Neutral Citation Number: [2010] EWHC 2279 (Comm)

Case No: 2010 FOLIO 187

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/09/2010

Before :

MR JUSTICE CHRISTOPHER CLARKE

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Between :

STONEBRIDGE UNDERWRITING LIMITED (Claiming on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 990 for the 2001 and 2002 years of account)	**Claimant**
- and -	
ONTARIO MUNICIPAL INSURANCE EXCHANGE	**Defendant**

- -
- -

Alexander MacDonald (instructed by **XL Services UK Limited**) for the **Claimant**
Charles Dougherty (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 26th July 2010

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Judgment

MR JUSTICE CHRISTOPHER CLARKE

1 This is an application by the defendant, Ontario Municipal Insurance Exchange ("OMEX") for an order that the service on it of a claim form in Ontario be set aside on the ground that England is not the proper forum for the dispute between the parties.

2 Stonebridge Underwriting Limited, the claimant, is a Lloyd's underwriter. It brings the present claim for a declaration on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 990 for the 2001 and 2002 years of accounts. XL London Market Ltd ("XL") is the managing agent of the syndicate. For convenience I shall refer to the claimant and XL collectively as XL.

3 OMEX is a Canadian not-for-profit reciprocal insurance exchange which provides primary insurance cover to a number of municipalities in Ontario, under whose Insurance Act it is licensed. A reciprocal insurance exchange is a risk-sharing arrangement owned by its members: it is essentially a form of mutual. OMEX only operates in Ontario and has no presence outside Ontario. OMEX is governed by a "Reciprocal Insurance Exchange Agreement" dated 13th December 1988. According to the witness statement of Ms Sarah Jones, on behalf of XL, OMEX ran two separate risk pools involving Ontario municipalities:

(a) the OMEX Program, which was the main programme, providing liability and automobile insurance cover, mainly to large municipalities, up to a limit of $ 50 million[1]; and

(b) the SUG OMEX Program (with a $ 5 m level of cover and covering smaller municipalities, who were some of the members of the Rural Ontario Municipal Association ("ROMA").

The SUG program arose because under the terms of the Reciprocal Insurance Exchange Agreement it was possible to set up sub-groups for underwriting purposes. One such group– Special Underwriting Group 1 ("SUG 1") - was set up pursuant to an agreement between the members of that group and OMEX dated 12th December 2007.

4 The OMEX Program was administered by employees of OMEX while the SUG OMEX Program was, in the relevant period, administered by Jardine Lloyd Thompson Canada Inc. ("JLT Canada")[2]. 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.

The dispute - overview

5 The dispute between the parties relates to the Claimant's failure to pay the sums said to be due to OMEX under an excess of loss policy number LK0106144 for the period 1st July 2001 to 31st December 2002 ("the Reinsurance Contract"). The Reinsurance Contract is contained in a slip policy dated 10th September 2001, which XL subscribed as to 100%. It reinsured the $1 million to $ 2 million layer of the OMEX Program and, according to the claimants, the same layer of the SUG OMEX Program.

6 The material terms of the policy are as follows:

"*Type:* *Excess Liability Reinsurance.*

[1] Hereafter all dollar figures are in Canadian dollars.

[2] Formerly Jardine Lloyd Thompson Canada Ltd.

Form:	*Slip Policy.*
Reinsured:	*Ontario Municipal Insurance Exchange.*
Original Insured:	*All Members participating in Omex.*
Period:	*1st July 2001 to 31st December 2002 both days inclusive.*
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.*
Limit of Indemnity:	*CAD1,000,000 any one occurrence* *CAD1,000,000 in the annual aggregate in respect of Products Liability.* *CAD1,000,000 in the annual aggregate in respect of Professional Indemnity.*
In excess of:	*CAD1,000,000 any one occurrence but CAD2,000,000 in the annual aggregate.*
Conditions:	*1) To follow the full wording, terms, clauses, conditions, exceptions and settlements of the Original Policy… as far as applicable hereto*".

7 The Conditions clause also incorporated a Claims Co-operation Clause in the following terms:

> *"Claims Co-operation Clause*
> *Notwithstanding anything herein contained to the contrary, it is a condition precedent to any liability under this Policy that:*
>
> *9.1. The Reinsured shall, upon knowledge of any loss or losses which may give rise to a claim under this Policy, advise the Reinsurers thereof as soon as is reasonably practicable and in any event within 30 days.*
>
> *…..*
>
> *b) The Reinsured shall furnish the Reinsurers with all information available respecting such loss or losses, and shall co-operate with the Reinsurers in the adjustment and settlement thereof.*"

8 The policy was on a typical London market slip policy form. It incorporated a number of standard London market terms including: (a) "*Several Liability Notice - LSW 1001 (Reinsurance)"; (b) "Ultimate Net Loss Clause Reinsurance – NMA 457"; (c) 'NMA 1685; (d, "NMA 464,* and (e) "*NMA 2092 – Date Recognition Clause*."

