brokers' decision to effect the placement for Glacier on a separate slip was consistent only with a separate placement with Glacier as part of that Swiss market.

38. Glacier also contended that the separate nature of the placement was reflected by a number of differences with the main slip as used for those who subscribed in London:

    i) The Glacier slip did not incorporate a choice of English Law clause whereas the main slip did.

    ii) The main slip had a subscription agreement which bound participating underwriters to the decision of the leading underwriter on certain issues whereas there was no such clause in the Glacier slip. However the conditions of the Glacier slip stated that "any specific agreement hereunder was to be agreed by Leading Reinsurance Underwriter only."

    iii) The main slip had a fiscal and regulatory page, whereas the Glacier slip did not have this page. The page simply recorded information for coding, tax and regulatory purposes.

    iv) Some manuscript amendments were made to the main slip. These were immaterial.

    v) One of the manuscript changes to the main slip was to choose a different standard form of radioactive, chemical contamination and cyber-attack exclusion clauses, with the result that the precise wording of these clauses differed.

    vi) The brokerage was different as I have explained at paragraph 9 above.

    vii) The brokers had reserved to themselves a power in the main slip (as set out at paragraph 11 above) to allocate the cover.

39. I cannot accept Glacier's contention. In my view, in agreement with that of the judge, Gard have clearly established sufficiently for present purposes that the proper law of the Glacier slip is English law, as Gard have demonstrated with reasonable certainty a real choice by the parties of English law under Article 3.

40. First, the reinsurance by Glacier of Gard was a participation by it as part of a London market placement and not a separate placement in the Swiss market. The expiring excess of loss reinsurance was a London market placement; the renewal was a London market placement and the participation of Glacier was invited as part of that placement, as Glacier understood by their response in the e-mail of 11 August 2005 (see paragraph 9). The fact that a broker approaches a reinsurer in another state in

circumstances such as this does not indicate that the broker is placing part of the risk in a different market. The broker, in the circumstances of this case, was seeking to persuade a reinsurer domiciled in Switzerland to participate in a London market placement; the correspondence to which I have referred made that clear. Indeed, Glacier accepted their participation as "a share" on the London placement. The fact that the slip signed by Glacier was a separate slip is of little significance. Sometimes overseas subscriptions are set out on separate slips for convenience in getting documents signed; in some cases, there may be a further reason, as in the present case, relating to the discounts allowed. As I have set out at paragraphs 8 and 9 above, the brokers' offer and Glacier's acceptance were clearly on the basis that Glacier were participating in a London market placement; there was, in short, no Swiss market placement. I entirely agree with the conclusion of the judge at paragraph 30 of his judgment.

41. Second, it would make no commercial sense for one part of the reinsurance to be governed by one system of law and another to be governed by a different system.

42. Third, the underlying policy was governed by English law. Although as in *Vesta v Butcher* [1989] A.C. 852 there can be a different choice of law for the reinsurance, it would be more usual for the parties to chose that the excess of loss reinsurance be governed by the same law as the underlying insurance so that the provisions were interpreted consistently.

43. Fourth, the form of slip used in the London market was used for both the main and the Glacier slip. Glacier subscribed to a slip in that form which provided for a standard London market policy. Its terms were London market terms; both the main and the Glacier slips were phrased in the language of a London market slip. The Glacier slip incorporated LSW 196A (Several Liability Notice Reinsurance), CL 356A and 365 (radioactive, chemical contamination and cyber-attack exclusion clauses) and LSW 1001 (cancellation for failure to pay premium). The policy was then issued on form J(A). The differences between the main slip and the Glacier slip (which I have set out at paragraph 38) were, as is self evident, minor and immaterial. I do not attach significance to the fact that the Glacier slip did not incorporate an express choice of law clause, as mistakes of this kind can be made.

