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# REINSURANCE GROUP E-ALERT

## Claims co-operation clauses: the duty to co-operate outlives rejections of the claims by Reinsurers.

### ***Lexington Insurance Company & ors v Multinacional De Seguros S.A. (2008)***

This recent Commercial Court decision provides useful guidance on the application of claims co-operation clauses that operate as a condition precedent to reinsurers' liability. Amongst other things, the Court had to consider whether reinsurers can still require compliance with such a clause after claiming they are discharged from liability because of a breach of that clause.

As in the recent Court of Appeal decision in *Kosmar Villa Holiday Plc v Trustees of Syndicate 1243 (2008)* (see our previous E-Alert [http://www.addleshawgoddard.com/asset\\_store/document/reinsurance\\_group\\_e-alert\\_17\\_march\\_08\\_102616.pdf](http://www.addleshawgoddard.com/asset_store/document/reinsurance_group_e-alert_17_march_08_102616.pdf)), the Court took, in our view, the common sense decision and ruled that reinsurers should not be prevented from raising a number of defences whilst investigating the claim, and that it was in both parties' interest to encourage continued compliance with the co-operation clause during those investigations.

### **Background**

The dispute concerned a property and business interruption insurance provided to a Venezuelan aluminium producing company, Industria Venezolana de Alumino CA ("Venalum"), by the defendant Venezuelan insurer, Multinacional De Seguros S.A. ("Multinacional"), who were acting as a front for a number of reinsurers, including the claimant Lexington Insurance Company ("Lexington"). The reinsurance agreement between Lexington and Multinacional (the "Reinsurance") contained the following "Claims Settlement Clause" (the "Clause"):

*"...it is a condition precedent to any liability under this policy that:*

*(b) The reinsured shall furnish the reinsurers with all information in respect of [notified] circumstances and shall co-operate with the reinsurers in the adjustment and settlement of the claim."*

On 16th April 1998, an incident within the production line of the Venalum's plant caused significant loss. As the claim was being investigated by loss adjustors, tensions arose between Multinacional and Lexington as to whether Venalum had failed to mitigate its loss. In January 2000, Multinacional's failure to provide technical support for its view that Venalum had not failed to mitigate its loss led to Lexington invoking the Clause and asserting they were discharged from all liability under the Reinsurance. At the same time, however, Lexington wrote to Multinacional on a without prejudice basis to encourage further communication to settle their disagreement. In April 2001 another cause for disagreement arose, this time relating to time bar. Lexington took the view that the Venalum's claim, which had not yet materialised, was by then time barred under the Venezuelan 3-year limitation period, but Multinacional disagreed. Unbeknown to Lexington, Multinacional filed an application with the Venezuelan Superintendencia de Seguros (the "Superintendencia"), an insurance official empowered to opine on time bar issues, but whose decision is not binding. The Superintendencia ruled there was no time bar. However, once informed, Lexington rejected the decision of the Superintendencia, and they took the view that Multinacional's unilateral approach was another breach of the Clause.

As Lexington and Multinacional were seeking to agree an action plan (for the purposes of which Multinacional had agreed to raise time bar as a defence), on 3rd April 2002 Multinacional sent a letter to Venalum making it clear Multinacional did not agree with Lexington's views on time bar (the "Letter"). It later transpired that Multinacional were incorrect and Venalum's claim was time barred under Venezuelan law.

## The decision

Both parties agreed that a breach of the Clause would automatically discharge Lexington from liability under the Reinsurance. Multinacional, however, argued that the Clause had effectively stopped operating since Lexington had first declared themselves discharged from liability for breach of the Clause in January 2000. Multinacional said that thereafter all dealings between the parties had been outside the contractual framework. The Court disagreed, pointing out reinsurers should be entitled to rely on several defences whilst investigating so they can assess the strength of the claim and the suitability of their defences. The alternative would be to discourage reinsurers and their assureds from working together and finding compromises when appropriate. From a legal perspective, denial of liability by reinsurers does not automatically relieve the reinsured from its obligations under the reinsurance, unless the denial is a repudiatory breach which the reinsured is entitled to treat as a discharge from the contract.

Alternatively, Multinacional contended that by repudiating liability in January 2000, Lexington had elected to waive their rights to rely on the Clause. The Court rejected this argument. A waiver by election requires a choice to be made between mutually inconsistent rights. In this case, there was no choice to be made by Lexington: if there had been a breach of the Clause, they were automatically discharged; if not, there were not. Relying on *Kosmar*, the Court made the distinction between raising a defence and making an election to waive a contractual right. In the earlier situation a reinsurer simply raises a potential defence and continues to investigate the claim on a without prejudice basis. In the case of waiver the reinsurer makes a clear and irrevocable choice not to rely on a contractual right.

Since the Clause applied, the next issue was whether Multinacional had committed a breach of the Clause by sending the Letter. The Court found that the letter was an express or at least implicit waiver of the time bar defence available to Multinacional as against Venalum, and therefore, sending the Letter was a breach of the Clause. In addition, the Court found that even if there was no renunciation of the time bar remedy in the Letter, there was a breach of the Clause because the Letter was contrary to Multinacional's agreement at the relevant time to take the time bar point.

## Comments

Claims co-operation clauses are commonplace in reinsurance agreements, and this decision highlights some of the difficulties that arise in practice. Whilst most reinsureds and reinsurers understand the duty to co-operate, there can be misunderstandings as to the extent of that duty, and the effect of a breach. If the clause is drafted as a condition precedent, a breach discharges reinsurers from liability, but reinsureds are still bound to co-operate whilst the claim is being investigated. However, the Court did point out that, although the aim of the clause is to oblige the parties to work together, *"there are no doubt limits to what the clause requires of the reinsured. He is not obliged to take false points, much less to act in any way improperly. In some cases there will be legitimate debate about the extent to which he is bound to march in step with the reinsurers"*.

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