Neutral Citation Number: [2009] EWHC 2388 (Comm)

Case No: 2007-351

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2009

Before :

MR JUSTICE HAMBLEN

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Between :

GARD MARINE & ENERGY LIMITED **(A company incorporated in Bermuda)**	**Claimant**
- and -	
(1) LLOYD TUNNICLIFFE (sued on his own behalf and on behalf of all other members of Lloyd's Syndicate 780 for 2005 year) **(2) GLACIER REINSURANCE AG** **(A company incorporated in Switzerland)** **(3) AGNEW HIGGINS PICKERING & COMPANY LIMITED**	**Defendants**

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Mr Andrew Hunter (instructed by **Clyde & Co**) for the **Claimant**
Mr Peter MacDonald Eggers (instructed by **Barlow Lyde & Gilbert**) for the **2nd Defendant**

Hearing dates: 17th September 2009

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Judgment

Mr Justice Hamblen :

Introduction

1. This action concerns reinsurance claims made by the Claimant ("Gard"), a Bermudan company, against the First Defendant ("Advent"), a Lloyd's syndicate, and the Second Defendant ("Glacier Re"), a Swiss reinsurer.

2. The original policy insured Devon Energy Corporation (a US company) in respect of *inter alia* property and business interruption risks, initially for the period from 1st July 2003 to 1st September 2005. The period was extended to 1st September 2007 by an endorsement dated 4th August 2005, which stipulated that there be a combined single limit of US$400 million "*any one accident or occurrence in respect of losses arising out of a Named Windstorm in the Gulf of Mexico*".

3. Gard insured 12.5% of this risk (*i.e.* US$50 million). Prior to confirming its participation in the underlying risk, in early August 2005, Gard placed an order with its broker, the Lloyd's brokers, Agnew Higgins Pickering & Company ("AHP"), for excess of loss reinsurance to reinsure its whole proposed 12.5% line in respect of losses in excess of a deductible of US$250m (100%). This was a renewal of reinsurance which Gard's predecessor had had for the period to 1 September 2005.

4. Gard reinsured the risk under two excess of loss reinsurance slips, under each of which the reinsurers agreed to "*pay up to Original Package Policy limits / amounts / sums insured excess of USD250,000,000 (100%) any one occurrence of losses to the original placement*" ("the Sum Insured clause").

5. The two placements were made by AHP as follows:

   (1) London market underwriters (Advent, Ascot, Map and Axis) subscribed to a slip in respect of a reinsurance order of 7.5% of the whole ("the London Market slip").

   (2) Glacier Re signed a slip in respect 100% of a reinsurance order of 5% of the whole ("the Glacier Re slip").

6. In September 2005, Devon Energy Corporation sustained damage to its insured interests in the Gulf of Mexico by reason of Hurricane Rita and presented a claim against Gard under the original policy up to the full limits of the policy. The claim was subsequently settled in a global sum of US$365 million, of which Gard bore 12.5%.

7. Following settlement of the underlying claim, Gard made claims against its reinsurers. It calculated the reinsurance claim on the basis that the US$250m deductible in the Sum Insured clause is a deductible which is referable to 100% property values, and so where a claim is made in respect of property in which Devon had less than 100% interest, the deductible falls to be "scaled" to reflect the lower interest.

8. For a short period the entire market disputed the scaling of the deductible. However Axis and Ascot soon paid on the claim as presented. Glacier Re and two of the four Lloyd's reinsurers, Advent and Map, continued to dispute that the basis of scaling the deductible was correct and, argued, instead, that the full deductible should be applied. After proceedings were issued, Map agreed to accept the scaling approach.

9. Glacier Re paid the sum it considered was due under the Glacier Re slip, namely US$5,750,000, on the basis that the excess attachment point was US$250 million and has declined to pay the balance on the grounds that it is not so obliged. Indeed, Glacier Re contends that it was not liable for any part of the claim and claims to be entitled to recover the sum so paid.

Procedural history

10. The current action was commenced by a claim form issued on 25th March 2007. Three defendants were named in that claim form, Advent, Map and Glacier Re. The claim form was served on Glacier Re on 26th June 2007.

11. Glacier Re objected to the jurisdiction of the English Court. That objection however was held in abeyance, because on 13th September 2007, the current proceedings against Glacier Re were stayed, in consequence of Glacier Re having earlier commenced proceedings in Switzerland (on 14th May 2007), seeking repayment of sums paid under the Glacier Re reinsurance contract on the grounds that Glacier Re was not liable to indemnify Gard.

