Relief for Insurers - Court of Appeal finds statutory assignment to an insurer is not caught by a no-assignment clause

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Overview

In ***Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd*** [2024] EWCA Civ 5, the Court of Appeal has held that a clause prohibiting assignment "*by a party*" did not catch an assignment to an insurer taking place by operation of law pursuant to the Japanese Insurance Act.

In overturning the decision of Mrs Justice Cockerill in the Commercial Court, the Court of Appeal's lucid and concise Judgment provides important clarity and is likely to be of considerable market interest.

Background

The 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 aircraft were delivered late, giving rise to a claim against Dassault for damages for breach of contract.

So far, so straightforward. However, MBA had taken out an insurance policy governed by Japanese Law, which covered it against consequences of the aircraft being delivered late. MBA made a claim under the insurance policy, and that claim was accepted and paid by the insurer.

As a matter of Japanese insurance law, an insurer who satisfies an insurance claim is automatically assigned such rights of recovery against third parties as the assured might have. The insurer was therefore assigned the rights of MBA by operation of Japanese law (the unanimous finding of the Tribunal, and as was common ground before Mrs Justice Cockerill and the Court of Appeal), except to the extent that such an assignment was prohibited and rendered void by the Sale Contract, article 15 of which provided:

"this Contract shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party…"

The insurer commenced arbitration in its own name against Dassault. Dassault challenged jurisdiction before the Tribunal on the basis that article 15 of the Sales Contract prohibited the assignment, and as such the insurer had no title to sue.

Argument before the Tribunal (and later in the Commercial Court and Court of Appeal focused on the language of "*by any party*" and whether, in light of the commercial context to the clause and the limited relevant authorities, it caught an assignment by operation of law.

Dassault's challenge to jurisdiction failed before the arbitrators (by a majority of Lord Collins of Mapesbury and Joe Smouha KC, with Simon Crookenden KC dissenting). Dassault challenged the decision of the Tribunal under section 67 of the Arbitration Act 1996.

The First Instance Decision

Mrs Justice Cockerill concluded that article 15 of the Sale Contract caught an assignment which was voluntary in the sense of having been caused or brought about by the acts of a party, even if the mechanism of the transfer was statutory/by operation of law.

The assignment which took place here had been brought about by MBA (e.g. by the taking out of insurance, and making a claim thereunder), and as such was found to have been prohibited and rendered void. Mrs Justice Cockerill therefore set aside the decision of the Tribunal as to jurisdiction. The decision is analysed in greater detail here.

Having reached that conclusion with "*an unusual degree of hesitation*", Mrs Justice Cockerill granted permission to appeal.

The Court of Appeal

The Master of the Rolls, giving the unanimous Judgment of the Court of Appeal, disagreed with Mrs Justice Cockerill's approach and allowed the appeal.

The Court of Appeal decisively determined that the language of article 15, in prohibiting an assignment "*by any party*", did not catch an assignment which took place by operation of law. Indeed, the Court of Appeal found that the language was sufficiently clear so as to not give rise to any ambiguity requiring an iterative process of construction [paragraphs 30 and 31].

The Court therefore determined that there was no need to consider the commercial consequences of each party's proposed construction, which had received significant focus in the Commercial Court.

The Consequences for Non-Assignment Clauses and Insurance

The Court of Appeal's decision is lucid and concise. In focusing on the mechanism of the transfer itself, and rejecting Mrs Justice Cockerill's approach of analysing the degree of voluntariness in bringing about an assignment in each instance, it is likely to have relieved concerns about the potential uncertainty and difficulties in application arising from that decision.

Additionally, although the Court of Appeal focused on the language of the particular clause in question, there are a number of points addressed which are likely to be of wider application:

- The Court was clearly of the view that when determining whether an assignment or transfer can be said to have been "by" a party, the analysis should focus on the precise legal mechanism by which the assignment or transfer occurred, and not a wider consideration as to how that assignment or transfer came about.
- The Court of Appeal otherwise rejected the existence of any general principle applicable to the interpretation of non-assignment clauses in commercial contracts [paragraph 20]. The language used in each non-assignment clause is therefore of paramount importance.
- Although the Court of Appeal noted that confidentiality was clearly important to the parties, this was said not to weigh in favour of a broader prohibition of assignment [paragraphs 25 and 26].
- It ultimately appears to have been accepted that subrogation under English law would not have been caught by the particular non-assignment clause in question [paragraphs 10 and 31]. However, there was initially real debate as to whether subrogation might have been caught by this clause, both before Mrs Justice Cockerill and the Court of Appeal, and as such it should not be readily assumed that subrogation will always escape a clause prohibiting transfers of rights.

Ultimately, the decision of the Court of Appeal is clear and should allay concerns in the insurance market caused by the first instance judgment as to the potential effect of prohibitions against assignment or transfer to a transfer of rights to an insurer. Nonetheless, in light of the focus upon the language of the particular clause in question, it is unlikely that this is the last time that the English Court will be faced with similar issues. Parties should seek legal advice as to the potential effects of non-assignment clauses prior to agreeing contract terms, as well as when obtaining and claiming on their insurance.

Chris Smith KC and Benjamin Joseph were instructed for the successful appellant insurer by Zayba Drabu, Cloudesley Long and Yiannis Charalambous at Norton Rose Fulbright LLP.

Chris Smith KC

"A ferociously hard-working KC. Completely on top of the case and documentation, and nice to work with too." (Legal 500, 2024)

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.

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