

Australian difficulties for “service of suit” clauses in insurance contracts

AIG UK Ltd v QBE Insurance (Europe) Ltd [2008] QSC 308 (28 November 2008) reveals some of the difficulties that can be created for insurers and reinsurers of Australian liabilities by the form of “service of suit” clauses often found in Lloyds and other non-Australian insurance contracts. Typically of such clauses, the service of suit clause in the insurance contract in this case provided that any dispute concerning the contract would be governed by “Australian Law” and that the insurers and the insured agreed “to submit to the jurisdiction of any Court of competent jurisdiction within Australia” and that “[a]ll matters arising hereunder shall be determined in accordance with the law and practice of such Courts”. The reinsurance contract defined “jurisdiction” as “Commonwealth of Australia and New Zealand only, as original”, and this appears to have been accepted to “pick up” the service of suit clause in the underlying insurance contract.

The case arose out of an accident which occurred during a motor race in New South Wales. The driver sued the Confederation of Australian Motor Sports (“CAMS”) in Victoria, apparently attempting to avoid the operation of a New South Wales statute which would have barred the claim. The proceedings settled. CAMS was insured by QBE. QBE was reinsured by AIG and two other reinsurers (together, “the reinsurers”). The reinsurers took action against QBE in the Supreme Court of Queensland, seeking a declaration that they were not liable to indemnify QBE on the reinsurance contract, because QBE had failed to comply with a condition precedent to liability that it advise the reinsurers of any loss which might give rise to a claim as soon as practicable and without undue delay.

QBE sought orders staying the proceedings or setting aside the originating process. Mackenzie J refused to make such orders, considering that the effect of the service of suit clause was that QBE and the reinsurers had submitted to the jurisdiction of the Supreme Court of Queensland, it being a “Court of competent jurisdiction within Australia”.

QBE also sought a transfer of the proceedings to the Supreme Court of Victoria

pursuant to the Australian Cross-Vesting Scheme, which provides for a transfer from the Supreme Court of one Australian state to the Supreme Court of another state if it is “more appropriate” that the proceedings be heard in another state. QBE’s application appears to have been motivated, at least in part, by the fact that a provision in the Victorian *Instruments Act* 1958 of assistance to insureds and reinsureds in cases of non-disclosure had no analogue in Queensland. Indeed, the absence of such a provision in Queensland may have been the reason the reinsurers instituted proceedings there. Mackenzie J declined to order the transfer, considering that any connection with Victoria was incidental and that no preference was expressed in the service of suit clause for one Australian jurisdiction over another.

This case serves as a reminder that service of suit clauses like the one considered often mean that proceedings may be instituted in the courts of *any* Australian state, and that obtaining a stay or a transfer in the face of such a clause may be difficult.

One issue not decided by this case is whether the Victorian *Instruments Act* will apply even if the proceedings continue in Queensland, if the governing law of the reinsurance contract is Victorian law. This highlights a difficulty with the specification in the service of suit clause of the governing law as “Australian Law”, together with the submission to the jurisdiction of any Court of competent jurisdiction within Australia and the reference to matters being determined “in accordance with the law and practice of such Courts”, rather than the selection of the law of a particular Australian state.

As part of the argument in this case, the parties disagreed as to the effect of this clause. QBE submitted that it mandated the application of the law of the Australian state with the closest and most real connection with the transaction. This was said to call for consideration of the particular claim in question, with its Victorian connections, and consequently the application of Victorian law, ie Commonwealth statutes, the common law of Australia and Victorian statutes (including the Victorian *Instruments Act*). In contrast, the reinsurers submitted that the service of suit clause could not be read as directing application of the law of any particular Australian state, and either was not a choice of law clause at all (resulting in the application of English law as the proper law of the contract) or mandated only the application of Commonwealth statutes and the common law of Australia, ignoring any state statutes.

Mackenzie J did not need to resolve this issue for the purposes of QBE's application, but it is one which will presumably need to be resolved if the proceedings continue. More generally, it is an issue which inevitably can arise in cases involving service of suit clauses such as that considered here. Perhaps a clearer choice of law clause would be advisable.