9 There are two endorsements to the slip policy. In summary:

(a) The first endorsement, dated 15 February 2002, purported to add certain councils to the cover. It also amended the annual aggregate deductible ("AAD") in the "*Limit of Indemnity*" provision, with effect from 2 January 2002, to read:

> *"CAD 1,000,000 any one occurrence*
> *CAD1,000,000 in the aggregate in respect of Product Liability*

CAD1,000,000 in the aggregate in respect of Professional Indemnity
In Excess of
CAD 1,000,000 any one occurrence but CAD 3,000,000 in the annual aggregate."

(b) The second endorsement dated 22 October 2002, purported to add further municipalities to the cover.

10 The claim form was issued on 17th February 2010.

The issues that divide the parties

11 XL denies that any sums are due under the Reinsurance Contract. There are two main[3] issues between the parties in these proceedings.

12 First, there is a dispute as to the proper construction of the excess provisions in the Reinsurance Contract.

13 XL's case[4] is that:

(i) the AAD must first be exhausted before any claim may be made under the policy;

(ii) the AAD may only be exhausted by losses themselves in excess of $ 1m per occurrence;

(iii) OMEX is then only entitled to be indemnified in respect of losses in excess of $ 1m per occurrence.

As to the AAD, XL's case is that for the period 1 July 2001 – 1 January 2002 the applicable AAD is $1m [i.e. ½ of $ 2m], and that the applicable AAD for the remainder of 2002 is $3m (Jones 1, para 40). On XL's case nothing is due under the Reinsurance Contract. If OMEX is only entitled to be indemnified in respect of losses in excess of $ 1m per occurrence once the applicable AAD has been exceeded but that deductible can be exhausted by losses from the ground up XL calculates its liability at about $ 1.5m.

14 OMEX contends that:

(i) it is not necessary for the applicable AAD to have first been exceeded before it is entitled to be indemnified for individual losses in excess of $ 1m;

(ii) the AAD may be exhausted by any claims from the ground up, not just those which exceed $ 1m, and

(iii) once the AAD has been exhausted, it is entitled to be indemnified in full for losses from the ground up (up to $ 1 m) without application of the $ 1m per occurrence deductible.

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[3] XL has reserved its position as to the effect of the endorsements to the Reinsurance Contract, insofar as those endorsements purported to add particular councils to the Contract which were not members of OMEX and/or SUG1.

[4] Which differs from that put forward in XL's letter to OMEX of 16th December 2009 in which XL said that *"the reinsurance responds once the 'per occurrence' retention of C $ 1 million has been exceeded and, on a ground up basis, once the applicable AAD has been eroded".*

It is not clear to me whether OMEX agrees with XL as to the applicable AADs for the 2001 and 2002 periods, namely $ 1m for the former and $3 m for the latter (as its claims bordereaux suggest), or whether it contends that a single AAD of $ 3m is applied across the entire 18 month period (its case in the Ontario proceedings at para 12).

15 Second, XL resists OMEX's claim on the basis that there has been a breach of the Claims Co-operation Clause. XL's case is that compliance with the notification requirements in paragraph (a) of the clause ("*The Reinsured shall, upon knowledge of any loss or losses which may give rise to a claim under this Policy, advise the Reinsurers thereof as soon as is reasonable practicable and in any event within 30 days*") is a condition precedent to XL's liability under the Reinsurance Contract, and that there has been a clear breach of the clause in respect of both the individual and the aggregate claims advanced under the policy. XL's factual case on these breaches is set out in detail at Jones 1, paras 60-76 (in connection with individual claims) and paras 77-81 (in connection with breaking through the AAD). These paragraphs reveal an arguable case that OMEX was significantly late in notifying XL in respect of several very large road traffic accident claims; and that the AAD had been exhausted by January 2004 in respect of the 2001 period, and by February 2004 in respect of the 2002 period, if account is taken of claims from the ground up, such that, on OMEX's interpretation, XL was responsible for subsequent losses, whereas no notification of the exhaustion of the AAD was given until December 2006.

