No-assignment clauses, involuntary assignments and transfers to insurers.

Chris Smith KC

21 December 2022

In the recent decision in ***Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd*** [2022] EWHC 3287 (Comm), the Commercial Court had to consider whether a contractual prohibition against assignment applied in relation to an assignment of rights to an insurer under an insurance policy

This dispute arose out of a contract for the construction and sale of two aircraft and related spare parts ("the Sale Contract") under which Dassault Aviation SA ("Dassault") was the seller and Mitsui Busan Aerospace Co Ltd ("MBA") was the buyer. The contract contained a prohibition against assignment. The aircraft were delivered late giving rise to a claim against Dassault for damages for breach of contract. As it transpired, MBA had obtained insurance cover with Mitsui Sumitomo Insurance Co ("MSI") which covered it against certain consequences of the aircraft being delivered late. The insurance Policy ("the Policy") between MBA and MSI was governed by Japanese law. MBA made a claim under the policy in respect of the delayed delivery of the aircraft, and that claim was accepted and paid by MSI.

As a matter of Japanese insurance law, an insurer who pays out on an insurance claim has automatically assigned to it such rights of recovery against third parties relating to the claim as the assured might have. MSI was thus assigned MBA's right to bring a claim against Dassault under the Sale Contract for late delivery. This assignment occurred by operation of Japanese law. MSI duly commenced ICC arbitration proceedings against Dassault pursuant to the arbitration clause in the Sale Contract. Dassault challenged the jurisdiction of the Tribunal on the basis that the assignment to MSI was, as against Dassault, ineffective because it was in breach of the no-assignment clause in the Sale Contract. Thus, it was said, MSI had no right to invoke the arbitration clause as against Dassault.

Dassault's challenge to the jurisdiction failed before the arbitrators (by a majority: Lord Collins of Mapesbury and Joe Smouha KC being in favour of MSI, and Simon Crookenden KC dissenting). Dassault brought a claim to review the decision of the Tribunal under section 67 of the Arbitration Act 1996.

The issue before the Court was one of construction of the contractual prohibition against assignments. In particular, the Court had to consider whether or not the prohibition applied to automatic or involuntary assignments and also, more generally, whether it applied to an assignment of rights to an insurer which was akin to a subrogation.

The Court decided in favour of Dassault and ruled that the Tribunal had no jurisdiction over the dispute. The Judge, Mrs Justice Cockerill, stated that she had reached this conclusion with "an unusual degree of hesitation" and noted that the case gave rise to an interesting and difficult issue.

As a first part of the Court's analysis, consideration was given to the general question of whether prohibitions against assignment should be construed as applying to involuntary assignments. The Court noted that whilst there were some, relatively old, cases in which it was held that a no-assignment clause did not apply to an involuntary assignment, these decisions arose in a very different context to that of the immediate dispute (usually bankruptcy).

Nonetheless, the Court accepted that the contractual prohibition against assignments did not apply to truly involuntary assignments. The question which arose however was whether any assignment to MSI could be said to be "involuntary" in circumstances where it was the result of MBA's voluntary acts (i.e. the conclusion of the Policy and/or the making of a claim under the Policy). Based purely on the wording of the prohibition itself, the Court's preliminary view was it would catch assignments which, whether by operation of law or not, were caused by the voluntary act of either party to the Sale Contract.

This led on to a consideration of whether such a conclusion was justified in the context of an assignment to an insurer which was akin to a subrogation. The Court accepted MSI's argument that the prohibition against assignment would not have prevented MSI from bringing a subrogated claim in MBA's name (had Japanese law provided for subrogation rather

than an assignment of rights). The only difference between MSI bringing a subrogated claim and a claim qua assignee would be the name of the claimant on the arbitration documents. MSI thus argued that there could be no good reason for construing the prohibition on assignment as preventing an assignment to insurers akin to a subrogation.

The Court accepted the force of this argument and recognized the comity implication of any conclusion to the effect that the prohibition did not impact on a subrogation under English law, but did apply to a foreign law equivalent of subrogation. Ultimately though, the Court concluded that whilst there was a case to be made by reference to the factual matrix and commercial common sense for not interpreting the no-assignment clause so as to apply to an assignment to an insurer such as MSI, that was not a sufficient basis to displace the effect of the wording of the clause, which was to prohibit any assignment which took place with the consent of MBA.

As can be seen, this case gives rise to various interesting questions relating to the effect of prohibitions against assignment generally, the concept of involuntary assignments (including whether an assignment by operation of law is to be regarded as voluntary because it has been caused or consented to by the assignor), and the impact of a no-assignment clauses on a transfer of rights to an insurer.

Chris Smith KC was instructed by Zayba Drabu, Cloudesley Long and Yiannis Charalambous at Norton Rose Fulbright LLP

Permission to appeal to the Court of Appeal has been granted and the appeal is likely to be heard during 2023.

Chris Smith KC

"Strong all round - on paper and as an advocate. Very approachable and down to earth." (Legal 500, 2023)

Chris has a broad practice encompassing all areas of commercial law, with a particular focus on dry shipping, commodities, energy, and insurance disputes. He has appeared extensively in the Commercial Court, representing clients at all stages of proceedings, from urgent pre-action interlocutory applications all the way through to trial. Chris also appears regularly in both domestic and international arbitrations, and has undertaken cases before tribunals in London, Zurich and Hong Kong.

> view Chris' full profile chris.smith@quadrantchambers.com