Choice of law: New York and English approaches to insurance and reinsurance contracts

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1. INTRODUCTION

It seems an appropriate time to consider the laws applied to international insurance and reinsurance business under the conflicts rules of New York and England. The Regulation on the Law Applicable to Contractual Obligations (the Regulation) has recently come into effect in England and makes significant changes to the regime. New York law has, since the 1950s, undergone a revolution in approach. London and New York are two of the main international centres for insurance and reinsurance disputes, so there is a good deal of material on which to draw for a comparison of the approach in each jurisdiction. The basic issues faced in each jurisdiction in relation to international disputes are of course largely similar. Should the parties be free to choose the applicable law? How should the applicable law be identified where there has been no choice of law? What limits should there be on party autonomy?

However, the context within which each jurisdiction exists is now very different. English rules on the applicable law, once more or less the creature of common law, are now exclusively contained in the civil and commercial field (with a few exceptions) in the Regulation. The Regulation is applicable to all the states of the European Union (EU) and must be capable of being operated by jurisdictions which are widely divergent in their traditions and approaches. The New York rules on applicable law remain almost entirely based on the common law, and have to a large extent been developed in the context of interstate disputes within the federal system of law, where the traditions and approaches are essentially similar.

1.1 Summary

The English rules and now the New York rules both give effect to party autonomy in the choice of law. There are basic differences in the rules which apply in the absence of an express or implied choice. In practice, in the absence of an express choice of law agreement, there is an even more stark difference in the analysis adopted under New York law and English law, with disputes under New York law being predominantly decided on the basis of no agreement as to the choice of law, while disputes under English law are usually decided on the basis of an implied agreement. However, in terms of outcomes, it is difficult to say that there are very significant differences between New York and English law in relation to the applicable law in insurance and reinsurance.

1.2 Large Insurance and Reinsurance

Since the rules under the Regulation relating to non large insurance contracts, and contracts of

1 Regulation EC 593/2008, came into force on 17 December 2009, and applies to all contracts concluded after that date: articles 28, 29.


3 A non large risk is one which is not a large risk. A large risk covers specified types of valuable assets, e.g. ships, aircraft and rolling stock; credit or suretyship insurance of specified policyholders, e.g. those engaged in industrial or commercial activity; and insurance of policyholders in relation to whom two of three thresholds are exceeded, being: a
insurance with a consumer covering a risk outside the EU, are very specific, and different from the other English law rules, and from anything in the New York rules, it is helpful for current purposes to deal with them separately (see section 4) and to concentrate in the rest of this chapter only on large insurance\(^4\) and reinsurance contracts.

1.3 Chapter Outline
I begin in section 2 by briefly surveying the framework of New York choice of law rules in relation to insurance and reinsurance, as compared with those under English law. The questions are: (1) What are the rules? (2) What is the policy behind them?

In section 3 I consider how those rules operate in practice under New York and English law. The essential questions are: (3) What are the outcomes of disputes in relation to insurance and reinsurance under New York and English law? (4) How do they compare? To do that I consider a number of areas:

1. the need to consider whether or not there is an actual conflict
2. insurance cases
3. reinsurance cases
4. the possibility of more than one applicable law.

In section 4 I consider the limits on party autonomy. Section 5 consists of a summary of conclusions.

2. NEW YORK AND ENGLISH LAW: GENERAL

2.1 New York Applicable Law Rules in Brief
New York rules on the applicable law of insurance and reinsurance are almost entirely contained in common law decisions.\(^5\) The cases largely follow the rules set out in the Restatement articles 187 to 188 (applicable law under express choice of law agreement, and in the absence of such a choice of law), and articles 192 to 193 (life and casualty insurance).\(^6\)

The choice of law rules of the forum will determine which law is applicable to a contractual dispute. The court must first decide whether or not there is a true conflict between the rival laws. If there is not, the court will proceed to decide the matter according to New York law. If there is an actual conflict, the court will apply the law chosen by the parties, expressly or impliedly, if any. This rule is subject to important grounds on which the decision of the parties may be overridden.

If the parties have not chosen the applicable law, the court will apply the law of the state with which the transaction has the 'most significant relationship'. To do that, the court will identify all relevant contacts of the transaction and the parties with one state or another, and assess which state has the most significant relationship with them ('the grouping of contacts approach'). The court may in some cases also compare the extent to which different states have an interest in having their laws applied to the dispute ('state interests').

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\(^4\) See previous footnote.

\(^5\) A notable exception is article 5-1401 of the 2010 New York Code on General Obligations which removes one of the grounds on which a choice of law agreement may be overridden. It provides that an express choice of New York law may be effective, whether or not the contract bears a reasonable relationship to New York, if the contract includes an obligation of not less than US$250,000 (see further section 4). The application of New York conflict of law rules to arbitration clauses is summarised in The Bermuda Form, Scorey, Geddes and Harris (OUP, 2011), para. 3.66.

2.2 English Applicable Law Rules in Brief

For practical purposes, English law is now European law, where the law applicable to contracts in civil and commercial matters is concerned. Before the Regulation, the regime was a mosaic of European derived rules, set out in the Rome Convention on the law applicable to contractual obligations (the Convention), and in secondary legislation. The rules are now largely contained in the Regulation (also known as Rome I). Of course, courts across the EU vary in the way that they interpret the Regulation. This chapter focuses on the approach in the English and European Court of Justice cases to the application of the Regulation, and the previous rules where helpful.

The Regulation applies in situations involving a conflict of laws, to any contractual obligations in civil and commercial matters. The Regulation is not concerned with many important matters, including arbitration and jurisdiction clauses, obligations arising from dealings prior to the conclusion of a contract, and negotiable instruments (article 1). In these areas the common law still applies.

Under the Regulation the primary rule is that the parties are free to choose the applicable law, expressly or in any other way which clearly demonstrates a choice of law.

In the absence of choice, the law of the country of residence of the insurer or reinsurer will normally apply (as the service provider, or the party required to effect the characteristic performance). But if that cannot be determined, or the contract is manifestly more closely connected with another country, the applicable law will be that of the country with which the contract is most closely connected.

As has been said, there are different specific rules in relation to contracts of insurance which are not large, or with a consumer covering a risk outside the EU. All of the above is subject to the application of 'non-derogable laws' and public policy in specified cases.

The policy of New York rules is to give effect to party autonomy, and, in default of an effective choice of law, to identify the state with which the transaction and parties have the most significant relationship by using objective criteria or contacts. One of the purposes is to give effect to the law of the state which has the most interest in having its law applied.

The policy of English law is also to give effect to party autonomy, but, in default of that, the first aim is to promote certainty by applying the law of the place of residence of the insurer or reinsurer. It is only if that place either cannot be determined, or if the contract is manifestly more closely connected with another place, that the policy is to apply the law of the place with which the contract is most closely connected. However, the policy behind the most closely connected test is not yet defined, so that it is not clear precisely what contacts should be regarded as significant, or how they should be weighed.

2.3 Procedure

Before considering the rules in more detail, a word should be said about the different procedure in New York and England, which has some significance, and calls for caution in considering the cases.