16 The two issues are related in this sense. If on the proper construction of the policy OMEX has no claim against XL, there is no need to decide whether the claims notification provisions have been complied with. If, on the other hand, OMEX prima facie has a claim, the precise operation of the Claims Co-operation Clause will depend on which construction of the excess provisions is favoured.

17 On 18th December 2009 XL rejected OMEX's claims under the Reinsurance Contract on the basis of a breach of the notification requirements. On 18th January 2010 OMEX issued proceedings before the Ontario Superior Court of Justice claiming damages on the basis that XL had failed to honour the terms of the Reinsurance Contract. The Statement of Claim in those proceedings is dated 17th February 2010. Paragraph 15 (a) asserts that the Reinsurance Contract is governed by Ontario law.

18 The present proceedings were issued on 17th February. In them XL claims declarations as to the effect of the Reinsurance Contract and a consequential declaration that XL is under no liability to indemnify OMEX thereunder. Permission to serve out was granted by Cooke, J on 9th March. It was sought on the basis that the Reinsurance Contract was made in England, through an agent trading in England (JLT London), and was said to be governed by English law. OMEX's application to set aside the order was issued on 6th May.

General principles

19 The general principles applicable are well known. In order to justify service out XL must first show that there is good arguable case that each of the relevant causes of action fall within one of the relevant grounds of CPR 6PD3.1. and that the claim has realistic prospects of success. OMEX does not dispute that these two requirements have been satisfied.

20 XL must then establish that England is the proper place for the claim to be brought – the *forum conveniens*. That depends on whether England is the forum where the claim can most suitably be tried in the interests of all the parties and the ends of justice. It is

necessary for XL to show that England is clearly and distinctly the most appropriate forum. In determining that question the court will take into account a number of factors including (a) which is the natural forum i.e. the place with which the dispute has it most real and substantial connection; (b) the nature of the dispute and the law by reference to which the dispute is 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 governing law

21 The putative governing law of the contract may be "*of very great importance*" or of little importance (*Spiliada* per Lord Goff at 481H).[5] XL submits that a considerable body of authority establishes that in a reinsurance context, the fact that the putative governing law of the reinsurance is English law is, indeed, of very great importance. Thus:

a. In *Gan v. Tai Ping* [1999] Lloyd's Rep IR 229, 240 (upheld on appeal at [1999] Lloyd's Rep IR 472, 481) Creswell J held that since issues relating to avoidance and the claims co-operation clauses fell to be determined according to English law "*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 the claims co-operation clauses, which were standard London reinsurance market clauses designed to protect the position of London market reinsurers. He pointed out in particular that they "*utilise the English law concept of a condition precedent*".

b. In *Tryg Baltica v. Boston Cia de Seguros* [2005 Lloyd's Rep IR 40, 51-52 at [49]) Cooke J 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."*

c. In *Dornoch v. Mauritius Union Assurance* [2006] Lloyd's Rep IR 127 (upheld [2006] 2 Lloyd's Rep. 475) at [72], Aikens J, as he then was, held that the fact that English law was or may be the proper law of the contract was "*of very great importance*" because it was "*likely to have a crucial impact on the shape and possible outcome of the case*". In particular, he drew attention (at [73]) to the fact that the competing forum, Mauritius, took a different approach to the question of deciding the proper law of the reinsurance contract and that it would not apply the Rome Convention, that the Mauritius court was likely to conclude that the reinsurance was governed by the law of Mauritius [74], and that, if the law of Mauritius was applied, the principles concerning the central issue of the construction of a clause which provided fidelity cover subject to a 72 hour Discovery Period would be "*significantly different*" since Mauritius would seek guidance from French case law and text book writers (at [75]).

d. Similarly, the authors of *Dicey, Morris and Collins*, observe (at para 12-029) that:

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[5] On the facts, Lord Goff found that the fact that the putative governing law of the bill of lading contract was English law was a relevant factor, since there was a dispute as to the effect of the contract (notably, on one point English and Canadian law appeared to differ): 486F.

