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Applicable law and jurisdiction in international reinsurance contracts from a Swiss perspective

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Introduction

Reinsurance practice often involves international contractual relations. Issues that regularly arise in reinsurance litigation relate to the place of jurisdiction and the applicable law. As reinsurance disputes are frequently brought before arbitral tribunals, there is virtually no jurisprudence by Swiss courts in reinsurance matters. In a recently handed down decision,[1] the Swiss Federal Supreme Court clarified the important issue of the competence of the Swiss courts in international reinsurance contracts.

The cedent, with its seat in Switzerland, commenced litigation before the Commercial Court of Zurich (the Commercial Court) against a reinsurer, with its seat in Italy, and requested that the Commercial Court order payment of roughly 1.2m Swiss francs plus interest arising out of a reinsurance contract the claimant had entered into with the respondent's predecessor. The contract provided for Swiss substantive law to apply, however, it was silent on jurisdiction. In an interim decision, the Commercial Court assumed jurisdiction, arguing that the reinsurer's primary obligation was a mere payment of benefits in case the reinsured risk occurred and that the payment had to be performed at the seat of the reinsured insurance company. The Federal Supreme Court (the Supreme Court) reversed the decision.

We take the Supreme Court's judgment as an opportunity to briefly discuss the issues of competence in reinsurance disputes and the applicable law to reinsurance contracts from a Swiss perspective.

Reinsurance contracts in Swiss law and jurisprudence

As in many jurisdictions, Switzerland’s reinsurance contracts are not subject to the special rules on insurance contracts as laid down in the Swiss Federal Act on the insurance contract. Rather, reinsurance contracts are subject to the general principles of contract law laid down in the Code of Obligations (CO). As the CO gives parties wide autonomy in shaping their contractual relations, the internationally accepted reinsurance principles are considered relevant sources of reinsurance law in Switzerland and play an important role in contractual interpretation of reinsurance contracts.[2]

In this context, the Supreme Court expressly recognised the importance of the jurisprudence of the British courts and the practice of the London reinsurance market in the development of the international reinsurance practice.

The law applicable to reinsurance contracts

Parties to a reinsurance contract can freely agree the law by which their contractual relationship shall be governed. In the absence of a choice of law, it is for the Swiss judge to determine the law governing the contract based on the Swiss Private International Law Act (PILA). The PILA provides that the contract shall be governed by the law of the state with which the relevant contract is most closely linked. This link is deemed to exist with the state in which the party performing the obligation characteristic of the contract has its habitual residence.

The criteria of the closest link is disputed in Swiss doctrine as it is assumed that both parties to a reinsurance contract provide obligations that are characteristic. The prevailing doctrine suggests that a reinsurance contract is so closely linked to, and dependent on, the underlying insurance contract that the applicable law derives from the

domicile of the cedent.[3] Furthermore, if a primary risk is reinsured with multiple reinsurance companies from different legal orders, there is a prevailing interest of the cedent to have all reinsurance contracts governed by the same substantive law. Otherwise, the cedent would have to consider a multitude of local rules in order not to lose its reinsurance coverage under one or several contracts. This was deemed to result in unreasonable business impediments,[4] hence the determination of the applicable law was inter alia characterised by practical considerations. However, the Supreme Court rejected such practical considerations in the context of competence as will be shown below.

The place of jurisdiction in international reinsurance contracts

In the absence of a choice of forum clause, jurisdiction of the Swiss courts is determined by the PILA or, as the case may be, an international treaty. In the case in question, the issue had to be considered under the 2007 convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention) since both Switzerland and Italy – the latter by virtue of it being a member state of the European Union – are contracting parties to the Lugano Convention.

Reinsurance contracts are considered contracts for the provision of services which are not captured by the Lugano Convention's prescriptions in Section 3 (jurisdiction in matters relating to insurance).[5] Hence, in the absence of prorogation of the competent court by agreement of the parties pursuant to Article 23 of the Lugano Convention, the question of competence shall be determined pursuant to Section 2 (special jurisdiction), namely Article 5(1).

This provision is virtually identical to Article 5(1) of Council Regulation (EC) No 44/2001. As a matter of practice, Swiss courts tend to follow in the construction of the Lugano Convention the jurisprudence of the European Court of Justice (ECJ) on Regulation 44/2001. According to the ECJ's decision of 11 March 2010 in *Wood Floor Solutions* v *Silva Trade*,[6] the rule in Article 5(1) of Regulation 44/2001 establishes, in essence, that the court in the place with the closest connection to the contract shall be competent to hear all matters arising out of a single contract. The ECJ determined that the contract was most closely connected to the place of performance of its principal obligation, where a contract required performance of several obligations,[7] as is the case in a reinsurance contract.

Article 5(1)(b) determines the place of performance of the contractual obligation where, under the contract, the services were provided or should have been provided. In this context, the Commercial Court first had to determine the principal obligation of the contract and, second, the place of performance thereof.

The principal obligation under a reinsurance contract

The Commercial Court held that the settlement of the reinsured damages was at the core of a reinsurance company's obligations, hence the payment of a sum to offset an incurred damage. This payment would – according to Article 74 CO – occur at the place of business of the ceding company, that is, the Swiss insurance company in the case at hand.