Firstly, in relation to New York law, many of the reported cases involve applications for summary

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7 The Convention was implemented in the UK by the Contracts Applicable Law Act 1990, and is Schedule 1 to that Act. The relevant statutory instrument was the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635. For a comparison of the regime in relation to insurance under the Regulation and the previous regime see Choice of Law in Insurance Contracts under the Rome I Regulation, Merrett [2009] PILJ 49.


9 The dominant theme influencing the modern international view of contract is party autonomy, Raffeisen Zentralbank Österreich AG v Five Star General Trading [2001] Lloyd's Law Reports 460, at 469, Mance LJ.

10 The purposes are set out in Restatement section 6.
judgment. Care needs to be taken because the question in such cases is whether or not the result is so clear that there is no genuine issue of material fact, so that the cases tend not to be well balanced. There is a relative paucity of judgments following trial which are usually with a jury. Occasionally there will be a written decision following a trial without jury (a bench trial).  

An insurance or reinsurance dispute may be heard in either the state or federal courts, which will in each case apply New York law. The state courts include the Supreme Court of New York, from which appeals go to the Appellate Division, and then to the New York Court of Appeals which is the highest state court. The federal courts are the United States District Court (the court for the Southern District covering Manhattan produces most decisions of relevance to insurance and reinsurance choice of law), from which appeals go to the United States Court of Appeals for the Second Circuit. The final arbiter of New York law is the New York Court of Appeals whose decisions the federal courts will seek to follow. 

In relation to English law, many of the reported cases concern jurisdiction challenges. A party may seek to rely on the contention that English law applied to the insurance or reinsurance as a ground of jurisdiction. In such cases, the court will not usually decide the dispute finally, as at a trial, but will only allow the application if the claimant has a ‘much better’ argument that English law applied than the respondent’s argument that it did not.  

Similar considerations apply where a party contends that, for example, English law is the applicable law as part of a dispute about forum non conveniens. Caution therefore needs to be exercised in relation to such judgments. In practice, the law is usually fully considered in such judgments, but the facts will not have been finally found. Having said that, English cases are routinely relied on as authority in relation to the law even though the facts have not been conclusively found. Other reported cases follow a trial which is invariably without a jury, and conclude with a full statement of the relevant law in a judgment.

2.4 Scope of the Applicable Law

It appears there is little substantive difference between English and New York law as to the scope of the applicable law. It is likely that the basic approach in both jurisdictions is that issues as to consent, formal and material validity, construction, discharge, termination and nullity are governed by the law which is applicable in accordance with the choice of law rules of the forum, or the law which would be applicable if the contract were valid (the putative law).

The Regulation has some relatively minor qualifications to this basic approach. In relation to consent, the Regulation provides that in order to establish that he did not consent, a party may rely on the law of the country in which he habitually resides, as distinct from the applicable law or putative law (article 10.2). In relation to formalities, the Regulation is essentially inclusive in approach, and provides broadly that the contract is formally valid if it satisfied the formal requirements of either the putative law, or the law of a country where it was concluded (article 11). While performance is generally governed by the applicable law, in relation to the manner of performance, and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place (article 12.1 and 12.2). It appears that the manner of performance would encompass such matters as the rules governing public holidays, and that the court has a discretion whether or not to apply the law of the place of performance.

15 Not including the applicable law in relation to consumers: Regulation article 11.4.
16 Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul
Under New York law, the applicable law governs the validity, interpretation and effect of the contract. Not surprisingly, New York law does not incorporate the specific qualifications to the basic approach like those found in the Regulation. There is, however, a tendency to seek to give effect to contracts which are effective under the law of the domicile of a party in the case of an issue as to capacity, or the law of the place the contract was made in the case of a dispute as to formalities, and the law of the place of performance if the issue relates to 'details of performance'.

3. AGREEMENT AND NO AGREEMENT ON CHOICE OF LAW

3.1 Actual Conflict
Under New York law the first step is to consider whether or not there is an actual conflict between the effect of the rival laws which are said to be the applicable law.

So, for example, in Allstate Insurance Company v Stolarz the court considered whether New York and New Jersey law would require an insured to give credit to his insurer for sums already paid by third party insurers. Because it found both laws were the same on that issue, there was no actual conflict of laws.

In practice, it is probable that disputes relating to the application of the laws of different states in the USA provide the most likely ground for the application of this rule. It seems less likely, though by no means impossible, that New York law and the law of a foreign country, would be held not to differ on a material issue.

This approach forms no part of English law or practice in the common type of dispute about the applicable law for the purposes of establishing jurisdiction or the appropriate forum. Where the parties contend that different laws apply, the court will not usually be in a position to resolve any conflict about the content of the rival laws. Because such disputes commonly occur at a very early stage in the proceedings, it would usually be impracticable to identify all the issues to which foreign law might apply, much less resolve any disputes. It will be assumed that there are differences, and the court will proceed to decide which party has the stronger argument for the applicable law for the purpose of the application.

It seems likely that the readiness of the New York courts to consider whether or not there is an actual conflict reflects, at least to some extent, the fact that the issue of the applicable law is not usually determined at the outset of the proceedings, but at a later stage when the issues are more defined.

3.2 Insurance
Insurance contracts will usually contain an express choice of law clause, and, where they do, both New York and English law will give effect to it. However, if there is no such clause, there are differences in the framework of rules which apply in default of a choice of law agreement, as we have seen.

Furthermore, there is a surprising divergence in practice between the application of New York law and English law. Where there was no express choice of law clause, in practice most disputes are determined under English law by asking what was the implied choice of law agreement; only rarely does the court resort to the rules which apply in the absence of an implied agreement.

By contrast, in practice most disputes in New York state courts and federal courts applying

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Lagarde, O.J. C 282 31/10/1980 (Giuliano-Lagarde), commentary on article 10.2 of the Convention; Plender, op. cit., p. 408.
Companhia Transatlantica Centro-America SA v Alliance Assurance Co. 50 F. Supp. 986 (SDNY 1943); New York Jurisprudence, 2nd edn, section 877; Restatement, chapter 8, sections 198-207.
Restatement sections 198, 199, 206.
New York law are determined by asking with which state the parties and transaction have their most significant relationship. Only rarely does the court determine the issue on the basis of an implied choice of law.

Clearly, the theoretical basis of the decisions in the latter two types of cases is very different; one is concerned with objectively what was agreed, and the other with what law should apply where there was no agreement.

However, in considering those divergent questions, the matters taken into account in practice under New York and English law are essentially similar: the language of the cover, the place of contracting, negotiations and performance, the subject matter of the contract, and the place of residence or business of the parties.

Having said that, the convergence of matters considered under New York and English law does not mean that the outcomes are the same. The policies behind New York and English rules are different. Further, there are differences to the approach adopted in practice. In cases decided under New York rules there is a tendency in insurance cases to apply where possible the law of the place of the risk, or the law of the residence of the insured, which is not observed in cases decided under English rules.

3.2.1 Express choice
So far as express choice of law agreements are concerned it does not appear that the test should differ between New York and English law. There have been instances of insurance cases under English law in the past decade in which one of the issues has been whether or not there was an express agreement as to choice of law. In particular, there have been cases considering the issue of when a choice of law agreement may be incorporated by reference.\(^{20}\) By comparison, there is a dearth of reported insurance cases under New York law in the comparable area in the past decade.