"*In cases concerned with insurance written on the London market and governed by English law, there is a strong tendency for the court to consider England as the natural forum.*"

The applicable law under English private international law

22 The Reinsurance Contract contains no express choice of proper law. It is virtually common ground between the parties that its putative proper law under the Rome Convention is English law. But there is disagreement as to why that is so. 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.…..*
>
> *5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."*

23 XL contends that the parties have impliedly chosen English law and that that choice is demonstrated with reasonable certainty by reason of the following:

(a) although the parties have not employed a standard form of Lloyd's policy, but a brokers slip policy, the Reinsurance Contract incorporates a number of standard London market clauses (see para 8 above) some of which have been referred to in the abbreviated manner customary in the London market as well as other clauses which bear the hallmark of clauses framed in London

according to English law 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) these are factors which have been said to give rise to an implied choice of English law in a contract of reinsurance: see, e.g., *Tryg Baltica* at [8]; *Tiernan v. Magen* [2000] I.L.Pr. 517 at [12]-[13]; *Gan v. Tai Ping* [1999] Lloyd's Rep IR 229, 234-234. In *Vesta v. Butcher* [1986] 2 Lloyd's Rep. 179, 193 Hobhouse, LJ, stated that "*there remains something surprising and improbable about the conclusion that the Lloyd's slip and the Lloyd's policy is governed by anything other than English law.*";

(d) 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: see e.g. *Gan v. Tai Ping* [1999] Lloyd's Rep IR 229, where there was an express choice of Taiwanese law in the underlying policy but this did not prevent Cresswell J from holding that English law governed the reinsurance.

24 OMEX accepts that, as a matter of English choice of law rules, there is a "*strong chance*" that the court will conclude that the applicable law is English law. This is not, it submits, because any implied choice of law is demonstrated with reasonable certainty. To place a risk on the London market and/or to refer to standard London market wordings does not inevitably lead to the conclusion that the parties intended English law to apply. No such implication can be demonstrated with reasonable certainty. The reason why English choice of law rules are likely to dictate that English law governs is because the characteristic performance of the Reinsurance Contract, namely the provision of an indemnity, is that of XL which is domiciled in England. The factors which might point to Ontario are insufficient to overbear the presumption.

The applicable law under Ontario private international law

25 Section 123 of the *Insurance Act (Ontario) 1990* provides that:

> *"…where the subject matter of a contract of insurance is property in Ontario or an insurable interest of a person resident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any courier, messenger or agent to be delivered or handed over to the insured or to the insured's assign or agent in Ontario shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada"*

26 The evidence of Mr Thomas Donnelly, OMEX's Canadian counsel, is that an Ontario Court would apply section 123 with the result that the Reinsurance Contract would be deemed to have been made in Ontario and Ontario law would apply, "*the agent*" referred to in line 4 of the citation being JLT London, the placing broker, and "*the insured's …agent*" referred to in line 5 being JTL Canada, the producing broker.

27 Mr Alan D'Silva, a partner in XL's Canadian solicitors, expresses the view that the Ontario court is likely to hold that the section does not apply. He relies on a 1905 decision of the Ontario High Court in *Burson v German Union Insurance Co* [1905] O.J. No 51 to the effect that delivery to an agent outside Ontario of a policy which is

subsequently passed to the insured in Ontario is not sufficient to come within the section, and contends that the slip policy was not to be "*delivered or handed over to the insured or the insured's assign or agent in Ontario"*if delivery of the policy was made by the insurer to the insured's agent, JLT London, in London. He also expresses the view that the policy considerations underlying the section – to protect Ontario policyholders in their dealing with foreign insurance companies who have superior bargaining power – do not extend to OMEX and XL.

28 In response Mr Donnelly reiterated his view that s.123 would be applied in Ontario proceedings. He distinguishes *Burson* on the ground that, in that case, there was no evidence of any authority granted by the US insurer (incorporated and with a head office in Delaware) to provide the policy to the insured company or its agent in Ontario, the insured's broker being located in Montreal. Here XL was aware that it was reinsuring an Ontario insurance exchange and that the producing broker was JLT Canada so that it must have been clear that the policy would be delivered by the placing broker to the Ontario office of the producing broker. He expresses the view that, even if s.123 is not applied, there is a good chance that the court would hold that Ontario law is the proper law of the Reinsurance Contract pursuant to common law choice of law rules (which are, of course, different from those laid down by the Rome Convention).

The significance of English law

29 The fact that English law is the likely proper law of the contract is, XL submits, of considerable significance for the purpose of deciding the natural forum. Firstly the true meaning of the Reinsurance Contract requires the court to interpret the relevant provisions in their context and with an appreciation of the manner in which reinsurances such as this operate. That is an exercise which it is more appropriate for the English Court to perform especially as it is likely to be necessary to consider the inner workings of the reinsurance with the assistance of experts with market experience of the operation of annual aggregate deductibles and because the condition precedent contained in the claims notification clause has a particular significance in English law.

