MONTE CARLO SPECIAL: LEGAL FOCUS

Border skirmishes

Given the international nature of reinsurance contracts, effective management includes removing doubt about which country's courts might hear any future dispute. Where the cedant and reinsurer do not make an express choice of jurisdiction, things gets complicated — but it happens in reinsurance contracts all the time. ***ANGUS RODGER*** *(left) and* ***TODD COREY*** *explain the problems that can arise*

WHENEVER a dispute is brought to trial in the US, the courts may decline to hear the case on the grounds of *forum non conveniens* — in other words, that the case would be be more appropriately tried elsewhere. But to reach this decision the court must weigh up all the relevant factors and perform a balancing act. As a result, it is often impossible to have a strong degree of confidence as to what decision will be taken in any particular case.

Historically, it has not been uncommon for US courts to decline jurisdiction in reinsurance actions involving the London market, taking into account the English courts' experience in the specialist business of reinsurance as well as practical factors such as the location of witnesses. However, a recent ruling in the case of *Combined Insurance Company of America v Certain Underwriters at Lloyd's* illustrates that London reinsurers cannot rely on US courts exercising their discretion in this way.

Combined, which was reinsured at Lloyd's, sought to recover a World Trade Center insurance loss from its reinsurers. In November 2001, the reinsurers brought proceedings in London, seeking a declaration of non-liability. Almost two years later, Combined filed a lawsuit in Illinois and asked the English court to stay its proceedings, which it declined to do.

The reinsurers applied to have the Illinois proceedings dismissed on the grounds that London was a more appropriate forum for the dispute. The Illinois court of first instance agreed it was inappropriate to have two sets of proceedings over the same subject-matter and dismissed the claim before it. That decision was subsequently overturned by a majority of the appeal court, which held that they would not require an Illinois resident with a case pending in Illinois to have to go through foreign proceedings to obtain relief.

The Illinois action was therefore permitted to proceed, despite the long-standing parallel proceedings in London and the risk of inconsistent judgments being given in the two actions.

EU and EFTA

In relation to EU and EFTA member states, the position should be somewhat less uncertain. These states have adopted (almost) identical rules to determine whether they have jurisdiction, as laid down in the Brussels Regulation and various conventions.

As a result, each state applies a set of "black-and-white", non-discretionary rules: for example, a defendant may always be sued in its home court, and in a claim for non-payment of money a defendant may be sued in the courts of the country where the money was due to be paid.

This provides more predictability than a discretionary test like *forum non conveniens* — but even so, applying the rules seldom produces such a categorical answer, as would be the case if the parties had expressly chosen the jurisdiction for themselves at the outset.

Worldwide

One advantage of the EU and EFTA rules is that if proceedings are brought in one of these courts, the other courts are prohibited from entertaining parallel proceedings unless the first court determines that it does not have jurisdiction. This removes the risk of conflicting judgments.

There have been some moves to extend this approach to other countries. On June 30, 2005, after more than a decade of negotiation, the Convention on Choice of Court Agreements was opened for signature. This provides that where the parties have chosen a country's courts to have exclusive jurisdiction, the court so chosen must generally accept the case.

Courts of states that were not chosen by the parties must suspend or dismiss proceedings unless the first court determines that it does not have jurisdiction. To date, no country has ratified the convention, but it is expected that several countries, including the US, will do so.

Conclusion

It is inevitable that disputes over reinsurance will continue to arise. But it is an easy matter to avoid compounding the substantive disputes with spin-off litigation about which court has jurisdiction. Ensuring that all contracts contain a clear choice of jurisdiction offers something attractive to all reinsurers: a quick and easy way to cut their legal costs.

Angus Rodger is a partner and Todd Corey is an associate in the London office of international law firm Steptoe & Johnson