12. On 17th April 2008, Gard obtained permission to amend its Particulars of Claim (removing Map as a defendant) and to add the broker, AHP, as a defendant. The claim against the broker is for damages in the event that Advent's and/or Glacier Re's defences to the reinsurance claims are successful.

13. In June 2009, the Swiss Federal Court dismissed an appeal by Glacier Re, holding that the Swiss Court did not have jurisdiction, because Gard was not domiciled in Switzerland.

14. As a consequence of the Swiss Federal Court judgment the stay of the action ordered in September 2007 was lifted and the English Court is again seised of the claim against Glacier Re. Glacier Re's objections to the jurisdiction of the English Court now therefore need to be addressed.

The grounds of jurisdiction asserted by Gard

15. Gard seeks to establish the Court's jurisdiction pursuant to article 5(1) and/or 6(1) of the Lugano Convention (being the applicable jurisdiction regime as between the United Kingdom and Switzerland). Gard argues that:

    (1) The Court has jurisdiction pursuant to article 5(1) because the relevant contractual obligation was to be performed in London pursuant to an alleged custom and practice of the London market.

    (2) The Court has jurisdiction pursuant to article 6(1), because the claim against Glacier Re is intrinsically connected with the claim against Advent and AHP.

16. Glacier Re takes issue with both of these grounds and submits that the Court must or should decline jurisdiction.

17. In those circumstances, Gard would be permitted to sue Glacier Re in its country of domicile, Switzerland, pursuant to article 2 of the Convention.

18. It is well established that provisions, such as Article 5(1) and 6(1), which allow a defendant to be sued in a country other than that of his domicile, are to be construed narrowly.

19. The burden of proof in the present case rests on Gard. It must establish a good arguable case that the case falls within Article 5(1) or 6(1). This has been said to mean that it has *"a much better argument than the defendants, on the material available at present"* - see Bols Distilleries BV v Superior Yachts Services Ltd [2006] UKPC 45, [2007] 1 WLR 12 at [28].

20. Before addressing these issues, the matter of applicable law needs to be considered.

Applicable law

21. There is a dispute between the parties as to whether the law applicable to the Glacier Re reinsurance contract is Swiss law (as Glacier Re contends) or English law (as Gard contends).

22. In order to determine the applicable law, reference is to be made to articles 3 and 4 of the Rome Convention (as incorporated by the Contracts (Applicable Law) Act 1990). Article 3 provides that:

> "*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*."

23. The London Market slip is subject to an express choice of English law and jurisdiction. There is no such express choice in the Glacier Re slip.

24. Gard, however, contends that there is an implied choice of English law in the Glacier Re slip. It is said that this implied choice is made clear by the following:

(1) The slip was in English, in a London market form. The slip also used specific London Market wording. It is well established that such matters are sufficient to demonstrate an implied choice of law.

(2) Both parties were clearly aware that the Glacier Re slip was part of facultative reinsurance protection intended to provide consistent and coherent reinsurance cover to such participants on the primary insurance cover as ordered reinsurance. This could only be achieved if the same applicable law applied to all the lines that were written on the reinsurance (which then fell to be allocated by the brokers). Both Gard and Glacier Re must therefore be taken to have agreed that English law should govern the Glacier Re reinsurance as well as the Lloyd's reinsurance.

25. This is disputed by Glacier Re on the following grounds:

(1) The choice of policy form (the J(A) form being a mere policy jacket) and the London market clauses were incidental to the scope and operation of the Glacier Re reinsurance contract.

(2) The absence of an express choice of English law is indicative that English law was not intended to apply to the Glacier Re slip. London market placements now commonly require the insertion of an express choice of law clause. The fact that the London market slip refers expressly to English law and the Glacier Re slip does not militate against the argument that English law is the chosen law.

(3) There was therefore no (express or implied) choice of English law. On the contrary, the choice of Swiss law as the applicable law is reasonably demonstrated, the most telling factor in favour of a choice of Swiss law being the fact that the slip was placed entirely ("*100% of order*") in the Swiss market with a Swiss reinsurer, Glacier Re. Placing a reinsurance contract in a

particular market invariably points to that market's legal system as the chosen law, as is often said when slips are placed in the London market.