30 Secondly, there is, XL submits, a real risk that if the dispute between the parties is determined in Ontario, it will be determined in accordance with the law of Ontario, which is not, to English eyes, its proper law, namely the law of England. If that is so, OMEX will rely on the "relief from forfeiture" provision in s 129 of the Ontario Insurance Act, which provides:

> *"Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against forfeiture or avoidance on such terms as it considers just".*

31 The effect of that is said to be that OMEX will be able to recover under the Reinsurance Contract even if it was in breach of the claims cooperation clause. As a result the consequence of applying Ontario law may be to deprive XL of a defence open to it under English law, being the very law which the parties impliedly chose. XL would thereby be deprived of a contractual benefit which formed part of the bargain.

32 Mr MacDonald prayed in aid the observation of Aikens, J in *Dornoch,* where there was a risk that the Mauritius court would apply Mauritian law. Aikens J observed (at [79])

that this would be a case where "*the wrong proper law and thereafter the wrong principles would be applied to all the issues that arise in this case*", so that it was

> "*legitimate for the reinsurers to say, first: that it is justifiable for them to try and ensure that the correct proper law and principles determine the issues as between them and [the reassured]; and, secondly, that it is reasonable for them to institute proceedings in England for a negative declaration as to liability and for a further declaration that the contract was properly avoided in order to ensure that those issues are decided in a court where the correct proper law and principles will be applied"*.

It is necessary to note that in *Dornoch* the Mauritian court would not only have applied different principles of construction but also a markedly different law in relation to the availability to the reinsurers of defences independent of any defence under the original insurances.

33 Since different countries may have different private law rules the identification of the "*correct proper law*" will inevitably depend on which court is deciding the question. There is however authority that the English Court should favour its own conflict rules: see per Staughton LJ in *The Irish Rowan* [1991] 2 Q.B. 206, 229G (cited by Longmore J in Tiernan at [18], p525):

> *"In an ideal world there would be no difference between the conflict rules applied by all nations. … But unfortunately uniformity is far from achieved. … [I]t seems to me fairly arguable that a plaintiff is entitled to claim the benefit of the conflict rules prevailing here. So far as concerns domestic law, it would be wrong for us to suppose that our system is better than any other. But in the case of conflict rules, which ought to be but are not the same internationally, there is a case for saying that we should regard our rules as the most appropriate."*

34 OMEX contends that the absence of any express choice of law is significant. In the absence of such a choice it is not possible to regard the parties as having made an implied choice. There is thus no question, if Ontario law applies, of XL being unjustifiably deprived of the benefit of a contractual stipulation for English law. In not agreeing, expressly or impliedly, to any proper law, the parties were 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 any claim was brought. That would inevitably mean that one party might be at a disadvantage compared with the other - and vice versa - according to which court exercised jurisdiction. But that circumstance would not make England the natural forum.

35 In my judgment XL has much the better argument for saying that the correct inference is that the parties to the Reinsurance Contract impliedly chose English law**.** Although it would, of course, be possible for the contract to be governed by some different law, the factors which point to English law are very strong. I respectfully agree with the observation of Hobhouse, J, as he then was that there is 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, particularly when the contract in question is replete with reference to Lloyd's market clauses (themselves likely to be habitually used in contracts governed by English law), and when the characteristic performance is to be by an English underwriter[6]. Although

[6] Similarly in *Prifti v Musini* [2003] EQHC 2796 (Comm) Andrew Smith, J observed that it was "*if*

the latter point is of most immediate relevance for determining the law applicable in the absence of an express or implied choice of law, it is not without relevance in deciding whether there was an implied choice. Further, those who negotiated this contract must, or at any rate would naturally, have regarded the parties for whom they acted as subject to the good faith obligations (and other obligations, such as in misrepresentation) habitually applicable between the parties (proposed and actual) to an English contract of insurance, and as subject to, or entitled to the benefit of, the condition precedent obligation contained in the claims co-operation clause. It is nothing to the point that that the present dispute does not relate to misrepresentation or non-disclosure.

36 The fact that the parties have impliedly chosen English law is, as it seems to me, in this case, of considerable significance. Firstly this is so because, as I have said, the choice of the only alternative venue may deprive XL of the benefit of English law, to which the parties agreed and rights under the condition precedent in the claims co-operation clause to which, under that law it is entitled. I do not think this consideration is trumped by the fact that any relief against forfeiture would be granted only if the Ontario court thought that it was just to do so.