3.2.2 No express choice
In the absence of an express choice of law agreement, the question under both New York and English law is whether or not there was an implied choice of law, or, if not, which of the default rules apply.

The predominant and decisive approach to insurance contracts under English law has been to determine the impliedly chosen law. The great preponderance of decisions in the past decade have concerned the law impliedly chosen. Rarely has the court decided that there was no implied choice of law in an insurance contract, and that the applicable law should be the law of the country of the habitual residence of the insurer (as the party to provide the characteristic performance). It has been quite common for a court applying English law also to hold that contracts of insurance were most closely connected with a particular country, but only as an alternative after finding that there had been an implied choice of law.

By contrast, the vast majority of decisions under New York law in the past decade turned on the identification of the state which, in the absence of any clear choice of law clause or other agreement between the litigating parties on choice of law, had the most significant relationship with the transaction and parties, and was therefore the applicable law. None turned on what the express or implied agreement was as to the applicable law.

In addition, in the New York law cases decided on the basis of the most significant relationship,

\(^{20}\) English law applied where the marine policy stated that it was subject to the Institute Time Clauses — Hulls, which expressly stated that English law applied: *Sun Alliance & London Insurance plc v PT Assuransri Dayin Mitra Tbk* [2006] 1 Lloyd's Law Reports 860. However, where an open cover was expressly subject to Italian law, but an individual certificate under the open cover referred to Institute Clauses which stated that the insurance was subject to English law, there was no good arguable case that English law applied: *Evialis S.A. v S.I.A. T. and others* [2003] 2 Lloyd's Rep. 377, para. 42; distinguished in *Cadre SA v Astara Asigurari* [2005] EWHC 2504.
either there was no review of the terms of the covers to see what if any pointers they gave to what might have been the parties’ implied intention, or the terms of the covers were relied on in relation to the question of the most significant relationship, rather than any implied choice of law agreement.\(^{21}\)

It is not clear why there should be such a difference to be observed in the approaches. It does not appear that the formulation of what amounts to an implied agreement is materially different. Nor that, if under New York law an implied choice of law agreement is found to exist, the implied agreement may not be given effect for any reason.

However, there is little point in comparing the treatment of implied choice of law in insurance and reinsurance cases under English and New York law; there are no New York law cases to compare with the plethora of English decisions. Similarly, there is little point in seeking to compare the most significant relationship cases under New York law with the most closely connected cases under English law; there are no insurance decisions in the past decade under English law where the most closely connected point was decisive to compare with the wealth of New York decisions.

It is, however, possible and useful to compare the outcomes of the decisions under New York and English law where there was no express choice of law agreement. In this way, it can be seen how choice of law disputes are in fact dealt with under New York and English law, regardless of the different approaches, and why.

### 3.2.3 Implied choice

The Regulation states that the choice of law must be ‘clearly demonstrated by the terms of the contract or the circumstances of the case’ (article 10.1). The commentary on the slightly different wording in the Rome Convention (‘demonstrated with reasonable certainty’) gives as examples of relevant matters: agreeing a Lloyd’s policy of marine insurance, the previous course of dealing, a choice of forum clause, or references to provisions of national law. The commentary referred to matters which might ‘show in no uncertain manner’ and ‘impel’ the court to the conclusion that a ‘real choice of law’ had been made, and stated that: ‘[t]his article does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice’.\(^{22}\) This looks very similar to the commentary on implied agreements in the Restatement. The Restatement refers to cases where, for example, ‘the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state’, but adds: does not suffice to demonstrate that the parties, if they had thought about the matter, would have wished to have the law of a particular state applied.\(^{23}\)

Under English law, in the absence of an express choice of law clause, the other express terms of the contract are usually the starting point in considering what if any agreement may be implied. This is only natural because the question is whether or not there was an implied agreement to a choice of law supplemental to what was expressly agreed. Pointers one way or the other in the express terms are therefore taken into account.

However, other matters apart from the express language of the cover are usually also taken into account under English law in deciding which law was impliedly chosen, and these matters are not different from the contacts usually taken into account under New York law under the grouping of contacts approach; that is: the place of contracting, the place of negotiation of the contract, the

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\(^{21}\) E.g., in Travelers Casualty and Surety Company v Dormitory Authority — State of New York 2008 WL 5233691 (S.D.N.Y.) in rejecting an application by insurers for summary judgment in respect of a claim by an additional insured, the court applied the grouping of contacts approach in holding that New Jersey law applied. One of the matters taken into account was that applying New York law would subvert the ‘clear intent’ of the parties, as could be seen from the ‘many New Jersey-specific policy endorsements’ (p. 3). On these facts a court applying English law would have had no difficulty in finding that there was an implied agreement to New Jersey law.

\(^{22}\) Giuliano-Lagarde, commentary on article 3.3.

\(^{23}\) Restatement, section 187, p. 562.
place of performance, the location of the risk, and the place of business of the parties. Such matters are known to both parties and form part of the background to the contract, and therefore may justify the implication of a choice of law agreement.

Under English law, for example, in *Travelers Casualty & Surety v Sun Life Assurance*[^24^], insurers sought a declaration of non-liability under a liability policy, and the applicable law was held to be Ontario law. The insured was the parent company Sun Life Financial Incorporation (SLFI), and its subsidiaries, including the Defendant. When the Defendant made a claim relating to liability in respect of business in the UK, insurers denied cover on the ground of breach of warranty and notification requirements by SLFI. Of the subscribing market, 40 per cent participated through operations in Ontario, 40 per cent were Lloyd's underwriters, and the balance was taken through the lead underwriter in New York.

In finding an implied choice of Ontario law, the court relied on the following: SLFI was the insured and based in Ontario, the main brokers were in Ontario; there were terms of the covers including, for example, provisions relating to the period, and payment, which pointed to Ontario; the 'centres of gravity' for the negotiation of the covers was Ontario and New York; the Lloyd's market subscribed on the policy wording, not a London market slip or form; the wording was delivered to SLFI in Ontario; and premium and claims management was dealt with in Ontario (pp. 627-628).

In other words, the terminology of the policy was significant, but not conclusive. Other objective contacts relating to the place of contracting, negotiation, performance, the residence of the parties were all taken into account in determining the implied choice of law. These are four of the five contacts used in the grouping of contacts approach under New York law. The location of the risk appears to have been world-wide and not relied on.

The process of implication under English law therefore involved taking into account the contacts which would be taken into account under New York law on the grouping of contacts approach.[^25^] The difference is that the purpose of the enquiry under English law was to see whether or not there was a demonstrable choice by the parties of the applicable law. In principle, the significance of features which were not part of the terms of the contract, or the conduct of the parties, such as, for example, the place of residence of the parties, was presumably that it provided the background to those features which were chosen by the parties.

### 3.2.4 Closest connection

In the alternative to the finding of an implied choice of law, the court in *Sun Lift* went on to say that the contract had its 'closest connection', under article 4 of the Convention, with Ontario law, because of the matters relied on in relation to the finding of an implied choice of law. This is the usual approach where the court applying English law has made a finding of an implied choice of law. There have been no cases where the court has, in the context of insurance and reinsurance, made a finding based on the law with which the contract has its closest connection without also having found that there was an implied choice of law.[^26^]

It seems likely that this approach of applying the law with which the contract was most closely connected, if there was no implied choice of law, will continue to be applied under the Regulation.