(4) Alternatively, however, there is no such choice, the applicable law is the law of the country with which the Glacier Re slip has its closest connection. That country is Switzerland, pursuant to the presumption in article 4(2) of the Rome Convention, there being no closer connection with England.

(5) Accordingly, the Glacier Re reinsurance contract is governed by Swiss law.

26. I am satisfied that Gard have established at least a good arguable case that English law is the applicable law.

27. First, the circumstances of the placement point towards a choice of English law. The underlying policy was a London market policy which would have been governed by English law, as was not disputed. The expiring reinsurance was part of a London market reinsurance programme which would also have been governed by English law. The replacement reinsurance programme was also likely to be primarily a London market placement. This was borne out by the renewal endorsement signed by the leading Lloyd's underwriter, a copy of which was provided to Glacier Re.

28. AHP were London based Lloyd's brokers who were offering Glacier Re a share of an existing reinsurance programme. As stated in their email to Glacier Re of 11 August 2005:

> *"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.."*

29. That Glacier Re were aware that they were being asked to share in an existing reinsurance programme is borne out by their response of the same day:

> *"Referring to our conversation earlier today we thank you very much 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%. Please advise."*

30. In reality therefore this was not a Swiss market placement. It was a case of a Swiss reinsurer being invited to participate in a London market placement.

31. Secondly, the use of a Lloyd's slip and policy points towards a choice of English law. As stated in the Giulano and Lagarde report on the Rome Convention, in respect of Article 3(1): *"For example the contract may be in a standard form which is known to be governed by a particular system of law even though there is no express statement to this effect, such as a Lloyd's policy of marine insurance ..."* - see also: Dicey and Morris (14th ed) vol 2, pp. 1708-1710. Glacier Re submitted that this comment was directed at policies such as the SG form. However, in Tiernan v Magen Insurance Company [2000] IL Pr 517 a similar point was rejected by Longmore J who held that the same considerations apply to a Lloyd's policy of reinsurance. As stated in Vesta v Butcher [1986] 2 Lloyd's Rep 179 per Hobhouse J at 196: *"there remains something*

surprising and improbable about the fact that a Lloyd's slip and Lloyd's policy are governed by anything other than English law"

32. In the present case a Lloyd's policy J(A) form was used and the slip was a Lloyd's brokers slip structured in a manner common to Lloyd's.

33. Thirdly, the slip incorporated a number of London market wordings, such as LSW196A, CL 356A, CL 365 and LSW 1001. The significance of doing so has been stressed in a number of cases – see, for example, Gan v Tai Ping [1998] IRLN 7 (Cresswell J), affd [1999] Lloyd's Rep IR 229 (CA); Aegis v Continental Casualty (Cresswell J, 11 May 2006).

34. Further, the wording included provisions which have particular relevance to and resonance of English law. For example, the Notice of Cancellation clause provides for return of balance of premium, thus varying the position which would otherwise arise as a matter of English law, that the whole premium was earned on inception of the risk. The Conditions were also expressed in terms well known under English law, namely "Subject to all terms, clauses, conditions as Original and to follow the original in every respects..". In the Aegis case Cresswell J regarded such a provision as involving the use of "terminology which associates it with the law of England" (at para. 40).

Article 5(1)

35. Article 5(1) of the Lugano Convention provides that:

> "*A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question …*"

36. Gard sues Glacier Re for an indemnity under the reinsurance contract embodied in the Glacier Re slip. The "*obligation in question*" is the obligation on which Gard's claim is based, namely the obligation to pay a claim under the reinsurance contract. The place of performance of that obligation is determined in accordance with the law governing the reinsurance contract, as determined by the *lex fori* (English law).

37. Under English law the general rule is that the place of performance is where the creditor resides. Gard resides in Bermuda and accordingly Glacier Re contends that Article 5(1) is inapplicable.

38. Gard contends that neither party contemplated that claims payments would be made to Gard in Bermuda. Its case is that the common intention was that payments should be made to AHP in London and relies on the following:

(1) The fact that both parties were aware that Gard had instructed the London broker, AHP, to place and administer the reinsurance. It was clear from the form and terms of the slip and the circumstances of the placing that the reinsurance was to be administered by AHP in accordance with London market practice.

(2) The London Market practice in respect of risks is for brokers to pay premiums and collect claims (and engage in net accounting). See O'Neill and Woloniecki, the

Law of Reinsurance (2nd ed.) paras 11-24-11-25 (pp. 608-9). See also Grace v Leslie & Godwin Financial Services Ltd [1995] LRLR 472 per Clarke J at 477; Citadel Insurance [1982] 2 Lloyd's Rep 543, at 548; Deutsche v La Fondiara [2001] 2 Lloyd's Rep 621 per David Steel J at 625).

