Shipping

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A VICTORY FOR INSURERS? A QUESTION AGAIN.

EUROPEAN COURT TO DECIDE WHETHER TO ALLOW DIRECT ACTIONS AGAINST INSURERS

Denmark's highest court has asked the European Court of Justice (ECJ) to determine whether a claimant bringing a direct action against an insurer is bound by the jurisdiction agreement between the insurer and insured. The outcome could have significant implications for P&I Clubs. If the ECJ finds in the claimant's favour, this would allow direct action against insurers throughout the EU and EFTA in any member state where such direct action is permitted, irrespective of any jurisdiction agreements in the relevant policies.

This development follows several other high-profile cases involving direct action against P&I Clubs. In January 2016, the Spanish Supreme Court allowed a direct claim against the London P&I Club in Spain in relation to the 2002 *PRESTIGE* disaster, despite a London arbitration clause in the P&I policy and an arbitration ruling – recognised as a judgment by the English High Court – that any direct action was subject to London arbitration. The English High Court, on the other hand, upheld an anti-suit injunction preventing the charterers of the *YUSUF CEPNIOGLU* from prosecuting a direct action in Turkey against the owners' P&I Club.[1]

Background

Whilst navigating the Port of Assens, Denmark (the port), the tug *ENDEAVOUR I* (the tug) caused damage to the quay installations. The tug's bareboat charterer, Skåne Entreprenad Service AB (Sverige) (Skåne Entreprenad), was entered for P&I risks with Navigators Management (UK) Limited (Navigators). The insurance policy was governed by English law and subject to the exclusive jurisdiction of the courts of England and Wales. Navigators' rules also provided for English law and jurisdiction.

1 See our previous publications at http://www.hfw.com/Direct-rights-of-action-against-P-and-I-clubs-February-2015 and http://www.hfw.com/A-victory-for-insurers-the-YUSUF-CEPNIOGLU-April-2016

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Skåne Entreprenad subsequently became insolvent. The port arrested the tug and, the value of the tug being insufficient to cover the loss, brought a claim directly against Navigators as Skåne Entreprenad's insurer. Navigators successfully defended the claim in the Danish Maritime and Commercial High Court on the basis that the Danish courts did not have jurisdiction to determine the claim because the port was bound by the jurisdiction agreement in the P&I policy.

The port appealed to the Danish Supreme Court on the question of jurisdiction. In particular, the Supreme Court was asked to determine whether the port could bring a claim in Denmark against the tortfeasor's P&I Club where the P&I policy was subject to the exclusive jurisdiction of the courts of England and Wales.

Legal context

Whilst Brussels Regulation 44/2001 (Brussels I) is not directly applicable in Denmark, its provisions have the force of law by virtue of a parallel agreement. This agreement also allows Denmark to put questions regarding interpretation of Brussels I before the ECJ.

Section 3 Article 10 of Brussels I provides that *"In respect of liability insurance … the insurer may in addition be sued in the courts for the place where the harmful event occurred"*. Pursuant to Article 11(2), this provision also applies to actions *"brought … directly against the insurer, where such direct actions are permitted"*. Direct action against insurers is permitted under Danish law in circumstances where the insured has become insolvent. The relevant statute provides that the injured party "steps into" the insured's rights against the insurer.

Section 3 Articles 13(5) and 14(2) of Brussels I together provide that Article 10 may be derogated from by a jurisdiction agreement "*… which relates to a contract of insurance in so far as it covers … any liability, other than for bodily injury to passengers or loss of or damage to their baggage, … arising out of the use or operation of [seagoing] ships…"*

The ECJ has held that the list of exceptions allowing derogation from the rules of jurisdiction laid down in Section 3 of Brussels I must be interpreted strictly.[2] That case involved the somewhat different situation of an insured who had not expressly approved the jurisdiction agreement in the policy, and was therefore held not to be bound by it. The ECJ has subsequently commented that the provisions of Section 3 were intended to apply only *"to relations characterised by an imbalance between the parties"*, and in fact exclude (by Article 12(5)) *"insurance contracts in which the insured enjoys considerable economic power"*.[3]

The Supreme Court also referred to the 1979 Schlosser Report on the Brussels Convention[4], which stated that *"Jurisdiction clauses in insurance contracts cannot be binding upon third parties. The provisions of the second paragraph of Article 10 [corresponding to Article 11.2 of Brussels I] concerning a direct action by the injured party are thus not affected by such jurisdiction clauses."* At that time, however, the Brussels Convention did not contain any equivalent provisions to Articles 13.5 and 14 of Brussels I.[5]

Question for the ECJ

The Supreme Court was of the view that the wording of Articles 13(5) and 14(2) of Brussels I, the ECJ case law referred to above, and the Schlosser Report together gave rise to doubt as to the interpretation of Articles 13(5) and 14(2): Is the effect of these provisions that a party bringing a direct action against an insurer is bound by a jurisdiction agreement between insurer and insured?

2 C-112/03 (Peloux)

3 C-77/04 (*GIE Réunion européenne and others v Zurich España*)

4 Report on the Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom (OJ C 59, 5.3.1979)

5 Such provisions were incorporated by Articles 8 and 10 of the 1978 Accession Convention (78/884/EEC)



If the ECJ finds in the claimant's favour, this would have far-reaching consequences for insurers, who may face claims from unknown parties in unknown jurisdictions (and subject to unfamiliar procedural rules) which were never contemplated in the insurance contract.

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Since this question is of crucial importance to the case at hand, and involves the interpretation of a rule of EU law, the Danish Supreme Court found it necessary to refer the question to the ECJ. A decision is awaited.

Consequences

If the ECJ finds in the claimant's favour, this would have far-reaching consequences for insurers, who may face claims from unknown parties in unknown jurisdictions (and subject to unfamiliar procedural rules) which were never contemplated in the insurance contract.

This uncertainty is not helpful to the industry, and we will circulate another briefing once the result is known.

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