[^26^]: Other examples of a finding, in the alternative to an implied choice of law, that the contract is most closely connected with the law which was impliedly chosen are *Tiernan v The Magen Insurance Co. Ltd* [2000] I.L.Pr. 517; and *American Motorists Insurance Co v Cellstar Corporation and another* [2003] EWCA Civ 206. Exceptionally, in two cases under the Convention, the court found that the presumption that the law of the residence of the party to effect the characteristic performance (i.e. the insurer or reinsurers) applied: *Dornoch Limited v Mauritius Union Assurance Co Limited* [2006] 2 Lloyd's Rep 475; *Credit Lyonnais New Hampshire Insurance Co* [1997] 2 Lloyd's Rep 1.
even though the rules have changed somewhat. Under the Convention, in default of an agreement on choice of law, the contract was governed by the law of the country where the party required to effect the characteristic performance of the contract (the insurer) was resident, but the presumption did not apply where the contract was 'more closely connected' with another country.\(^\text{27}\) By contrast, under the Regulation, in the absence of an agreement on choice of law, the rule is simply that the law of the country of the party to effect the characteristic performance applies, and only if it is clear from all the circumstances that the contract is 'manifestly' more closely connected with another country will the law of that country apply (Regulation article 4.3).\(^\text{28}\) The new requirement that the contract of insurance be 'manifestly' more closely connected is likely to be fulfilled where, as is usual, the court has found that there was an implied choice of law agreement relying on all the factors referred to above, and in the alternative relies on Regulation article 4.3.

In the context of insurance, the precise scope of the connection required under Regulation articles 4.3 (more closely connected) and 4.4 (most closely connected) is not clear. Under New York law, there is the concept of the 'most significant relationship' which is superficially similar. However, the Restatement is clear that the relationship is to be assessed against the principles in Restatement section 6, including state interests.\(^\text{29}\) When it comes to the Regulation, recital 21 merely states that: 'account should be taken inter alia of whether the contract in question had a very close relationship with another contract or contracts'.

In \textit{Sun Life}, contracts which would have been closely related would have been contracts with co-insurers, and the broker contracts. In other insurance cases, attention might focus on contracts of insurance being renewed, other related insurances, or reinsurances.

There are obvious reasons why the law applicable to closely related contracts should be telling. There could be practical problems in giving effect to related contracts if governed by different laws. The parties may expect that one law would apply to closely related contracts.

However, no general principle underlying the close connection tests in Regulation article 4 appears from the Regulation, and it is therefore unclear which if any other contacts are relevant, and what weight should be accorded them.

Regulation article 4.3 assumes that a contract may be manifestly more closely connected with one country even though there was no implied choice of law; and even if the characteristic performance test would have pointed to the law of a different country, being the law of the country of residence of the insurer. It is clear from this that evidence of the actual or implied intention of the parties is not relevant when considering Regulation article 4.3.\(^\text{30}\) It does not mean the country of residence of the insurer is irrelevant, but that it may be outweighed by other connections.

Historically, in the absence of an effective choice of law, English common law would ask with which system of law the contract had its 'closest and most real connection'. In essence, that meant ascertaining what intention: 'ordinary, reasonable and sensible businessmen would have been likely to have had if their minds had been directed to the question'.\(^\text{31}\)

\(^{27}\) Convention, article 4; Intercontainer Interfrigo SC v Balkenende Oosthuizen BV [2010] QB 411, where the Court of Justice of the European Communities held that Regulation article 4(5) applied where the circumstances as a whole showed that the contract was more closely connected with one country than that to which the presumption applied, and it was not necessary to decide that the presumption had no 'genuine connecting value' (p. 435).

\(^{28}\) Regulation recital 20 describes this as an 'escape clause', and refers to a 'very' close relationship with another country.


\(^{30}\) This was what the court held was the position under the Convention in \textit{Credit Lyonnais}, op. cit., at p. 5, although that was a decision on the wording of the Convention which was different from the Regulation in that under the Convention the closest connection test expressly included the characteristic performance test while under the Regulation the tests are different.

Such a form of intention may be called a reasonably *imputed* intention, as distinct from the *implied* intention. The parties never held the imputed intention, whereas they objectively held the implied intention. What reasonable parties would have thought should be the applicable law had they thought about it, may, in theory, provide a rational basis for assessing which connections are relevant to the arguments under Regulation articles 4.3 and 4.4, and what weight to give them. However, it seems unlikely to be adopted in practice because of the necessity under the Regulation to minimise the potential for divergence across member states in the application of the Regulation.

### 3.2.5 Most significant relationship

When it comes to insurance cases decided under New York law, if there is an actual conflict, and no express or implied agreement as to the applicable law, the approach is, in relation to a particular issue, to apply the law of the state which, with respect to that issue, has 'the most significant relationship' with the transaction and the parties.  

The factors relevant to the identification of the state with the most significant relationship include:

(c) the relevant policies of other interested states, and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result.

In considering those factors, contacts between the transaction and a state to be taken into account are: the place of contracting, negotiation and performance, the location of the subject matter of the contract, and the place of business of the parties.

The merit of this approach is said to be that "it gives the place "having the most interest in the problem" paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction "most intimately concerned with the outcome of the particular litigation"."  

### 3.2.6 State interests

The consideration of state interests under New York law involves investigating the purpose of the rival laws, and the extent to which the purposes of those laws would be served if applied to the issue in question.

For example, in *Zurich Insurance Company v Shearson Lehman Hutton Inc.*, insurers under a liability insurance sought a summary declaration of non liability for punitive damages which had been awarded against a bank. Texas law would allow the recovery of punitive damages from insurers, whereas New York did not. There was a dispute as to whether the location of the risk was at the bank's head office in New York, or Texas where judgment had been entered. But the court considered that even if the place of the risk had been Texas, the interest of the state of New York in having its law applied would have outweighed the place of the risk. The policy behind New York's law was described by the court as to prevent recovery of punitive damages from insurers, and to preserve the condemnatory and deterrence effect of punitive damages on insureds. The fact that the

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32 Restatement, section 188(1); *Auten v Auten* 308 N.Y.155, N.E.2d 99 (Court of Appeals of New York 1954); *Allstate Insurance Company v Stolarz* 81 N.Y.2d 219, 613 N.E.2d 936, 587 N.Y.S.2d 904 (Court of Appeals of New York 1993); *Zurich*, op. cit.

33 Restatement section 6; *Zurich*, op. cit., at 318, fn.5.

34 Restatement section 188(2).


insured was resident in New York meant that New York had a weighty interest in having its law applied. By comparison, the New York court perceived the interest of Texas in having Texas law applied as little because neither party was resident in that state.

The New York Court of Appeals also referred to the five contacts relevant to a grouping of contacts approach and emphasised that the purpose of grouping contacts is to establish which State has 'the most significant relationship to the transaction and the parties' (p. 317). The grouping of contacts approach was the 'primary analytical tool' although 'in certain instances' state interests could be taken into account (p. 319). The parties were located in New York, the insurances were negotiated and issued there, and claims were handled there; all of which supported the choice of New York law.

