Browne Jacobson

Statutory assignment to insurers not caught by no-assignment clause

25 January 2024 Colin Peck

In a decision that will come as a relief to insurers the Court of Appeal has confirmed in **Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd [2024]** that a clause in an underlying contract prohibiting assignment did not include an assignment taking place to an insurer pursuant to the Japanese Insurance Act.

Background

Dassault Aviation SA ("**Dassault**") and Mitsui Bussan Aerospace Co. Ltd ("**MBA**") entered into a contract for the manufacture and sale of two maritime surveillance aircraft. These aircraft would later be sold under a contract to the Japanese Coast Guard ("J**CG**").

Dassault and MBA's contract contained a clause which stated:

"...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".

Any such assignment would be deemed null and void without this consent.

MBA's contract with JCG covered instances of delayed delivery of the aircraft whereby liquidated damages would be paid should delay occur. As a result, MBA took out an insurance policy with Mitsui Sumitomo Insurance Co. Ltd ("**MSI**") that was governed by Japanese law and without Dassault's knowledge or consent.

Ultimately, Dassault delivered the aircraft to MBA after the prescribed delivery period which resulted in MBA's delivery to JCG also being delayed. Consequently, MBA was liable to pay liquidated damages to JCG, after which, MBA claimed under the insurance policy with MSI.

Following MSI's payment to MBA, under Japanese insurance law when an insurance claim is paid out by the insurer then the insurer is automatically assigned the assured's recovery rights against third parties in respect to that claim.

MSI commenced arbitration proceedings in its own name against Dassault pursuant to the terms in the Dassault and MBA contract.

In the arbitration proceedings, Dassault relied on the non-assignment clause arguing that the Tribunal lacked jurisdiction to hear the matter because the assignment to MSI was null and void due to lack of consent by Dassault. MSI argued that the appropriate interpretation was that the non-assignment clause did not bar assignment by operation of law.

The Tribunal found in favour of MSI concluding that involuntary assignments were not covered by the non-assignment clause in the contract.

Dassault commenced proceedings in the Commercial Court under section 67 of the Arbitration Act 1996.

Commercial Court Decision

In reaching her decision at first instance Mrs Justice Cockerill placed weight on the words of the Dassault – MBA contract, its commercial purpose, commercial common sense, and the factual matrix of the case.

The Judge questioned whether the case law gave rise to a presumption that a non-assignment provision will not be interpreted to apply to an assignment by "operation of law". As she was not persuaded that such a presumption arose, the focus shifted to deciding what constitutes "by operation of law". In determining the answer to that question, the Judge focused on the case law's emphasis on the distinction between voluntary and involuntary. In her view the real concern was not the mechanism of transfer but whether transfer truly occurred "outside the voluntary control of the transferring party". Applying this construction, she took the view that MBA's voluntary decision to enter into a Japanese governed insurance policy resulted in the ultimate assignment being "tinged with a taint of voluntariness".

The Judge also focused on the commercial purpose of the non-assignment clause, commercial common sense, and factual matrix to interpret the clause, noting that the clause was broad and only limited by the words "by any party to any third party". Considering this, it seemed apparent that the cause of the assignment was the crucial matter. Thus, she ultimately decided that the clause's wording could not be interpreted to apply to truly involuntary assignments.

As there was a sufficient degree of 'voluntariness' the Judge held that MBA had assigned its rights to MSI and evidently without consent of Dassault. Accordingly, she set aside the decision of the Tribunal as to jurisdiction.

This decision was appealed by MSI.

Court of Appeal Decision

The Court of Appeal unanimously overturned Mrs Justice Cockerill's decision finding in favour of insurers MSI.

The Court of Appeal highlighted that the cases relied on to determine that the distinction between voluntary and involuntary was the primary consideration were old insolvency cases that turned on the nature of the insolvency. They could not be deemed as generating a general principle that is applicable to the interpretation of non-assignment clauses.

Secondly, the Court of Appeal focused on the wording of the clause and determined that it clearly barred assignment "by any party". However, this wording did not extend to include tracing the original cause of the transfer of rights, instead it focuses on whether the transfer itself was made by MBA (or Dassault). In the present circumstances, the transfer was a consequence of MBA's specific actions but not a result of MBA's direct assignment. Therefore, the non-assignment clause was not triggered as MBA did not directly assign the rights. The Court also deemed it unnecessary to review the commercial impact of either party's arguments as the wording was sufficiently clear.

Consequently, the Court of Appeal concluded that the wording of the non-assignment clause did not apply to a transfer that was triggered by the operation of law. The assignment of the claims from MBA to MSI was pursuant to Japanese statute and thus was assignment by operation of law making it outside the scope of the non-assignment clause's operation.

The Court of Appeal allowed the appeal, supporting the Tribunal's arbitral award provision.

Dassault is seeking permission to appeal the decision to the Supreme Court.

Comment

For insurers this decision provides some relief that assignment of subrogation rights by operation of law does not fall foul of non-assignment clauses in the underlying contract.

However, given that the case focused on the language of the particular clause in question, it is possible that this will not be the last time that the English Courts will be asked to consider the issue.

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