Freeborn

Buying English Law When You Place London Market Reinsurance?

by Patrick Frye and Sean T. Keely

A FREEBORN & PETERS LLP CLIENT ALERT

Cedents based in the United States should be aware that they may be buying (or, indeed, have already bought years ago) English law to govern interpretation of their reinsurance contracts placed in the London market.

In a US court presiding over a lawsuit involving reinsurance placed in London, English law can apply despite the American forum. In any given case, whether the reinsurer is found to owe indemnification to its cedent – or not – can be the immediate result of whether English law applies rather than the contract law of any of the 50 US states. English and US law can vary on a number of issues relevant to a reinsurance lawsuit, including for example: allocation of loss; follow the fortunes; the timeliness of notice; or the statute of limitations. English law also varies from most US laws on how pre-judgment interest is calculated. The application of English law also might preclude an action based on an American statute.

In a very recent case, a US federal court decided that English law would apply in a dispute between a US cedent and its London reinsurers. *See Certain London Market Co. Reinsurers v. Lamorak Insurance Co.,* 2022 WL 194998 (D. Mass. Jan. 20, 2022). The court applied the "most significant relationship" (or "center of gravity" or "grouping of contacts") test, which considers the place of the contracting, the place of negotiating, the place of performance, the location of the contract's subject matter, the locations of the parties, and the parties' justified or reasonable expectations. In *Lamorak*, the ceding company was originally based in Massachusetts. But the slip agreements were placed in England through London brokers, they were signed by reinsurer representatives in England, the documents were issued in England, and the cedent presented its demands for payment to reinsurers in England. Those facts gave England the predominant relationship with the reinsurance contract in light of the parties' differing locations. Similarly, it determined that the US location of the cedent was not controlling, because the cedent would issue its billings to London and performance under the slip contracts – *i.e.,* payment of the billings – would come from London.

Lamorak adds to the small but growing body of US federal caselaw that considers what law applies to reinsurance contracts placed in London.[1] So far, those courts have all applied the most significant relationship test to conclude that English law governed the reinsurance contracts before them. One fact was apparently common to all of those cases and significant to all of the courts: in every case, the cedent's and reinsurers' agents met in London, often face-to-face, to negotiate the reinsurance. Though not always stated in the decisions, it appears that the cedent hired a broker in London to approach underwriters in order to procure reinsurance for the cedent. These facts led every court to conclude that England was the place of contracting and of negotiating.

Courts have deemed England the place of performance, but not always. Performance under a reinsurance contract is both the cedent's payment of premium and the reinsurers' payment of indemnity, and the cedent and reinsurer each issues its payment and receives the other's payment in its home jurisdiction. The place of performance does not necessarily need to be any particular one of these places. The *International* court therefore decided that the place of performance did not necessarily favor England (while downplaying the place of performance because it only involved the payment of money). The *Houston* court reached a similar conclusion. The other two courts gave slightly different reasons for deciding that this factor favored England. The *Lamorak* court simply declared the place of performance to be wherever the cedent makes its demand for payment, and the *Republic* court also emphasized where payments and credits were issued from or to.

1 Other cases to hold that English law applied to reinsurance contracts placed in London include: *Republic Ins. Co. v. Banco De Seguros Del Estado,* 2013 WL 3874027 (N.D. Ill. July 26, 2013); *Houston Cas. Co. v. Certain Underwriters at Lloyd's London,* 51 F. Supp. 2d 789 (S.D. Tex. 1999); and *Int'l Ins. Co. v. Certain Underwriters at Lloyd's London,* 1991 WL 349907 (N.D. Ill. Sept. 16, 1991).

If anything, citing London as the place of performance in those actions drastically simplified matters, in that *Republic* dealt with defendant French and Uruguayan retrocessionaires that indemnified a syndicate that included the plaintiff US reinsurer. Their world-spanning post-contracting relationship apparently was intermediated in London. Hence the place of performance is not as predictable and as obvious as the places of contracting and of negotiating are.

Strictly speaking, the most significant relationship test calls for a balancing of all conceivably relevant factors, with no one factor (or fact) to trump all the others. Theoretically, this flexibility means that English law could be rejected based on differences among the facts found in the cases above and those presented to the next US court that will decide which law governs a reinsurance contract placed in London. Further, because the cases above are trial court decisions, they are not binding on the next US court.