Further, the court said that the Restatement addressed 'the special subset of contracts that involves insurance' in section 193, where the law of the state of 'the principal location of the insured risk' would apply 'unless with respect to the particular issue some other state has a more significant relationship under the principles stated in section 6 to the transaction and the parties' (p. 318). Section 6 'embodied the general choice of law principles' (p. 318). In this case the court determined that even if the place of the risk was Texas, the state interest of New York in the application of its law to the issue of punitive damages prevailed over the place of the risk.

In many cases, however, it is not necessary or appropriate to go beyond considering the five contacts. In *Allstate Insurance Company v Stolarz*, the insurers sought a declaration that a payment already made by another insurer should be deducted from the claim. On the hypothesis that New York law differed from New Jersey law on the point, the New York Court of Appeals emphasised that:

contract cases often involve only the private economic interests of the parties, and analysis of the public policy underlying the conflicting contracts laws may be inappropriate to resolution of the dispute. It may even be difficult to identify the competing 'policies' at stake, because the laws may differ only slightly, and evolve through the incremental process of common-law adjudication as a response to the facts presented. The 'centre of gravity' or 'grouping of contacts' choice of law theory applied in contract cases ... enables the court to identify which law to apply without entering into the difficult, and sometimes inappropriate, policy thicket. Under this approach, the spectrum of significant contacts — rather than a single possibly fortuitous event — may be considered... (p. 226)

It was accepted that state interests could properly be considered where the policies underlying the laws were 'readily identifiable and reflect strong governmental interest' (p. 226). The example was given of a letter of credit case where New York law was applied 'so that our State should maintain its position as a financial capital of the world' (p. 226).

Automobile insurance, being highly regulated, is another area in which the state has an interest in the enforcement of its regulations. The court in *Allstate* considered that New York had no interest in enforcing its regulations about the deduction of monies received by the insured where the policy was sold in New Jersey by a New Jersey insurer to a New Jersey insured in accordance with a New Jersey statute (p. 227) and therefore applied New Jersey law.

Other examples of issues in insurance cases where state interests have been considered are: whether or not an insurer could contest a claim on a life insurance as ineligible despite the existence of an incontestability clause; whether or not a liability insurer has to show prejudice to rely on a defence of a failure to serve due notice; how a gradual loss should be allocated over time

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37 81 N.Y.2d 219 (Court of Appeals New York 1993).
38 *Krauss v Manhattan Life Insurance Company of New York* 643 F.2d 98 (1981, Court of Appeals, Second Circuit) where New York had no interest in applying its law to policyholders domiciled in Illinois.
39 *Booking v General Star Management Company* 254 F.3d 414 (2001, Court of Appeals, Second Circuit) where it was held that New York had no interest in applying its law allowing a claim to be denied for late notice without prejudice
between different liability insurers;\(^{40}\) whether or not a 'gross disregard' by a primary insurer of the interests of an excess liability insurer was necessary for a bad faith claim;\(^{41}\) and which law should be applied to claims on a liability insurer which was in liquidation.\(^{42}\)

The state interests arguments considered under New York law are clearly very remote from the approach under English law where the implied agreement of the parties is paramount. The consideration of state interests under New York law appears to reflect the practice under New York law of resolving the issue of the applicable law at a later stage than in cases under English law. It would be impracticable for state interests to be considered in the common type of dispute under English law, where the jurisdiction or forum non conveniens is in question. As has been said, at that stage the specific laws which will be relevant and in issue under the rival systems of laws are often not known, or not completely known. It would therefore be just as impracticable for the court applying English law to compare the state interests in the application of specific laws, as to decide whether or not there was an actual conflict.

In practice, however, under New York law it appears to be rare that the outcome depends on the state interests argument; where state interests are referred to, they are usually an alternative reason for holding that the law applicable under the grouping of contacts approach is applicable.

### 3.2.7 Preference for location of risk and insured

Unlike the Regulation, New York law does not contain detailed rules which apply to protect the consumer or the policyholder under non large insurance contracts. However, in applying the most significant relationship test, New York law tends to prefer the application of a law which will favour the insured.

In relation to disputes concerning fire, surety and casualty insurance, the approach under New York law is to apply the law of the state where the risk was principally located, if there was one, unless some other state had a more significant relationship with the transaction or parties. In Zurich (supra) the New York Court of Appeals expressly referred to the passage in the Restatement, which sets out this approach, although in that case New York public policy would have applied New York law even if the place of the risk had been outside New York.\(^{43}\)

It is not difficult to see a rationale for the principal location of the risk. It is said that it can often be assumed that the parties would expect the local law of the state where the risk was principally located would be applied,\(^ {44}\) although the implied agreement approach under English law has not led to the same weight being given to the location of the risk, at the expense of the other matters which are taken into account.

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\(^{40}\) Certain Underwriters at Lloyd's, London v Foster Wheeler Corp. 36 A.D.3d 17, 822 N.Y.S.2d 30 (2006, Supreme Court Appellate Division, First Department, New York) where New Jersey law had an interest in applying its law to an insurance of an insured domiciled in New Jersey where the insurance covered risks in multiple states. The liability policy covered the insured corporation in multiple states, and the state interests were said to be those in (1) regulating conduct with respect to insured risks within the state's borders; (2) assuring that the state's domiciliaries are fairly treated by their insurers; (3) assuring that insurance is available to the state's domiciliaries from companies located both within and without the state; and (4) regulating the conduct of insurance companies doing business within the state's borders. (p. 22)

\(^{41}\) Bernard L. Schwartz v Liberty Mutual Insurance Company 539 F.3d 135 (2008, Court of Appeals, Second Circuit) where New York had an interest in applying its law which required a gross disregard of the excess insurers' interests to a claim of bad faith by an insurer based on conduct in New York.

\(^{42}\) In re Liquidation of Midland Marine Insurance Company (2010, 71 A.D.3d 221, 893 N.Y.S.2d 31) where New York had a paramount interest in applying its law to claims from 50 states in the USA in the liquidation of an insurer incorporated in New York; and see generally New York Jurisprudence, 2nd edn, section 883.

\(^{43}\) Restatement section 193, and in particular comment (b); Zurich op. cit., at 318; Seidel v Houston Casualty Company 375 F.Supp.2d 211 (2005 US District Court, S.D. New York) where the risk a D&O policy was located where the insured's management decision-making took place.

\(^{44}\) Restatement, section 193, comment (c).
Where there is no state which can be said to be the principal location of the risk, the approach under New York law is to prefer the law of the state of the insured. In Certain Underwriters at Lloyd’s, London v Foster Wheeler Corp, insurers sought summary judgment on a dispute about the allocation of asbestos personal injury claims against the New Jersey insured to a number of policies which spanned a decade. New Jersey law was applied. The approach of applying the law of the principal location of the risk had no application where the risks were 'nationwide or global' in scope (p. 22). Further, where a policy covered risks in multiple states 'the insured's domicile' should be regarded 'as a proxy for the principal location of the risk' (p. 24).

Various reasons were put forward for this approach. Certainty, predictability and uniformity of result would be promoted by selecting the law of the insured's domicile in such cases. That location would be a well-known fact, and one which 'ties all the parties together' (p. 23). The insurers in Foster Wheeler were domiciled in various states.