37 Secondly, it is because the chief subject matter of the dispute – the proper construction of the excess provisions, according to which the claimant may have a good claim, no claim or a claim but to less - appears to me particularly suited for determination by this court, whose habitual business includes the resolution of reinsurance disputes between reassureds and Lloyd's underwriters in accordance with well-developed principles of law and construction.

38 I accept that the central issue involves issues of construction, rather than some debatable point of principle of the English law of insurance, and that, if the Ontario Court were to hold that the governing law is that of England (which it may well not), evidence could no doubt be given in Ontario as to English principles of construction, informed by well-known text books and authorities. A similar exercise occurred, but in reverse, in *Travellers Casualty& Surety Company of Canada v Sun Life Assurance Company of Canada (UK) Ltd* [2006] EWHC (Comm) 2716 in which this Court had before it substantially agreed expert evidence of the principles of construction applicable in Ontario (see para 27 ff of my judgment). Further Ontario is itself, a common law jurisdiction which frequently cites and relies on English authorities.

39 Nevertheless there is a distinct advantage in having the issue of construction 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 (as opposed to deciding, on the evidence of experts, what as a matter of fact they are); (c) which regularly applies them; and (d) which has a particular degree of experience and expertise in reinsurance matters, particularly those concerning Lloyd's. I note the unchallenged evidence of Mr D'Silva that there is little jurisprudence in Ontario relating to the interpretation and application of reinsurance contracts and that Ontario courts have limited experience in dealing with the present type of insuring arrangements. I note also that in *Tryg Baltica International v Boston Compania de Seguros* [2005] Lloyd's Rep IR 40,45 Cooke J said that "*where points of construction of English law are involved, particularly those which*

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anything more natural to suppose that parties to reinsurance underwritten in the London market would more probably expect litigation to be in the English court", rejecting the submission that the parties intended the Spanish courts to have jurisdiction because the subject matter of the reinsurance was a Spanish risk.

involve reinsurance with conditions precedent ….the natural expectation of the parties must be for the English Courts to resolve such matters".

40 Thirdly, it seems to me that this is a case in which some evidence of the circumstances and context in which the slip was signed may be relevant (and there may be a dispute, to be determined according to English law, as to the extent to which any such evidence is admissible). Evidence as to the subjective intentions of those who were responsible for negotiating and agreeing the policy is not admissible; nor is evidence of prior negotiations (absent a plea of rectification). But evidence of facts and matters which were or ought to have been known to the parties, may be admissible, if relevant. That may include evidence as to previous placements (the Reinsurance Contract being part of a programme that had been placed in the London market in previous years) and evidence as to market practice and understanding as to the application of annual aggregate deductibles (although the dividing line between market understanding/practice and subjective intention may sometimes be blurred).

41 Any such evidence is likely to be located in London where the underwriters and placing brokers are located, where the placing files are located, and where any expert as to London, and, in particular, Lloyd's, market practice is likely to be found. It is not clear to me what evidence (if any) JLT Canada witnesses could relevantly give[7], but, whatever it is, it would seem to me likely to be evidence which could also come from JLT London, the placing broker. It is difficult to see how matters not known to JLT London (if there are any) but known to JLT Canada could be relevant; indeed evidence that was not and could not be known to XL would be likely to be inadmissible. The potential significance of witnesses as to the genesis of the transaction ("*market background*") in favour of England as the appropriate forum was a factor considered by Moore-Bick, J, as he then was in *Lincoln National v ERC* [2002[2 Lloyd's Rep IR 853, 858 [25]. The Court has, in the past, considered expert evidence on the application of AADs: *Wace v Pan Atlantic* [1981] 2 Lloyd's Rep, 339, 349ff.

42 So far as the defence based on non-compliance with the notification requirements of the claims cooperation clause is concerned it may well be necessary for the English Court to determine the dividing line between a case such as *Royal Sun Alliance v Dornoch Ltd* [2005] Lloyd's Rep IR 544 and a case such as *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* [2008] Lloyd's Rep 4540. In the former case, where shareholders alleged that the directors of a company had made false statements which caused the value of the shares to be artificially inflated, the Court of Appeal held that the relevant losses under contemplation in the claims cooperation clause were those of the third party claimant seeking to recover from the original insured; but that there was no actual loss, on the facts of that case, until it had been established that the value of the shares had been artificially inflated on account of the directors' false statements. In *AIG* on not dissimilar facts, the Court of Appeal distinguished *Dornoch*, holding that the shareholders had suffered a loss as a result of a sharp fall in the company's share price.