That said, these cases will be strongly persuasive to the next US court to take up this choice-of-law issue over London-placed reinsurance. Most US states, including New York, have adopted the most significant relationship test. Because the formation of the contracts in the cases above are fairly typical of reinsurance contracts placed in London, one would expect courts in such states to similarly conclude that English law applies, particularly if there is an emphasis on the significance of the reinsurance contract having been negotiated and formed in England. As for those states that have not adopted the most significant relationship test, they usually enforce the ancient rule of *lex loci contractus* – applying the law of the jurisdiction where the contract was made. Under this rule, the case for applying English law is even stronger.

The unanimity of these few cases thus far strongly suggests that English law may be applied more and more in US litigation over London-placed reinsurance. All parties embroiled in disputes involving such reinsurance agreements would do well to consider how their position might fare under English law – applied by a US court.

If you have any questions about how English law may affect interpretation of your reinsurance contracts, please contact Patrick Frye (pfrye@freeborn.com), Sean Keely (skeely@freeborn.com), or another member of Freeborn's Reinsurance team.

ABOUT THE AUTHORS

Patrick Frye
Partner

Chicago Office
(312) 360-6785

pfrye@freeborn.com

Patrick Frye is a Partner in the Litigation Practice Group and member of the Insurance/Reinsurance Industry Team. He represents clients in commercial litigation, including coverage disputes and antitrust claims. He advises clients on litigation strategy and appears before arbitration panels and state and federal courts. Patrick has represented policyholders or client insurers in disputes over a wide variety of insurance products, including CGL, E&O/professional liability, D&O, and long-term disability policies.

Sean T. Keely
Partner

New York Office
(646) 993-4444

skeely@freeborn.com

Sean Keely is the New York Office Managing Partner, a member of the Firm's Executive Committee, the head of Freeborn's Reinsurance Subgroup, and a Partner in the Litigation Practice Group. Sean was involved in reinsurance litigation as an intern with a firm handling reinsurance and insurance insolvency matters. Over 20 years later, Sean brings that deep industry knowledge to bear, litigating and arbitrating commercial disputes with a particular focus on the (re)insurance industry. Clients seek out Sean because he knows the industry and the issues they face. Clients rely on Sean to craft commercial solutions when appropriate and to take cases to trial when necessary to win them. He has successfully tried cases to verdict in U.S. state and federal courts, and to final award in arbitration for clients based in the U.S., London, Continental Europe, and Asia.

Freeborn

130+ Attorneys.
5 Offices.

Freeborn & Peters LLP is a full-service law firm with international capabilities and offices in Chicago, Ill.; New York, Ny; Richmond, Va.; Springfield, Ill.; and Tampa, Fla. Freeborn is always looking ahead and seeking to find better ways to serve its clients. It takes a proactive approach to ensure its clients are more informed, prepared and able to achieve greater success – not just now, but also in the future. While the firm serves clients across a very broad range of sectors, it has also pioneered an interdisciplinary approach that serves the specific needs of targeted industries.

Freeborn's major achievements in litigation are reflective of the firm's significant growth over the last several years and its established reputation as a Litigation Powerhouse®. Freeborn has one of the largest litigation departments among full-service firms of its size – currently with more than 90 litigators, which represents about two-thirds of the firm's lawyers.

Freeborn is a firm that genuinely lives up to its core values of integrity, effectiveness, teamwork, caring and commitment, and embodies them through high standards of client service and responsive action. Its lawyers build close and lasting relationships with clients and are driven to help them achieve their legal and business objectives.

For more information visit: www.freeborn.com

CHICAGO
311 South Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 360-6000
(312) 360-6520 fax

NEW YORK
1155 Avenue of the Americas
26th Floor
New York, NY 10036
(212) 218-8760
(212) 218-8761 fax

SPRINGFIELD
217 East Monroe Street
Suite 202
Springfield, IL 62701
(217) 535-1060
(217) 535-1069 fax

RICHMOND
901 East Byrd Street
Suite 950
Richmond, VA 23219
(804) 644-1300
(804) 644-1354 fax

TAMPA
1 Tampa City Center
201 North Franklin Street
Suite 3550
Tampa, FL 33602
(813) 488-2920