### 3.3 Reinsurance
In practice, courts applying English law to reinsurances will usually find that there was an implied choice of law in the absence of an express choice of law clause. As with insurance, the starting point is the terms of the reinsurance slip or wording. But the court will then consider matters which in New York are considered the contacts under the grouping of contacts approach, specifically the place of negotiation and contracting, the place for performance, and the place of business of the parties.

Much reinsurance is of course placed with a market of reinsurers. If the cover is placed in 'the London market' the court will usually treat that as an implied choice of English law, or alternatively as indicating the law with which the reinsurance has its closest connection. The English courts have consistently said it would be surprising if a Lloyd's slip or policy was governed by anything other than English law, and that it was natural that reinsurance 'underwritten in the London market' should be governed by English law.46 The approach has been summed up in this way:

> when parties enter a particular market in order to transact business they can usually be taken to intend that their relationship will be governed by the system of law in force in that market unless they provide some clear indication to the contrary. Whether it be viewed as an implied choice of law or simply the application of the system of law which has the closest connection with the transaction, the result will be the same.47

Quite what counts as a placement on the London market is not precisely clear. At most, it will involve a placement concluded in London with an insurer or reinsurer physically in London, or with an agent there, through a London broker, on terms which are standard in London.48 It will be seen that

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45 36A.d.3d 17, 822 N/Y.S.2d 30 (2006, Appellate Division, First Department, New York); Maryland Casualty Company v Continental Casualty Co 332 F.3d 145 (2003, Court of Appeals, Second Circuit) where the policies covered environmental contamination and the risks were located in12 states; American Home Assurance Company v Merck & Co. Inc. 329 F.Supp.2d 436 (2004, US District Court, S.D. New York) where the risk was worldwide; Appalachian Insurance Company v Riunione Adriatic di Sicurata 60 A.D.3d 495, 875 N.Y.S.2d 57 (2009, Appellate Division, First Department, New York).

46 Prifti v Masini Sociedad Anonima de Seguros y Reaseguros [2004] Lloyd's Rep IR 528, 534 (Andrew Smith J). See also Forsakringsaktieselskapet Vesta v Butcher [1986] 2 Lloyd's Rep 179, 193 (Hobhouse LJ); Tiernan v The Magen Insurance Co. Ltd. [2000] I.L.Pr. 517, para. 13; Stonebridge Underwriting Limited v Ontario Municipal Insurance Exchange Limited [2010] EWHC 2279, para. 35. There is, however, a noticeable tendency for facultative reinsurances placed in London to include an express choice of law clause in favour of the law of the place where the risk is situated.


Research Handbook on International Insurance Law and Regulation

this approach includes reliance on pointers in the contract terms, and some of the contacts familiar under the New York law grouping of contacts approach: the place of contracting, negotiation, and performance, and the place of business of the parties.

The place of the risk is rarely of importance under English law because in reinsurance the risk is often remote from the market in which the business is placed, or in more than one jurisdiction.

However, not all of the elements referred to above are necessary for the placement to be a market placement. In *Gard Marine and Energy Limited v Tunnicliffe*, the excess of loss reinsurance in question covered property in the Gulf of Mexico in respect of windstorm, and had been placed for years in the London market. On the relevant renewal, the London brokers needed extra participants, and the brokers approached Swiss reinsurers in Switzerland by email. The reinsurers participated by signing a 5 per cent line on a separate slip (the Swiss slip) from the main slip placed in London. Unlike the main slip, the Swiss slip did not include an express choice of law clause. In finding an implied choice of English law, the court placed much reliance on the finding that the Swiss reinsurers participated in 'a London market placement', even though they participated by way of a separate slip sent to them in Switzerland. The fact that a broker approaches a reinsurer in another state in circumstances such as this does not indicate that the broker is placing part of the risk in a different market (para. 40).

It appears that the fact that the Swiss reinsurers knew and understood that their 5 per cent line formed part of a London market placement was enough to make the Swiss slip one placed on the London market.

The court also emphasised that it would make no commercial sense for the reinsurance to be governed by two or more laws, and that the Swiss slip included pointers to English law, in that it provided for the policy to be on form J(A), and incorporated London market clauses LSW 196A (notice of cancellation clause), CL 356A and 365 (radioactive, chemical contamination and cyber-attack exclusion clauses) and LSW 1001 (several liability).

If the cover is placed in the London market, it will only be rarely that the applicable law will not clearly be English law. *Dornoch Limited v Mauritius Union Assurance Limited* [2006] 2 Lloyd's Rep 475 was an exceptional case where the court held that it could not be satisfied that reinsurers had much the better of the argument that English law applied. The excess reinsurances were brokered in London, on a Lloyd's proposal form, and written in the London market on London market terms. But the reinsurance included a follow terms clause, referring to the primary reinsurance, to which Mauritian law expressly applied. There was a 'stalemate' in the strength of the arguments for an implied term; and the court held English law applied because that was where reinsurers would have to pay.

In applying the grouping of contacts approach to reinsurance under New York law, it has been said that typically the law of the state where the reinsurance certificate is negotiated and issued, and the reinsurance is to be performed, will be applied. In other words, and by contrast with the approach in relation to insurance contracts, there is no preference for the law of the state where the risk, or the reinsured, are located.

For example, in *Travelers Insurance Company v Buffalo Reinsurance Company*, the reinsured had not served timely notice of an occurrence on reinsurers in respect of product liability claims. Under New York law the market of reinsurers could rely on the failure without

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51 Ibid., p. 6.
52 735 F.Supp. 492 (SDNY 1990); *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v Traveler's* 210 F.Supp.2d 479 (District Court, S.D.N.Y.) where the reinsurance contract was negotiated and entered into in New York, New York law was applied; *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v American Re-insurance Co* 351 F.Supp.2d 201 (District Court, S.D.N.Y.) where the reinsurance was issued in Ohio, and negotiated by Ohio brokers, Ohio law applied.
also having to prove prejudice, but not under Connecticut law. Most of the various reinsurers were incorporated in New York, or carried on business there, and the reinsurance certificates were issued in New York by the broker, and were to be performed there, and New York law applied. Those contacts outweighed the fact that the reinsured and its intermediary were incorporated in Connecticut.

In that case the court also considered that the purpose of the New York law was to protect New York reinsurers by permitting them to rely on the finality of notice clauses, whereas the purpose of the Connecticut rule was to protect ‘unsophisticated insureds’ (p. 497). New York had an interest in the interpretation of contracts issued there, and to be performed there, by reinsurers with a principal place of business there (as was mostly the case), while the Connecticut rule was not strongly engaged since the reinsured was itself an insurance company and did not need the protection afforded unsophisticated insureds (p. 498).

This analysis of the state interests in Traveler's v Buffalo was of course very different from what would be undertaken by an English court, but in Traveler's v Buffalo the analysis, as is usually the case, served only to confirm the outcome of the grouping of contacts approach. Under English law close attention would have been paid to the terms of the reinsurance, and in particular any pointers to the New York market, but such analysis was absent from the judgment in Traveler's, and typically does not feature in the reinsurance cases. However, it is rare to find under English law that the terms of the reinsurance contract are determinative, rather than confirming the analysis of the other features of the placement. It is difficult to imagine that under English law the outcome in Traveler's v Buffalo would have been any different from that in the New York court, because the reinsurance was placed with a market of reinsurers mostly in New York, using brokers in New York.