(3) In this case, both parties would have been aware that it would be impractical not to follow London market practice, and to make payments either direct to Glacier Re in Switzerland or to Gard in Bermuda.

(4) Moreover, all payments made by the reinsured, Glacier Re and the other reinsurers under the reinsurance slips and their predecessors were paid to AHP in London. This included the interim payment in respect of this claim.

(5) Gard accordingly contends that it was an implied term of the Glacier Re reinsurance (implied as obvious or necessary) that claims would be paid to AHP in London. Accordingly there is jurisdiction under Article 5(1).

39. Glacier Re disputes this and contends as follows:

(1) There is no evidence of a market custom or practice that claims would be paid to the broker, AHP, in London, let alone evidence satisfying the stringent demands of proof of a custom imposing a legal obligation. In fact, the English legal position in respect of the payment of claims is to the contrary. Further, Glacier Re's evidence is that it was not aware of any such custom or practice.

(2) In any event, the slip refers only to Glacier Re's obligation to pay the Sum Insured and the only counterpart or payee identified is Gard. It follows that, in the absence of any contrary provision, Glacier Re is obliged to pay Gard, not AHP, and that payment to Gard, not AHP, would discharge any such obligation.

(3) Further, the position under the Glacier Re slip stands in contrast to the London Market slip, which contains a subscription agreement requiring the management of claims in accordance with the Lloyd's 2005 Claims Scheme (absent from the Glacier Re slip).

40. I am not satisfied that Gard have established a good arguable case that the English court has jurisdiction under article 5(1).

41. I agree with Glacier Re that it is necessary for Gard to establish an obligation to pay claims to the brokers in London. A practice of doing so is insufficient.

42. Gard relies on Grace v Leslie & Godwin Financial Services Ltd [1995] LRLR 472, at 477 in which Clarke J held on the evidence before him that it was the universal practice of Lloyd's brokers to collect claims when called upon to do so and that this was an ordinary incident of the duty of a Lloyd's broker. However, even if a broker may be under an obligation to the insured/reinsured to collect claims when requested to do so it does not necessarily follow that the insurer/reinsurer is contractually bound to pay all claims to the broker.

43. There are cases where it has been held that payment falls to be made to the broker rather than to the principal, as in the case of Citadel Insurance [1982] 2 Lloyd's Rep 543, at 548. However, as pointed out by Robert Goff LJ in The "Stolt Marmaro" [1985] 2 Lloyd's Rep 428 at 436:

> *"There were however features of that case regarding the position of the brokers, and in particular regarding calculation by them of quarterly balances of account and the resulting remittances to be made under the cover which was being operated by them, which are absent from the present case. I do not think therefore that the Citadel Insurance case provides any direct authority to guide us. It may be that, in practice, claims would in fact be paid by underwriters to the brokers in London in a case such as the present; but there is no evidence before us of any binding practice to that effect, and I do not feel able to say that there was a term of the contract requiring this to be done."*

44. In my judgment, the position is similar here. There are no particular features of the reinsurance which support the implication of the term alleged and there is insufficient evidence of practice or custom to found the required implication.

Article 6(1)

45. Article 6(1) of the Lugano Convention provides that:

> "*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*."

46. It is common ground that, in the light of the ECJ decision in Kalfelis v Schroeder, Muenchmeyer, Hengst & Co [1988] ECR 5565, the issue under Article 6(1) is whether 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.

47. Gard relies on the judgment of Gross J in ET Plus SA v Welter [2006] 1 Lloyd's Rep 251 in which he summarized the correct approach as follows:

> *"i) The test now contained in article 6(1) of the Regulation, codifies the effect of the earlier decision of the Court of Justice of the European Communities ("the European court") on the Brussels Convention in Kalfelis v Schroeder, Muenchmeyer, Hengst & Co [1988] ECR 5565 , at page 5584 (para 12), namely: whether there is such a connection between the claims at the time when they are instituted that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings ("the Kalfelis test"). The risk of irreconcilability may arise from potential conflicting findings of fact or from potential conflicting decisions on questions of law: Gascoine v Pyrah [1994] IL Pr 82 , at 93. While article 6(1) constitutes an exception to the general rule contained in article 2 (that the defendant's domicile governs jurisdiction) and must not be abused, it does not follow that article 6(1)*

is so subservient to article 2 that it could only be invoked in special circumstances: Gascoine v Pyrah , at 94".