43 I, also, bear in mind that the issue as to whether there was non-compliance with the claims co-operation clause cannot be divorced from the issue as to the true construction of the excess provisions, since the correct interpretation of the latter will affect the question as to whether particular losses may give rise to a claim. Thus, on OMEX's

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[7] JLT Canada faxed information to JLT London which was shown to underwriters (e.g. about the municipalities which were members of OMEX in 2001 and about losses) but I am not aware of any direct involvement with XL.

interpretation of the AAD the date for notification will be earlier than that which applies on XL's interpretation. It is also necessary to consider what, as a matter of construction the words "*knowledge of any loss or losses which may give rise to a claim"* signify, so far as whether the test is subjective or objective. There is authority in English law that circumstances may give rise to a claim if there is, objectively viewed, a reasonable and appreciable possibility of a claim. The prospects of a claim of the requisite kind must be real as opposed to a prospect which is false, fanciful or imaginary: *HLB Kidson's v Lloyd's Underwriters*[2007] EWHC 1951 (Comm)

44 I would have reached the same decision if I had concluded that English law was likely to be the applicable law only because England was the place of characteristic performance. Once the court has decided that English law is applicable, the disadvantage to XL of running the risk that the Ontario Court (a) will apply a different law; and (b) will thereby deprive XL of a defence otherwise available to it under English law, is the same, whatever the reason for the application of English law. It is true that that factor becomes somewhat more significant if the effect is to deprive XL of a benefit for which the parties impliedly contracted but it remains a potent one even if English law applies only because England was the place of characteristic performance of the Reinsurance Contract. That was, after all, the principal performance for which the parties bargained. XL may legitimately say that, if as a matter of English private international law (applying the Rome Convention, an international obligation) English law is the law of the contract, an English Court ought to regard it as an important (but not conclusive) factor in favour of retaining jurisdiction that the only other foreign court which is a candidate may not apply English law. I reject the submission of Mr Dougherty for OMEX that it would be an error of principle to take this approach because OMEX is not domiciled in this country.

45 OMEX places reliance upon the fact that it was the first to commence proceedings, in Ontario. That does not seem to me a factor of significant weight. OMEX was able to issue and serve the Ontario proceedings, as it did without a court order. No Ontario Court has yet ruled, even provisionally, on jurisdiction. For that purpose the Ontario Court will need to decide whether a "*real and substantial connection*" exists between Ontario and the proceedings (so that the Ontario Court enjoys jurisdiction *simpliciter*), taking into account the eight factors considered by the Ontario Court of Appeal in *Van Breda v Village Resorts Limited* [2010] ONCA 84. It will then have to consider whether or not XL can establish that there is some other clearly more appropriate forum.

46 The existence of concurrent proceedings is a factor to be taken into account in considering which is the appropriate forum. But the existence of proceedings instituted earlier is not of itself a reason for the court to decline jurisdiction. (A similar rule applies in Canada – *Teck Cominco Metals Ltd v Lloyd's Underwriters* 2009 SCC 11, [2009] 1 SCR 321). As Bingham J put it in *Du Pont v. Agnew* [1987] 2 Lloyd's Rep. 585, 589 (cited by Aikens J in *Dornoch* at [112], p 153):

> *"the general undesirability of such concurrent proceedings is, however, but one consideration to be weighed as part of the overall assessment… The policy of the law must nonetheless be to favour the litigation of issues once only, in the most appropriate forum"*.

47 Much may depend on the stage which the rival proceedings have reached. In Ontario XL has challenged the Court's jurisdiction and that challenge, I understand, will not be heard until 2011. A statement of claim has been filed. Although I would not, I think,

go so far as to adopt Mr MacDonald's characterisation that it "*at best casts an opaque light*" on the nature of OMEX's claim, the construction argued for is not, itself, expounded. The pleading simply asserts what is claimed in respect of the Cyril, Thornhill, and excess of AAD claims. By contrast XL's case on construction has been set out in Ms Jones' first witness statement in considerable detail. The proceedings in England are in truth more developed than in Ontario. I do not regard it as significant that XL's claim is for a negative declaration.