Contrasting outcomes under New York and English law arose from decisions on the law applicable to reinsurances placed under a pool arrangement. In American Special Risk Insurance Company v Delta America Re Insurance Co. reinsurers sought summary judgment on a claim they were not liable to the reinsured in respect of product liability claims. The reinsurances had been placed with the reinsurers (which had their principal place of business in New York) in London, using London brokers, and then retroceded by them. The arrangements for the reinsurance and retrocessions were part of a scheme operated by a London agent, Stetzel Thomson, to enable parties who were not authorised to write business in the UK, to participate in reinsurances and retrocessions which Stetzel Thomson arranged. Under the scheme, the reinsurers permitted Stetzel Thomson to make arrangements for reinsurances and retrocessions to be put in place, albeit that the final agreement was to be signed off by Elkhorn in New York.

The New York court acknowledged that the reinsurances were placed using the London market: the reinsured used London brokers, and Stetzel Thomson in London accepted the risks for reinsurers and retrocessionaires. However, the court applied New York law. Apart from the use of Stetzel Thomson in London, all the contacts in the case were with New York or the USA. The reinsurance contracts themselves were made when the reinsurer signed them in New York, where the reinsurers had their principal place of business. In addition, New York had an interest in ensuring that reinsurers licensed in New York paid their debts, while the interest of England in making the reinsurances void and unenforceable was little (as evidenced by a change in the law — which came too late to apply to the dispute — to allow contracts to be enforced against a party which entered into it without authorisation).

The outcome may be contrasted with that in DR Insurance Co v Central National Insurance Co about reinsurances placed using the same Stetzel Thomson pool. The reinsurers were the same as in American Special Risk Insurance Company, although the reinsureds differed.

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54 [1996] 5 Re LR 482.
The reinsureds challenged the jurisdiction of the English court, which found that there was a strong argument that the applicable law was English law, principally because the reinsurance had been placed in the London market. Placing brokers for the reinsured had placed the risk with Stetzel Thomson in London in the usual way, except that Stetzel Thomson obtained a formal approval from reinsurers in New York and elsewhere before communicating acceptance of the risk.

In those Stetzel Thomson cases, exceptionally, the significant difference seems to have been that the New York court assessed the state interest of New York in having its law applied so as to enforce the reinsurances made by New York reinsurers to be much stronger than the interest of England in preventing New York reinsureds from recovering against New York reinsurers. Under English law, decisive weight was given to the market in which the reinsurance was placed, in accordance with the general approach under English law; whereas under New York law, the market was only one contact among many.

3.4 One Law for One Contract

The Regulation makes clear that ‘by their choice the parties can select the law applicable to the whole or part only of a contract’ (article 3.1). It also provides that the parties may agree to change the law which previously governed a contract (article 3.2).

New York law similarly specifically contemplates that more than one law may be applied to a contract of insurance or reinsurance. The Restatement at section 188(1) refers to the law applicable to 'an issue' in the contract, rather than the whole contract. It also contemplates that issues relating to the details of performance of a contract will be determined by the law of the place of performance (Restatement section 206).

However, in practice, under both English and New York law, one of the most powerful arguments remains that the parties must have intended only one law to apply to the contract.

Under English law (see for example the Sun Life, American Motorists and Gard Marine cases referred to above), English courts, when faced with insurance contracts which cover risks or insureds in multiple states, are very unwilling to accept that the parties could have intended that more than one law would apply to the insurance. The practical problems for an insurer or reinsurer in rating or operating an insurance contract which was subject to different laws depending on the current situation of the risk, or the location of a particular subsidiary of the insured, are easy to see. The court rejected as 'commercially uncertain and unworkable' a claim that the definition of property in a liability policy covering AstraZeneca and its subsidiaries world-wide, which was subject to English law, with a service suit clause in respect of a competent court of the USA, would alter after inception, so as to be construed according to the local law of the forum in which it was sued in the USA, in CGU International Insurance plc v AstraZeneca Insurance Co Limited (p. 428).

Under New York law, a similar approach has been taken. In Maryland Casualty Company v Continental Casualty Co, for example, insurers denied liability under comprehensive general liability insurance policies for environmental contamination at some 200 waste sites in 40 states of the USA. Not surprisingly, the court rejected the argument that the law of each state where a waste site was located should apply, and held that New York law applied: 'barring extraordinary circumstances, only one state's law should govern an insurance agreement' (p. 153). It would burden this Court unreasonably to consider the laws of many different states on every issue, make uniform interpretation impossible, and probably be inconsistent with the parties' expectations (p. 156).

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56 332 F.3d 145 (2003, Court of Appeals, Second Circuit. See also Certain Underwriters at Lloyd's, London v Foster Wheeler Corp 36A.d.3d 17, 822 N.Y.S.2d 30 (2006, Appellate Division, First Department, New York).
4. LIMITS TO PARTY AUTONOMY

English law is characterised by a number of tightly defined limits on party autonomy which fulfil various policy objectives of the Regulation. By comparison, under New York law public policy is the ground on which a choice of law agreement may not be given effect.

4.1 Public Policy

Provision is made by the Regulation for the public policy of the forum, or of the place for performance of a contract, to be permitted to prevail over a chosen applicable law. The public policy exception is intended to be narrow, and does not extend to protect the weaker party in insurance and consumer contracts, since separate provision is made for them. The chosen law may not be applied if 'manifestly incompatible' with the public policy of the forum (article 21). Public policy is defined restrictively as rules which are 'crucial for safeguarding' public interests (article 9.1). If performance would be unlawful under the law of the place for performance, effect may be given to that law, rather than the chosen law (article 9.3).

Under New York law, a choice of law clause in an insurance or reinsurance contract will not be given effect if contrary to the public policy of the forum, or of a state whose law would have applied in the absence of an effective choice of law agreement.\(^57\) The Restatement refers to the 'fundamental policy' of a state, and gives as an example statutes involving the rights of an individual insured as against an insured company.\(^58\) The Restatement indicates that effect will not be given to a choice of law provision in a life insurance contract 'which gives the insured less protection than he would receive under the otherwise applicable law', and that effect 'will frequently not be given' to a choice of law provision in a casualty insurance which gives less protection than would be available under the otherwise applicable law.\(^59\)

In relation to consumer contracts, the Restatement states that 'a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power'.\(^60\) An example under English law would be the consumer protection provisions of the Unfair Contract Terms Act 1977.

These references in the Restatement have led to a suggestion that American policyholders are likely to be afforded the same protection of the state of their habitual residence as European policyholders.\(^61\) There are, however, no examples in the last decade of New York law decisions applying these principles in insurance or reinsurance. Considerations of public policy often arise in cases under New York law where there was no express choice of law, in relation to the argument about state interests. This was the case in Zurich Insurance Company v Shearson Lehman Hutton Inc.\(^62\) where the interests of New York state in enforcing its law against the insurance cover for punitive damages would have outweighed the outcome of the grouping of contacts analysis, but not in cases where there is an express choice of law.

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\(^57\) New York Jurisprudence, 2nd edn, section 35; Restatement, chapter 8, section 187(2)(b).