The Supreme Court disagreed. It described a reinsurance contract as a contract by which the reinsurer assumed in favour of the cedent fully (exception), or in part (normal case), a certain risk covered by an insurance contract entered into between the cedent and the policy holder. The Supreme Court held that the reinsurer's performance comprised both the assumption of a risk as well as payment in the event the risk occurs. In most cases, however, the risk would not occur; hence, generally, the reinsurer would not have to make payment under the reinsurance contract. Rather, the (unconditional, continuous) obligation of the reinsurer was the provision of security based on which the insurer could increase its premium income and satisfy statutory solvability requirements. It was primarily for the provision of security, and not for a mere payment in the event of the risk occurring, that the cedent paid the reinsurance premium.

The place of performance of the principal obligation

Having determined the principal obligation under a reinsurance contract, the Supreme Court plainly stated the provision of security was performed at the reinsurer's domicile and not at the cedent's domicile. Therefore, the Supreme Court held that the Commercial Court was not competent to hear the matter.

Comments

The decision is notable for several reasons: firstly, it provides important guidance on the determination of the place of performance under the new Article 5(1) of the Lugano Convention; secondly, it determines the principal obligation that is characteristic of a reinsurance contract; thirdly, it may also provide guidance for PILA-governed litigation.

Article 5(1) of the Lugano Convention provides for the place of jurisdiction for all contracts on the one hand (let. a) and, on the other hand, specifically for contracts for the sale of goods (let. b, first indent) and contracts for the provision of services (let. b, second indent). While let. a fixes jurisdiction in the courts for the place of performance of the specific obligation in question, let. b provides for jurisdiction of all matters arising out of a contract in the courts for the place of performance of the contract's principal obligation.[8] Hence it is the place of delivery of the services that are principal under a reinsurance contract which is the linking factor to establish jurisdiction for all matters. While under the old scheme of the Lugano Convention the Commercial Court would have had jurisdiction – as the obligation in dispute concerned the payment of the insurance benefits – the forum at the place of performance of the obligation in question was ceded in favour of a uniform place of jurisdiction.

Can there be different forums in case of multiple reinsurance contracts? While in *Wood Floor* the ECJ noted (and the Supreme Court referred to) that the place of performance of the principal obligation that is characteristic of a services contract is normally in the state with which the contract is most closely linked, we see that this principle does not apply in this particular case. The cedent raised concerns against jurisdiction in the place of the reinsurance company as this would run contrary to the necessity of a uniform place of jurisdiction in such cases where an insurance company entered into multiple reinsurance contracts with multiple reinsurance companies for the same primary risk. The Supreme Court held that there is no room for such practical considerations under Article 5(1)(b) of the Lugano Convention. In this context, it noted that dissenting decisions could be avoided by joining several defendants. Pursuant to Article 6(1) of the Lugano Convention, a person domiciled in a state bound the Convention may also be sued 'where he is one of a number of defendants where any one of them is domiciled, provided the claims 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'.

Had the case arisen between a Swiss cedent and a US reinsurer the result would likely be the same, with the Commercial Court in Zurich lacking competence. In this case, jurisdiction would not derive from the Lugano Convention, but the PILA. In Article 113, the PILA provides for an alternative place of jurisdiction before the Swiss court if the obligation that is characteristic of the contract must be performed in Switzerland. It has not been settled pursuant to which law (autonomously, *lex fori, lex causae*) the place of performance of the obligation that is characteristic of the contract shall be determined in the absence of party agreement.[9] As it was the legislator's intent to harmonise the jurisdictional provisions in the PILA with those in the amended Lugano Convention, some legal literature, controversially, suggests an autonomous determination[10] while others suggest that the *lex causae* should be determinative.[11] In the instant case, the different doctrinal opinions appear not relevant. Firstly, it appears unlikely that the Supreme Court would make a different determination under the PILA with respect to the characteristic obligation. Secondly, Article 74(2)(3) CO provides that 'other obligations (namely such obligations other than the payment of a pecuniary debt) must be discharged at the place where the obligor was resident at the time they arose'. In reinsurance contracts, as the Supreme Court held, the provision of security to the cedent is performed at the place of the reinsuring company.

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[1] ATF 140 III 115 of 17 January 2014.

[2] Cf. ATF 107 II 196 of 10 June 1981, *Les Assurances Nationales IARD* v *The Northern Assurance Company*.

[3] ZK IPRG-Keller/Kren Kostkiewicz, Art. 117 N 156 ss.

[4] *Id.*

[5] C-412/98, ECJ Judgment of 13 July 2000, *Group Josi Reinsurance Company SA* v *Universal General Insurance Company (UGIC)*, para. 62 ss.

[6] C-19/09, ECJ Judgment of 11 March 2010, *Wood Floor Solutions Andreas Domberger GmbH* v *Silva Trade SA*.

[7] Id., para. 31, stating that '*for the purposes of applying the rule of special jurisdiction in matters relating to a contract, laid down in the second indent of Article 5(1)(b) of the regulation, concerning the provision of services, when there are several places of delivery of the goods the "place of performance"must be understood as the place with the closest linking factor, which, as a general rule, will be at the place of the main provision of services'.*

[8] *Wood Floor* v *Silva Trade*, para. 23 ss, referring to the ECJ Judgment of 3 May 2007 in *Color Drack GmbH* v *Lexx International Vertriebs GmbH* (C-386/05).

[9] Note that the prevailing doctrine to the previous article 113 PILA held the view that the lex fori was determinative (BSK IPRG-Amstutz et al. Art. 113 N 13a ss.).

[10] CHK-Schnyder/Doss, Art. 113 N 10a.

[11] BSK IPRG-Amstutz et al. Art. 113 N 13 ss., in particular N 13b.

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