48 I do not ignore the fact that OMEX has recently commenced proceedings against JLT Canada for alleged breaches of the insurance brokerage contract in procuring the coverage in the terms in which they did. OMEX says, amongst other things, that JLT failed (i) to become familiar with OMEX's business, (ii) to provide coverage that was appropriate for it with an appropriate deductible and appropriate claims notice provision; (iii) to explain the deductible clause; (iv) to draw attention to and explain the claims notice provision and how it worked and the importance of compliance with it; and (iv) to assist OMEX in reporting claims within the required timeframe

49 This third party claim is not, in my opinion, grounds for declining jurisdiction. I do not know what response JLT Canada is likely to make to the proceedings, so far as jurisdiction is concerned. In any event it would be open to OMEX to join JLT Canada as a necessary and proper party to the English proceedings under CPR 6.36, PD6B 3.1(4) as in *Gan v Tai Ping* [1999] Lloyd's Rep IR 229, 241.

50 If the present proceedings were to continue in tandem with the claim against JLT there would be an overlap of matters to be considered in the two actions. But I do not consider it likely that it would be very great. The issue as to the construction of the Reinsurance Contract depends (insofar as it depends on factual evidence at all) on what passed between representatives of OMEX and the underwriters. The claim that an inappropriate policy was taken out depends largely on what passed between OMEX and its representatives. A similar division arises in relation to the issue of claims notification which, as between OMEX and XL depends upon what passed between them and their representatives, and, as between OMEX and JLT Canada, as to what the latter were told and what advice they did or should have given.

51 So far as the present action is concerned, there appears to be no dispute as to when notification was actually made to XL. XL, in its case in relation to the claims cooperation clause, has put in issue five underlying claims together with its contentions in relation to breach arising out of the exhaustion of the AAD (on OMEX's interpretation). There were 2 individual claims (Cyril and Thornhill), which were paid in excess of $ 1 m and 3 further claims which might have exceeded the excess. There is an issue as to when the aggregate losses (from the ground up) would exceed the AAD for 2001 and 2002 but the six claims between them form a considerable proportion of the aggregate losses.

52 XL's case as to what OMEX knew is based on documents in OMEX's claim files. One would not expect much dispute that OMEX knew those matters. There will be an issue as to whether those matters may give rise to a claim under the reinsurance. Findings of fact would need to be made, which would, I anticipate, be made principally on the basis of the documents in OMEX's files. If it is found in the present action that OMEX knew of losses which might give rise to a claim, JLT Canada might seek to assert in Ontario that OMEX did not have such knowledge, but this seems to me unlikely.

53 OMEX has expressed concern that the Ontario Court might conclude that OMEX had complied with the notification requirements, leaving OMEX with no redress in this respect against JLT Canada; and that the English Court might hold that OMEX had not so complied, leaving it with no redress against XL. This prospect, which seems to me possible but not very likely, would be removed if JLT Canada was joined to these proceedings. Further it would make sense for the English proceedings to be heard first. It will then be possible to know whether, as a matter of English law, there was a failure to notify and what it was. JLT Canada's obligations would then fall to be considered in circumstances in which the risks of non-notification (viz non recovery or limited recovery under English law from XL) would be precisely known and JLT Canada's obligations (if any) to avert or warn against such risks examined in the context of what will actually have occurred.

54 The existence of this claim does not, in my judgment, outweigh the factors in favour of English jurisdiction. Nor does the possibility of Canadian witnesses having to give evidence as to the limits of their knowledge. During the relevant period there were no more than 3 OMEX claims handlers at any one time and it is not clear that all of them would be necessary; nor as to whether any witnesses from JLT Canada (who administered the SUG OMEX programme) may be required. If they were needed their evidence could be expected to be limited and probably confined to what was notified to XL. It may be necessary to look at the 60 claims files which XL has inspected but this is likely to be, wholly or mainly, a documentary exercise bearing on the question as to when the AAD was breached. When that was is largely apparent from the bordereaux and summary sheets submitted to XL.

55 Any Canadian witnesses would not have to give evidence in person: this court regularly hears evidence by video-link. OMEX submits that it will be necessary to call defence counsel who handled the individual claims to give evidence of their value. That may be so, although, since XL does not seek to rely on any information that OMEX did not have, the scope of this evidence seems to me likely to be limited. Further OMEX can themselves prove what they were told by their lawyers, if it qualifies the documentary record, and what they were told ought, itself to be the subject of such record.

56 I have not ignored the fact that the Reinsurance Contract relates to municipal insurance in Ontario effected by a corporation domiciled in Ontario. I do not regard this as a circumstance which is of any significance by itself. 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. There is nothing sufficiently special in the circumstance that the reassured is a Canadian mutual (to use English terminology) to mandate Canadian jurisdiction. Nor does the existence of an Agent in Ontario for Lloyd's Underwriters mean that Ontario is the most appropriate forum.

57 Accordingly I decline to grant the relief sought.