44. The importance of the choice of form and terminology is reflected in the Report of Professor Giuliano and Professor Lagarde on the Rome Convention. At paragraph 3 of the section on Article 3, the rapporteurs refer to the use of a standard form governed by a particular system of law as an indication of a real choice and give the example of a Lloyd's policy of marine insurance. Although I agree with the observation of Mance LJ at paragraph 43 of his judgment in *American Motorists v Cellstar* [2003] EWCA Civ. 206, [2003] Lloyd's Rep IR 295, that, given the date of the report, 1980, the rapporteurs had in mind the old SG form annexed as a schedule to the Marine Insurance Act 1906, I also agree with the observation of Longmore J at paragraph 13 of his judgment in *Tiernan v Magen Insurance* [2000] IL.Pr. 517. He made clear that the same considerations that applied to the old SG form applied "to the Lloyd's form on which the contract of reinsurance" had been written in that case. The use not only of the J (A) form as a means of embodying the terms of a slip in a formal policy, but also the use of London market terminology and London market clauses throughout the slip are clear indicia of a real choice of English law: see also *Dicey, Morris and Collins: The Conflict of Laws* 14th edit at paragraph 33-148; and

the observations of Hobhouse J in *Vesta v Butcher* [1986] 2 Lloyd's Rep 179 at 193; *Gan v Tai Ping* [1999] Ll I R 229 at 236 (Cresswell J) and [1999] Ll I R 472 at 480-1 (Beldam LJ) ; *Aegis v Continental Casualty* [2006] EWHC 1391 at paragraphs 39-41; *Dornoch v Mauritius Union* [2006] EWCA Civ 389 at paragraph 43.

45. In my view all these factors point to a real choice of English law and along with the experienced Commercial Judge, I am satisfied that there is sufficient for present purposes to demonstrate a real choice of English law under Article 3. It is also clear that, if there were no demonstrable choice of English law, there was certainly no demonstrable choice of Swiss law, as there is nothing in the placement with Glacier or in the Glacier slip that indicates such a choice of law.

The closest connection was with England and Wales

46. If I am wrong in my view that there has been a demonstrable choice of English law for the purposes of Article 3, it is my view that the contract had its closest connection with England. I will assume for this purpose that there was a presumption under Article 4.2 in favour of Switzerland on the basis that the obligation to pay was an obligation to pay in Switzerland. However, as is clear from the Report of Professor Giuliano and Professor Lagarde the presumptions are rebuttable. The ECJ made clear the approach a court should adopt in circumstances material to this case in *Intercontainer Interfrigo v Balkende Oosthuizen* [2010] 3 WLR 24.

> "62. As is apparent from the wording and the objective of article 4 of the Convention, the court must always determine the applicable law on the basis of those presumptions, which satisfy the general requirement of foreseeability of the law and thus of legal certainty in contractual relationships.
>
> 63 However, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that identified on the basis of the presumptions set out in article 4(2) to (4) of the Convention, it is for that court to refrain from applying article 4(2) to (4).
>
> 64 In the light of those considerations, the answer to the fifth question must be that article 4(5) of the Convention must be construed as meaning that, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in article 4(2) to (4) of the Convention, it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected."

47. Applying that approach, it seems to me, in the light of all the other factors to which I have referred, there is a strong case that the presumption ought to be disregarded. Looking at the circumstances as a whole, the participation of Glacier in the excess of loss reinsurance is more closely connected with England for the reasons I have given in respect of the considerations under Article 3.

(2) The facts

48. I therefore proceed to consider the issue under Article 6(1) on the basis that the law in relation to the reinsurance placed with Advent Syndicate 780 and that placed with Glacier was the same, namely that it is governed by English law.

(i) The issue of construction

49. The principal issue in dispute between Gard on the one side and Glacier and Advent Syndicate 780 on the other is one of construction of the reinsurance as to the point at which the excess attaches. That issue is the same. Glacier referred to the decision of the Swedish Supreme Court in *Estate in bankruptcy of the International Credit Insurance Corporation v Pohjola Insurance Company Ltd* [2003] I.L.Pr 3 where the court held that the fact that contracts were identical in wording was insufficient to found jurisdiction under Article 6(1). Whether that is so, in my view, depends on all the factors, but in the present case, the fact that the issue is a point of construction on the same placement is a very strong factor in evaluating the risk of irreconcilable judgments.

(ii) The factual matrix: differences in the timing and manner of the placements

50. The different manner and timing of the placements make no difference to the issue of construction. Nothing has been identified that could make a material difference to the factual matrix – it is in all material respects the same.

(ii) The differences between the slips

51. Nor in my view do the differences in the wording of the slip which I have set out at paragraph 38 have a material bearing on the issue. I have no doubt but that a tribunal approaching the construction of both slips would reach the same conclusion, as the differences relied on by Glacier are irrelevant to the issue of the way in which the excess point should be construed.