48. Glacier Re submits that regard must also be had to the recent ECJ decision in *Roche Nederland BV v Primus* (C-539/03) [2006] ECR I-6535; [2007] ILPr 9 in which the Court indicated the outer limits of "irreconcilability" for the purposes of article 6(1) in the following terms:

> "*even assuming that the concept of irreconcilable judgments for the purposes of the application of Article 6(1) of the Brussels Convention must be understood in the broad sense of contradictory decisions, there is no risk of such decisions being given [in this case] ... As the Advocate General observed ... 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*".

49. Gard contends that this test is satisfied in respect of Gard's claims against Advent and against Glacier Re. In particular:

(1) Both claims raise the same issue of construction, namely what is the correct meaning of the phrase "USD 250,000,000 (100%)". If the claims were to be heard in different jurisdictions, there is a risk that the different Courts might reach different conclusions on this central construction issue, particularly if, as I have held, the matter is to be approached on the basis that English law is the applicable law.

(2) Irrespective of the proper law, any Court which hears the claims will have to hear evidence and make findings of fact on factual matrix issues. Since the slips were placed pursuant to the same reinsurance order and against the same background, the evidence and factual issues will be the same or substantially the same. If these factual issues are canvassed before different Courts there is a clear risk of inconsistent findings of fact.

(3) Leaving aside the construction issue and factual matrix, the claims are also connected by the fact that both reinsurance defendants allege that AHP made misrepresentations to them or failed to make proper disclosure. Any Court which hears the claims will therefore have to hear evidence and make findings of fact on what was and what should have been said by AHP during the placing. Since the two slips were placed as part of a single placing exercise (with the same placing information), the same evidence will be relevant for each case. If these issues are canvassed before different Courts there is a clear risk of inconsistent findings of fact.

(4) Further, the close connection test is also satisfied in respect of Gard's claims against Glacier Re and against AHP. The case against Glacier Re will require the Court to consider Glacier Re's allegations as to what AHP said (and did not say) to Glacier Re during the placing and the evidence about this. So too will the Claimant's contingent claim against AHP. If these claims are not heard together then two Courts will have to hear evidence on the same matters and there will be a risk of inconsistent and irreconcilable judgments on issues of fact.

50. Glacier Re denies that there is a risk of irreconcilable judgments resulting from the proceedings in England (without Glacier Re as a defendant) and any proceedings instituted against Glacier Re in Switzerland.

51. In relation to the claim against Advent Glacier Re contends as follows:

(1) The two slips, the London Market slip and the Glacier Re slip, are entirely separate contracts based on separate presentations of the risk to different underwriters in different insurance markets.

(2) The terms of each slip are not the same, although they share a number of common provisions. In particular, the London market underwriters made a number of manuscript amendments to the London Market slip after the risk was placed with Glacier Re in Switzerland.

(3) The London Market slip contains a detailed Subscription Agreement as between the London market underwriters which regulates the agreement of contractual amendments and the handling of claims on behalf of the entire subscribing market. The Glacier Re slip contains no such subscription agreement.

(4) There is no reference in the Glacier Re slip to the London market placement (having been made after Glacier Re had agreed to a 100% reinsurance order).

(5) The issues arising in respect of the claims against Advent and Glacier Re are different. Advent relies on specific exchanges between the syndicate and AHP. These exchanges are not relevant to the claim against Glacier Re.

(6) Both claims give rise to an issue of construction, namely the proper interpretation to be given to the Sum Insured provision in each slip. Even if the issue could be formulated and determined in precisely the same terms, that is insufficient reason to hold that there is a risk of an irreconcilable judgment (the same contractual provisions are regularly interpreted by different courts in different countries at different times). In any event, in this case the issues of construction would be formulated and determined in different terms, because the factual matrix surrounding the negotiation of the Glacier Re slip is necessarily different from the factual matrix surrounding the presentation to the London market underwriters, being dependent on the actual or constructive knowledge of each of the reinsurers.

