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Cologne Commutations Rendez-Vous

Current Issues in German Reinsurance Law

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Lexington v. Wasa – Facts

- Lexington insured Alcoa against property damage for policy period July 1977 through July 1980; US service of suit clause
- Lexington arranged facultative reinsurance with Wasa on back-to-back basis for same period; English law applicable
- Alcoa required to pay for clean-up costs concerning pollution caused in period 1942 through 1986
- Alcoa sought to recover costs from Lexington
- Washington Supreme Court held that Lexington was jointly and severally liable for entire clean-up costs, irrespective of whether damage was sustained before, during or after policy period
- Lexington settled case and claimed recovery under reinsurance with Wasa

Lexington v. Wasa – English Proceedings

- Wasa sought declaration that it was liable only for damage that arose during three year period of reinsurance
 - Commercial Court found in favour of Wasa
 - Court of Appeal found in favour of Lexington
 - House of Lords found in favour of Wasa

Lexington:

„How could we possibly do anything more to make these contracts back-to-back than we have done? With a full reinsurance clause; as original wording; follow settlements clause; and a pro rata premium? What more do we need?“

Lexington v. Wasa – House of Lords

■ Key Points:

- Underlying policy and reinsurance contract subject to different laws
- Reinsurance contract subject to English law can not be constructed to the effect that coverage is provided for damage occurring outside period of coverage

Their Lordship's answer to Lexington:

„Make sure that underlying policy and reinsurance are subject to a common governing law.“

Lexington v. Wasa – A German View (1)

- Under German reinsurance law traditional (strict) distinction
 - Follow the Settlements („*Folgepflicht*“)
 - Cedent is able to control by applying proper business conduct

 - Follow the Fortunes („*Schicksalsteilung*“)
 - Cedent is not able to control

Lexington v. Wasa – A German View (2)

- Lexington's exposure towards Alcoa was determined by Supreme Court of Washington
 - Lexington not in a position to control far-fetched and excessive interpretation of scope of coverage by the US court
 - When providing facultative reinsurance for Lexington, Wasa knew of likelihood of US jurisdiction for underlying policy (US assured; US service of suit clause)
- Wasa should have to follow Lexington's fortunes?

English Standard Wordings Subject to German Law

- German cedent takes reinsurance on London Market
- Contract documentation frequently comprises London Market boilerplate clauses providing for application of German law and litigation / arbitration in Germany
- Contract interpretation?
 - Market standards / customs are decisive
 - If parties agree on wording drafted with view to English jurisdiction, also application of English interpretation agreed

Rome-I-Regulation (EC 593/2008)

- Regulation on the law applicable to contractual obligations
 - Effective since 19 December 2009
 - Scope includes contracts of insurance and reinsurance
 - Supersedes national law in the member states
- Art. 3, 4 of Regulation: Parties to reinsurance contract free to agree on application of any law
- Missing choice of law?
 - Formerly highly disputed in Germany
 - Now: No explicit provision in Rome-I-Regulation
 - For direct insurance of large risks
(in the meaning of Non-Life-Directives) application
of insurer's home state law (see Art. 7 Sec. 2)
 - Reinsurance comparable to insurance of large risks
 - Application of reinsurer's home state law?

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Thank you for your attention!

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