\(^58\) Restatement, chapter 8, section 187 comment g.

\(^59\) Restatement, chapter 8, section 192, comment e; section 193, comment e.

\(^60\) Restatement, chapter 8, section 187 comment g.


\(^62\) 84 N.Y.2d 309, 642 N.E.2d 1065, 618 N.Y.S.2d 609 (Court of Appeals of New York 1994); see also American Special Risk Insurance Company v Delta America Re Insurance Co 836 F.Supp. 183 (1993, District Court S.D.N.Y.), 191, where the court considered there was substantial justification for the argument that the denial by English law of a right of recovery under insurance contracts entered into without authorisation was against the public policy of New York.
4.2 Non-Derogable Laws
Apart from the public policy exceptions, the Regulation provides for circumstances in which a further category of laws may prevail over the chosen law. These are nonderogable laws and laws which under a particular law cannot be derogated from by agreement of the parties.

In limited circumstances the Regulation gives effect to such non-derogable laws, even if inconsistent with the law chosen by the parties. Essentially, if all elements in situation at the time of the contract are located in one country, apart from the choice of the law of another country, the non-derogable laws of the first country will be applied in any event. This represents a compromise between complete party freedom to choose an applicable law with no relationship with the transaction, or the parties, on the one hand, and a requirement for there to be present some foreign element or elements, to justify the application of a choice of law clause. In the case of consumer contracts, a consumer may not be deprived of the benefit of non-derogable laws of the country of his habitual residence, even if the parties have chosen a different applicable law. An example under English law is the Unfair Contract Terms Act 1977, which, by section 27(2), has effect in limited circumstances despite a choice of another law.

In effect, where the contract is a purely domestic or consumer contract, the Regulation will give effect to non-derogable laws of the domestic state, or the country of residence of the consumer.

New York law also places restrictions on the effect of choice of law clauses where all the features of the transaction or contract are domestic to one state. Where there is a choice of the law of state A, New York law requires that there be a 'reasonable relationship or sufficient contacts' between the state A and the transaction or contract, if the most significant contacts are all with state B. However, by statute this requirement does not apply where the law chosen is New York law, and the contract relates to a transaction relating to an obligation covering not less than US $250 000 in the aggregate.

4.3 Protective Laws
Unlike New York law, the Regulation sets out a number of tightly defined limits on party autonomy in the case of insurance and consumer contracts. The basic aim of the provisions is to provide some protection to the insured or consumer, as the weaker party in any contract, against the choice of law clauses which select a law which is not that of the habitual residence of the insured or consumer, or sufficiently linked to the risk.

In relation to insurance, a distinction is drawn by the Regulation between non large risks situated in a Member State, non large risks situated outside the EU which are consumer contracts, and other insurance and reinsurance risks. In essence, only the first two are subject to special rules. Other insurance, and all reinsurance, risks are subject to the same rules as other contracts, and are discussed above.

4.4 Non Large Insurance in a Member State
In relation to non large risks situated in a Member State, the parties may only choose an applicable law from one of a list of available laws which are essentially the laws of countries which are sufficiently linked with the policyholder or the risk to confer some protection on the policyholder. The list includes, for instance, the law of a Member State where the risk is situated, the law of a

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63 Regulation recital 37 makes clear that the concept of overriding mandatory provisions is more restrictive than that of non-derogable laws.
64 Giuliano-Lagarde, commentary on Regulation article 3, para 3. Regulation article 3.4 also applies non-derogable community law in the special case where all elements relevant to the situation at the time of the contract are located in Member States but the law of a non Member State is chosen.
65 Regulation article 6.2.
66 New York Jurisprudence, 2nd edn, section 34; see also Restatement, chapter 2, section 9.
67 2010 New York Code, General Obligations, article 5-1401.
68 See the definition of large and non large risks in section 1 above.
country where the policyholder has his habitual residence, or in the case of life insurance, and the law of the Member State of which the policyholder is a national.

However, greater freedom may be allowed in the case of certain laws within the pool, if greater freedom of choice would be allowed by that law. So, for instance, if the law of the Member State where the risk is situated would allow greater choice than Regulation article reg. 7.3, the parties may take advantage of that freedom.

4.5 Consumer Contracts which are Non Large Insurance Situated Outside the EU
In essence, the same rules which apply to other contracts under Regulation articles 3 and 4 apply to consumer insurance covering risks outside the EU, except that:

1. The consumer may not by any choice of law agreement be deprived of the benefit of any non-derogable laws under the law of the country of his habitual residence.
2. The law applicable, in default of any express agreement, is normally the law of the country of the habitual residence of the policyholder.

Accordingly, the law of the country of the habitual residence of the policyholder is applicable to a contract of insurance between a consumer and a professional, where the professional pursued his commercial or professional activities in the country, or directed such activities to that country, and the insurance fell within the scope of such activities, unless the parties chose the applicable law under Regulation article 3, in which case the law chosen applies.

5. SUMMARY AND CONCLUSIONS

In terms of outcomes, it is difficult to say that there are very significant differences between New York and English law in relation to the applicable law in insurance and reinsurance. Party autonomy is the basic rule in both New York and English law.

The significant cases are those where there was no express choice of law agreement. In practice, in such cases, both English and New York law take into account the same contacts between the relevant states and the parties and transaction: the language of the cover, the place of contracting, negotiations and performance, the subject matter of the contract, and the place of residence or business of the parties.

In relation to insurance, New York does not contain the specific protective laws for non large insurance and consumer insurance contracts which are seen in the Regulation. Instead New York law, subject to the possibility that the most significant relationship will point to another country, leans in favour of the law of location of the risk, or the residence of the policyholder, in a way which English law does not.

In relation to reinsurance, there is little evidence of substantive differences in outcomes. Under New York and particularly English law, most emphasis is put on the market in which the business is placed.

There are obvious, but in practice less significant, differences between the structure of New York and English law. Under New York law, the court considers the specific laws of the different countries to see if there is an actual conflict, and, where appropriate, what the interests of each state are in the

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69 A consumer is a natural person who concludes a contract outside his trade or profession with another person acting in the exercise of his trade or profession.

70 Regulation article 6.2.

71 Regulation article 6.1. This exception itself does not apply to an insurance where the services of the insurer were to be supplied only in a country other than the one in which he had his habitual residence: Regulation article 6.4(1). In such a case the ordinary rules under Regulation articles 3 and 4 would apply.
application of its laws. This approach plays no part in English law.

In the absence of an express agreement on choice of law, most disputes under New York law are decided on the basis of the most significant relationship, whereas under English law they are decided on the basis of the implied agreement. However, there is little evidence that this basic difference of analysis leads to different outcomes.

The outstanding difference between the approach under New York and English law is, where there was no express choice of law agreement, the practice of resolving disputes primarily by reference to the law of the state with which the transaction and parties had their most significant relationship under New York law, but by reference to the law impliedly chosen under English law.\footnote{The author warmly acknowledges the assistance provided by the following colleagues who generously commented on a draft of the chapter: Christopher Cardona and Mark Pring, Candbourne & Park (London) LLP; Louise Merrett, Fellow of Trinity College, Cambridge; Clive O'Connell; and Jon Turnbull, Clyde & Co. All errors are the author's own.}