52. Glacier Re contends that there is no risk of irreconcilable judgments involving AHP for the following reasons:

(1) The claims against Glacier Re and AHP do not share a common basis. The claim against Glacier Re is a claim by Gard for an indemnity under the Glacier Re reinsurance contract. By contrast, the claim against AHP is concerned with the agency relationship between AHP and Gard and whether AHP observed an applicable duty of care in the discharge of its agency services with respect to the reinsurance contract. Given that there is an entirely separate legal and factual relationship in issue between the two claims, there can be no sufficient degree of connection between them to justify the application of article 6(1).

(2) Further, the claim against AHP is made by Gard only if Glacier Re is not liable to indemnify Gard under the reinsurance contract. Therefore, the Swiss Court would determine Glacier Re's liability under the Glacier Re slip prior to the determination of AHP's liability in England.

(3) There is an additional reason why the Court cannot assume jurisdiction pursuant to article 6(1) by reference to the claim against AHP. The time at which the relevant nexus should exist is the date of the original issue of the claim form, namely on 25th March 2007, not the date on which the claim form is amended or re-issued to effect the addition of further defendants. This follows first from the prescription laid down by the ECJ in *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co* (Case 189/87) [1988] ECR 5565, para. 12, in requiring the actions to be "*related when the proceedings are instituted*" (emphasis added) and from the House of Lords' interpretation of the word "*sued*" in both articles 2 and 6(1) of the Lugano Convention. Such a construction was adopted by the House of Lords in the interests of uniformity and predictability (both objectives of the Lugano Convention).

(4) Accordingly, as no claim had been brought against AHP at the time of the initiation of the proceedings against Glacier Re in March 2007, it follows that the Court did not have jurisdiction to hear the claim against Glacier Re under article 6(1) at that time. That defect could not be rectified by the joinder of AHP as an additional defendant in April 2008.

53. I am satisfied that Gard have at least a good arguable case that the Court has jurisdiction under article 6(1).

54. Gard's claims against Advent and Glacier Re turn on the proper construction of the Sum Insured Clause in the reinsurances. That clause is in precisely the same terms in both contracts, which contracts were placed as part of a common reinsurance programme. The issue of construction falls to be determined under English law. There is no material difference between the terms of the two contracts and so the legal issue to be determined in both cases is the same.

55. It is unlikely that issues of fact will have a major bearing on the resolution of that issue of construction. If, for example, one has regard to the pleaded matters relied upon by Advent in its pleading in relation to the construction issue, they are all matters which would apply equally to Glacier Re. The general factual matrix in relation to both placements is likely to be the same, so to that extent there will be common issues of fact. To the extent that there are differences in the factual background they are unlikely to alter the court's conclusion as to the proper construction of the words used.

56. There is therefore a real risk of divergence of outcome in the context of the same situation in law and in fact.

57. A further connection between the claims is provided by the contingent claim against AHP. Such a claim is only likely to arise if Gard's claim fails on the construction issue. As a claim which is largely dependent on the outcome on the construction issue it therefore has a common basis. Moreover, this contingent claim makes the consequences of differing judgments particularly serious. If, for example, Gard's

claim against Glacier Re failed in Switzerland and it pursued a claim against AHP in this country, if the English Court reached a different conclusion on the issue of construction then its contingent claim against AHP might well fail, leaving Gard to fall between two jurisdictional stools.

58. I also consider that, as Gard submits, the claim against AHP is likely to involve common issues of fact and therefore a risk of inconsistent findings of fact. Nor do I accept that the claim against AHP is to be ignored since it was not party to the proceedings when first issued. AHP has always been domiciled here and under English law and procedure the claim is deemed to have been commenced at the same date as the original action.

59. Even without consideration of the claims against AHP I am therefore satisfied that jurisdiction under article 6(1) has been established, but all the more clearly so if those claims are taken into account.

60. Finally, Glacier Re contended that the Court should exercise its discretion to decline jurisdiction under article 6(1) even if there were shown to be a risk of irreconcilable judgments. In this connection, it was submitted that regard should be had to the lack of connection between the reinsurance contract on the one hand and England on the other. The original risks were located in the Gulf of Mexico; the reinsured is domiciled in Bermuda; and Glacier Re is domiciled in Switzerland, where the risk was presented. The only connection to England is supplied by the brokers, AHP.

61. I reject this contention. It is overwhelmingly just, convenient and expedient that Gard's claims against Advent, Glacier Re and its consequent contingent claim against AHP be determined in one jurisdiction.

Conclusion

62. I am accordingly satisfied that the Court has jurisdiction over the claim against Glacier Re and reject its jurisdictional challenge.