(iii) What happened during the placement

52. Both Advent Syndicate 780 and Glacier appear to rely on what happened during the placement as giving rise to a defence of misrepresentation or non disclosure. Each claim repayment of what they have paid on account.

53. Advent Syndicate 780 also relies upon what happened during the placement as giving rise to an estoppel by convention that the excess point was not subject to reduction or that there was a collateral contract to that effect. Glacier similarly relies upon what happened to show that there was no meeting of the minds (as set out in paragraph 16 above).

54. Although there are the differences to which I have referred in the legal bases of the defences raised by Advent Syndicate 780 and Gard arising out of what happened during the placement, the legal basis is in other respects the same and governed by English law. What is more important is that the determination of these issues arises out of the same factual situation. In placements of insurances and reinsurances with different underwriters, an assessment of what actually happened is part of a continuum, as the brokers use the same file and the same basic materials in each

placement (as appears to be the case in the placement under consideration). Although what was said or written to each participant may of course differ (as it may well do in this case), it would be wrong to categorise those differences as giving rise to a different factual situation, given the way such placements are made. It is invariably the case that a court hears disputes as to what happened on placements with different underwriters in the same trial, as the court reaches its conclusion as to what happened by its assessment of all the evidence in relation to the placements.

55. Glacier also rely (as I have set out in paragraph 16 above) on the way in which Gard dealt with the claim as providing a defence. It does not appear that Advent Syndicate 780 relies on this as giving rise to a defence, but if it did the factual issues would be the same.

(iv) The brokers as parties to the proceedings

56. Before the judge, Gard also relied on the fact that the brokers were parties to the proceedings. The judge found at paragraphs 57 and 58 this was a further factor that led to him to conclude that jurisdiction under Article 6(1) was well founded. It is accepted by Gard that they cannot rely on that fact as a separate matter, as the brokers were joined to the proceedings at a later stage: *Petrotrade v Smith* [1997] 1 WLR 457; *Syndicate 690 v Sinco SA* [2008] EWHC 1842 Comm. The relevance of the brokers is that they were brokers on the placement as discussed in the preceding paragraphs.

(v) The operation of the markets

57. As Glacier pointed out in argument, the jurisdiction under Article 6 (1) could be used as a means for forum shopping. This is not a case of forum shopping. Nor is it a case where the action has been brought with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled: see Jenard in his Report (O.J.1979 C.659) and paragraphs 51- 53 of *Freeport.*

58. On the contrary, this is a claim brought in respect of a market placement with different underwriters where there is a real commercial need for disputes to be determined by one tribunal. In the financial markets (including the insurance and reinsurance markets), contracts are frequently made as part of one placement with different companies domiciled in different states in Europe. It would not generally be in the interests of the proper working of these markets if disputes relating to the same issues on the same placement were determined by different tribunals. The risk of irreconcilable judgments would be particularly damaging to financial markets, as it would give rise to uncertainty and impede the speedy resolution of disputes which is so important to the proper functioning and stability of those markets.

The assessment

59. As is made clear in *Kafelis* and *Freeport*, it is for the national court to assess on the basis of the necessary factors the connection between the claims and to determine the risk of irreconcilable judgments if the claims had to be determined separately.

60. Taking into account the factors that I have set out, it is my view that, as the participation of Advent Syndicate 780 and Glacier in the excess of loss reinsurance are governed by English law and are on the same terms and part of the same

placement, there would be a risk of irreconcilable judgments if the primary issue, namely the construction of the excess of loss reinsurance, was decided by different courts. The same is also true of the secondary issue, the defences raised by Advent Syndicate 780 and Glacier arising out of what happened during the placement, as the basis of these defences is governed by the same law and arises out of what is a continuum of factual events.

61. The judge at paragraph 60 of his judgment considered that it was "overwhelmingly just, convenient and expedient" that the claims be determined in one jurisdiction. In my judgment, the judge was right to reach that conclusion.

62. It was submitted that there was little connection between the claim by Gard against Glacier and England and Wales and it would therefore not be right for the claim to be heard here. For the reasons, I have given, the premise of this contention is wrong; there is a very strong connection with England and Wales. In all the circumstances, the determination of the issues by one tribunal in England and Wales is plainly not only expedient for the purpose of avoiding irreconcilable judgments, but it is also just.

Conclusion

63. I would therefore dismiss the appeal.

Lord Justice Richards:

64. I agree.

Lord Justice Ward:

65. I also agree.