

Lloyd's and litigation on the Continent

Understanding Lloyd's
AIDA Swiss Chapter Event

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Lloyd's Underwriters as defendants

- Any litigant (claimant or defendant) requires legal capacity.
- Legal capacity not dealt with by neither the Lugano Convention, nor the EU Regulation 1215/12 (Brussel Ia).
- Usual clause if the Lloyd's Policy is governed by Swiss law:

A. The Underwriters and contractual partners of the Policyholder (hereafter: "the Policyholder") are underwriting members of the association of underwriters known as Lloyd's (hereafter: "the Underwriters"), having the following domicile, address and legal form:

Lloyd's	Lloyd's Versicherer, London	Head office: London / United Kingdom
One Lime Street	Zweigniederlassung für die Schweiz	Legal form: Association of Underwriters
London EC3M 7HA	Seefeldstrasse 7	
United Kingdom	8008 Zurich	
	Switzerland	

- In coverage disputes, claimants tend to sue either "Lloyd's, London, Zurich Branch" or the Syndicates, using either the Zurich or the London address.

Lloyd's Underwriters as defendants

- Lloyd's recommends using "Lloyd's Underwriters London, subscribing to Police No. ...".
- Lloyd's is not the party subscribing to the policy.
- Lloyd's is not contracting party to the Policy and not contractually liable for the indemnification.
- A Lloyd's Syndicate does not have such legal capacity to act as defendant, neither under English, nor under Swiss law.
- However, if Lloyd's Underwriters are the defendants, any wrong designation of the party will usually not be challenged (e.g. Supreme Court judgment 8C_640/2008).

Lloyd's Underwriters as claimants

- E.g. in recourse proceedings
- If the policy is governed by Swiss law:
 - By paying the indemnity the insurer becomes of the transferee of the claim of the assured against third parties.
 - The subrogating insurer initiates proceedings in its own name (no representative action as under English law).
- If the policy is governed by English law:
 - Representative action in the name of the assured

Lloyd's Underwriters as claimants

Who is the rightful claimant?

- If the Policy is governed by Swiss law?
- Judgment of the Commercial Court of Zurich of 2 June 2010, HG090242:
 - Cargo insurance policy written by 8 Syndicates
 - Instigation of recourse proceedings on behalf of these 8 Syndicates :
"Syndicate XXX, Lloyd's of London, [address of MGA], London, United Kingdom"
 - Defendant was a carrier of perfume products and challenged legal capacity of Syndicates.
- Commercial Court refused to consider the case
 - Under English law, these 8 Syndicates did not have legal capacity.
 - Left it open whether "Lloyd's Underwriters London, subscribing to Policy No. ..." would meet the requirement of a legally capable party

Lloyd's Underwriters as claimants

Who is the rightful claimant?

- Supreme Court judgment of 9 November 2015, case no. 4A_116/2015
 - Designation of Claimant:
"Lloyd's Underwriters, London (subscribing to Policy No. [...])"
 - Defendant challenged legal capacity of Claimant.
 - Commercial Court of Zurich refused to consider the case.
 - Federal Supreme Court upheld the judgment of the Commercial Court.
- Who is the claimant under Swiss law?
 - Not the Syndicates
 - Not "Lloyd's Underwriters, London, subscribing to Policy No. ..."
 - Not Lloyd's itself.
 - The only parties left are the Members (may be practically difficult but still possible)
 - Other possible option: Assignment of the recourse claim to a party with legal capacity.

Lloyd's Underwriters as claimants

Who is the rightful claimant?

- What if the policy is governed by English law?
 - Subrogation relates to the merits (i.e. English law)
 - Whether or not a representative action is permissible in Switzerland is usually governed by the law on the merits (i.e. English law).
 - However, the Federal Supreme Court held in case no. 4A_740/2011 that this issue is, rather, a procedural question, and applied *lex fori*, i.e. Swiss law (underlying policy was governed by Scots law).
 - Claimants are either the Members or the Assureds.
 - Not yet clear.

Thank you for your attention!

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